Extension of 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 (‘the EPPO’) (JUST/2022/PR/JCOO/CRIM/0004)

Extension of the Study
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This study was carried out for the European Commission by

Patricia Ypma
Célia Drevon
Chloe Fulcher
Angelica Rasiewicz

John A.E. Vervaele
Katalin Ligeti
Marc Engelhart

Sylvie Giraudon

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Print  ISBN [number]  ISSN [number]  doi:[number]  [Catalogue number]
PDF  ISBN [number]  ISSN [number]  doi:[number]  [Catalogue number]
EPUB  ISBN [number]  ISSN [number]  doi:[number]  [Catalogue number]
HTML  ISBN [number]  ISSN [number]  doi:[number]  [Catalogue number]

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Table of Contents

Table of abbreviations ........................................................................................................... 7
Executive summary ................................................................................................................... 8
1. Introduction ........................................................................................................................ 14
   1.1. Objectives of the extension .......................................................................................... 14
   1.2. Methodological approach ............................................................................................ 14
2. Independence of the EPPO – Article 6(1) ........................................................................ 17
   2.1. Introduction ................................................................................................................... 17
   2.2. Independence from national authorities ....................................................................... 18
   2.3. Independence from IBOAs .......................................................................................... 22
   2.4. Conclusions .................................................................................................................. 23
3. Material competence of the EPPO .................................................................................... 26
   3.1. Introduction ................................................................................................................... 26
   3.2. Competence of the EPPO regarding criminal organisations – Article 22(2) ........ 26
   3.3. Lack of competence regarding national direct taxes – Article 22(4) ....................... 29
   3.4. Exercise of the competence regarding inextricably linked offences – Article 25(3) .... 31
      3.4.1. Sanction threshold – Article 25(3)(a) .................................................................. 33
      3.4.2. Damage threshold – Article 25(3)(b) .................................................................. 35
   3.5. Conclusions .................................................................................................................. 38
4. Operations of the EPPO .................................................................................................... 42
   4.1. Introduction ................................................................................................................... 42
   4.2. Right of evocation – Article 27 .................................................................................... 42
   4.3. Access to information – Article 43(2) ......................................................................... 45
   4.4. Conclusions .................................................................................................................. 48
5. Cross-border investigations ............................................................................................... 50
   5.1. Introduction ................................................................................................................... 50
   5.2. Judicial authorisation in the context of cross-border investigations – Article 31(3) .... 50
   5.3. Admissibility of evidence obtained in another Member State – Article 37(1) .. 56
   5.4. Translations for the purpose of cross-border investigations ...................................... 57
      Conclusions ....................................................................................................................... 60
   5.5. ......................................................................................................................................... 60
6. Conclusions ........................................................................................................................ 65
EXTENSION OF 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 (‘THE EPPO’)
Table of abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
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<tbody>
<tr>
<td>CFREU</td>
<td>Charter of Fundamental Rights of the European Union</td>
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<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<td>CMS</td>
<td>Case Management System</td>
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<td>Council</td>
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<td>EAW</td>
<td>European Arrest Warrant</td>
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<td>ECP</td>
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<td>EDP</td>
<td>European Delegated Prosecutor</td>
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<td>EIO</td>
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<td>EP</td>
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<td>EPPO</td>
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<td>Eurojust</td>
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<td>EU</td>
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<td>IBOAs</td>
<td>Institutions, bodies, offices and agencies of the EU</td>
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<td>NEDPAs</td>
<td>National European Delegated Prosecutor's Assistants</td>
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<td>OLAF</td>
<td>European Anti-Fraud Office</td>
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<td>PIF</td>
<td>Protection of the EU's financial interests</td>
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Executive summary

Introduction

This document (hereinafter: the ‘Extension Report’) serves as an extension of 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 (hereinafter: the ‘EPPO’) for the 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 (hereinafter: ‘the Study Team’).

The objective of this Extension Report is to assess certain aspects of 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’) that may impact the effectiveness of the EPPO and its working practices.

As such, a number of provisions, namely Articles 6(1), 22(4), 25(3), 27, 31(3), 37(1) and 43(2) of the Regulation, were selected to be assessed. These provisions were further discussed with the Central Office of the EPPO during the workshop organised as part of the original Study. The provision concerning the EPPO’s material competence with regard to criminal organisations (Article 22(2)) and the aspect of translations in cross-border investigations were added after the workshop.

To gain further insight, interviews were conducted with the European Delegated Prosecutors (hereinafter: ‘EDPs’)/European Prosecutors (hereinafter: ‘EPs’) from all the participating Member States, along with representatives from the Operations and College Support Unit of the EPPO regarding Article 43(2). The input collected through interviews was compiled and further analysed in the present Report, and has been organised around four aspects: independence, material competence, operations of the EPPO and cross-border investigations.

Independence of the EPPO – Article 6(1)

Article 6(1) governs the independence of the EPPO. The assessment aimed at verifying the existence of any legal/institutional and/or practical constraints to the EPPO’s independence from national authorities and from the institutions, bodies, offices and agencies (hereinafter: ‘IBOAs’) of the European Union (hereinafter: ‘EU’).

Firstly, as already stated in 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’ (hereinafter: the ‘Study’), the findings of the extension reiterated that national laws in some of the Member States may pose a risk to the EPPO’s independence. Indeed, the independence of the EPPO from national authorities could be compromised due to some national authorities maintaining their investigative and/or prosecution powers, even in EPPO cases, resulting in the EDPs/EPs being unable to exercise such powers. The second issue identified refers to instances where the agreement of other national authorities is required before the EPPO can perform its tasks. Furthermore, a third issue relates to the need to report to other national authorities on the EPPO’s activities.

See Section 4.1.3. of the Final Report for the Study.
In addition, it was found that, despite the fact that Article 6(1) is a sufficiently clear provision stipulating that the EPPO should be independent, the safeguards on the EPPO’s external independence go beyond Article 6(1). These complementary provisions regard the selection and appointment of staff, the provision of necessary resources and/or equipment, and ‘adequate’ arrangements in place in the Member States for the EDP’s social security, pension and insurance coverage.

With regard to the appointment, selection and dismissal of staff, a variety of matters were pointed out by the EDPs/EPs. Some concerns were raised with regard to the lack of transparency in the appointment of the EPs. In particular, ensuring that the reasoning behind the selection of a second or third-ranked candidate for the position of EP is made public, when departing from the selection panel reasoned opinion, could strengthen the EPPO’s independence. Furthermore, it was mentioned that there are not enough safeguards in the Regulation when it comes to the national career for EPPO-personnel, particularly the European Chief Prosecutor (hereinafter: ‘ECP’) and EPs, following the termination of their mandate. Another point raised related to the difficulties in getting the national authorities to approve a request by the EPPO for more EDPs.

With regard to the provision of necessary resources and/or equipment, the competent national authorities provide the EDPs with their resources and equipment, including supporting staff that are ‘necessary’ to exercise their functions. The reliance on the national authorities could result in the EDPs not having the necessary resources and, thus, in difficulties when exercising their tasks. One of the issues regarding resources involved the fact that the national assistants to the EDPs (hereinafter: ‘NEDPAs’) come from the national prosecution office and, therefore, are not fully integrated within the EPPO structure. This might result in insufficient support to EDPs in the exercise of their tasks.

Additionally, the national authorities must ensure that ‘adequate’ arrangements are in place for the EDPs’ social security, pension and insurance coverage. It seems that, despite amendments to national law, in some Member States, problems and uncertainties still persist as to what exactly constitutes ‘adequate arrangements’ in practice.

More generally, some concerns were raised with regard to the fact that the allocation of budgetary resources comes from the national authorities. Indeed, all the points raised above relate to the fact that, as much as the EPPO’s independence should be beyond doubt,² the EDPs/EPs have to rely on the tools and resources of their national prosecution services. As such, as long as this is the case, the EDPs/EPs cannot be entirely independent.

When it comes to the EPPO’s independence from IBOAs, there were no specific issues raised by the EDPs/EPs. It appears that the EPPO is able to exercise its functions completely independently from the IBOAs, with the IBOAs being more inclined to accommodate the EPPO and its tasks in comparison to the national authorities.

**Material competence of the EPPO**

With regard to the material competence of the EPPO, Articles 22(2) and 22(4) were assessed, as well as Articles 25(3)(a) and 25(3)(b) with regard to the exercise of the competence vis-à-vis inextricably linked offences.

For Article 22(2), the assessment discussed any legal and/or practical constraints experienced by the EDPs/EPs regarding the competence of the EPPO for offences regarding participation in a criminal organisation. Most EDPs/EPs did not encounter any practical difficulties when

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² EPPO Regulation, Article 17(2).
exercising such competence. However, it was found that there is a lack of clarity on the notion of ‘focus’ of the criminal activity of a criminal organisation.

For Article 22(4), the analysis focused on whether the EPPO’s activities were somehow affected by lack of the EPPO’s competence for criminal offences in respect of national direct taxes, including offences inextricably linked thereto. While it was found that the wording of the provision is very clear, EDPs/EPs pointed out difficulties in establishing how to proceed in cases where Value-Added Tax (hereinafter: ‘VAT’) and national direct taxes are inextricably linked. Furthermore, it seems that national authorities do not all have the same approach when reporting cases to the EPPO which involve national direct taxes inextricably linked to a PIF offence.

With regard to Article 25(3)(a), it was assessed whether the EPPO has experienced any legal and/or practical constraints in exercising its competence concerning offences affecting the Union’s financial interests (hereinafter: ‘PIF offences’) and non-PIF offences inextricably linked to the latter, when the maximum sanction provided by national law for the PIF offence is equal or less severe than the maximum sanction for the inextricably linked offence. Several conclusions were drawn from the responses provided by the EDPs and EPs. Firstly, in several Member States, the maximum sanctions for the inextricably linked non-PIF offence are equal to or higher than for PIF offences, meaning that PIF offences often fall outside of the EPPO’s competence. Secondly, there are diverging interpretations amongst the Member States on how to consider whether the national offence is instrumental to the PIF offence. Thirdly, despite the harmonisation brought about by the PIF Directive, the way PIF offences are sanctioned, as opposed to non-PIF offences, differ depending on the Member State, resulting in fragmentation in the exercise of the EPPO’s competence. Finally, it was found that, in some cases, the national authorities consider that the EPPO is better placed to investigate specific cases, despite them falling out of its competence due to the wording of Article 25(3)(a).

With regard to Article 25(3)(b), it was examined whether the EPPO has experienced any legal and/or practical constraints in exercising its competence if 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 EDPs/EPs were found to have diverging experiences when it comes to situations falling under Article 25(3)(b). Several EDPs/EPs reported cases where they had to refrain from exercising competence due to the fact that damage to the national financial interests was higher. Furthermore, difficulties were noted relating to the calculation of the damage, in particular at the early stages of investigations. Nonetheless, it was also noted that national authorities are usually willing to grant their consent pursuant to Article 25(4).

**Operations of the EPPO**

Concerning the operations of the EPPO, Articles 27 and 43(2) were examined. Article 27 sets out the rules for the EPPO’s right of evocation. Article 43(2), in turn, grants the EPPO access to information stored in databases and registers of IBOAs.

In relation to Article 27, it was assessed whether the EDPs/EPs have experienced any legal and/or practical constraints in exercising their right of evocation vis-à-vis national authorities. In this regard, the vast majority of the EDPs/EPs agreed that the 5-day time limit set out in Article 27(1) is too short for the EPPO to decide on and inform the national authorities whether to exercise its right of evocation after receiving the information from the national authorities. Moreover, in some Member States, the EDPs/EPs noted a lack of awareness from the national authorities with regard to the material competence of the EPPO, and their reporting obligation, limiting the EPPO’s chance to exercise the right of evocation.

With regard to Article 43(2), the assessment focused on whether in practice the EPPO is able to obtain information that is stored in databases and registers of IBOAs and that concerns crimes
falling within its competence. Based on the input from the Operations and College Support Unit, it was found that the effectiveness of the EPPO’s operations can potentially be compromised, due to the EPPO having predominantly indirect access to databases that are beneficial to its work, as opposed to direct access. More specifically, the EPPO does not have access to all the databases managed by Eurofisc, in particular, Eurofisc’s analytical tool TNA which would be beneficial to its work. This is due to the data belonging to the Member States and not to a Union agency or body. Similarly, the EPPO also does not have access to the ECRIS-TCN in practice, despite being vested with direct access rights under Regulation (EU) 2019/816. Given more urgent cooperation mechanisms requiring IT development, granting such access to the EPPO has not been seen priority as most EDPs are able to request information via their national channels in their capacity as members of the national prosecution system. Such access would greatly benefit its work; thus, it should be ensured that the EPPO is not restricted from using the system.

Cross-border investigations

Regarding cross-border investigations, Articles 31(3) and 37(1) were examined, along with the issues related to multilingualism within the EPPO and translations in the context of cross-border investigations. Article 31(3) covers the rules regarding judicial authorisation in the context of cross-border investigations, while Article 37(1) sets out the principle of admissibility of evidence obtained in another Member State participating in the EPPO.

With regard to Article 31(3), the assessment focused on whether, in practice, the Regulation and its current application by the EPPO, would make it more cumbersome for the handling EDP to collect evidence in the cross-border cases where a judicial authorisation is required under the law of the assisting EDP. It was found that, for the majority of EDPs/EPs, while the general cross-border cooperation mechanism laid down in Article 31 is very effective, the application of Article 31(3) is more cumbersome than mutual recognition instruments in cases where judicial authorisation is required under the law of the assisting EDP. This is due to the fact that, in practice, a double judicial authorisation is required in these cases and, therefore, judicial authorisations are translated into the original language and reviewed by the judge of the assisting EDP. Having standardised documents in English, as is the case with the European Arrest Warrant (hereinafter: ‘EAW’), could remedy this issue.

Several EDPs/EPs found the wording of Article 31(3) as not exhaustive and clear enough, resulting in EDPs/EPs and national judicial authorities having diverging interpretations of the Regulation, including within the same Member State, as to the extent of judicial review in the Member State of the assisting EDP. Additionally, the wording of the Regulation does not explicitly indicate how the mechanism of cross-border investigations plays out with the protection of fundamental rights, as set up in Article 41 of the EPPO Regulation and Article 47 of the Charter of Fundamental Rights of the European Union (hereinafter: ‘CFREU’). Given the diverging interpretations and approaches at national level, it is evident that there is a need for further clarification and a harmonised approach on how to apply Article 31(3) and on how to balance effective cross-border cooperation with the protection of fundamental rights. A pending case at the Court of Justice of the European Union (hereinafter: ‘CJEU’) will shed light on these aspects.

Concerning Article 37(1), it was assessed whether EDPs/EPs face any difficulties regarding the admissibility of evidence obtained in other Member States participating in the EPPO. The responses of the EDPs/EPs showed that there is a diversity of national criminal procedural rules regarding the admissibility of evidence obtained in another Member State. Nonetheless, no specific issues have been experienced by EDPs/EPs so far and it appears that it is too early to draw reliable conclusions on whether the wording of the EPPO Regulation is sufficient to ensure the admissibility of evidence in cross-border EPPO cases.
Lastly, the assessment looked at whether, in practice, the EPPO has experienced any issues involving the translation of documents when handling case files or transferring them from one participating Member State to another, in particular, with regard to the varying criminal procedure requirements set out in each participating Member State. The responses from EDPs/EPs showed discrepancies as to the extent of translations required by judicial authorities across the Member States. Moreover, the obligation for handling EDPs to translate judicial authorisations in the official language of the assisting Member State(s) and the right to interpretation and translation for the suspected or accused persons involve important time and cost resources, which may impact effective cross-border cooperation. Possible solutions include the use of standardised documents in English or giving the EPPO the possibility to prepare its own translations and having the Regulation prescribe the principle of equivalence of these translations to those required according to national law. Lastly, it was acknowledged among some of the EDPs/EPs that there is no harmonised approach concerning the use of resources for translation. There is also a lack of legal certainty as to who bears the costs of translation in the context of cross-border investigations, which poses a risk for the EDPs/EPs of not receiving the resources needed to fulfil their duties.

Conclusions

To conclude, the data gathered on the independence, material competence, operations of the EPPO and cross-border investigations outline different categories of issues. Firstly, several issues seem to stem from the wording of the Regulation itself. In these cases, a revision of the Regulation would appear as the most adequate option to solve such issues. This can be exemplified by the issues concerning the material competence of the EPPO where the wording of Article 25(3)(a), as it currently stands, results in PIF offences falling outside the scope of the EPPO’s tasks in the Member States, posing a hindrance to its activities. A solution offered by some EDPs/EPs involves amending Article 25(4) in a manner which allows national authorities to consent to the EPPO exercising its competence under Article 25(3)(a) even where the sanctions applicable to non-PIF offences are equal to or higher than the ones for PIF offences. Moreover, due to the divergent national legal frameworks across the Member States and the fragmentation resulting from this, the criteria of preponderance, as based on the level of sanctions or damage, does not appear the most logical option to ensure the effective exercise of the competence of the EPPO. In this sense, the Legal Office suggested the revision of Article 25(3)(a) with an emphasis on the instrumentality, rather than the preponderance, to determine the exercise of the competence of the EPPO in cases of inextricably linked offences.

Secondly, a number of concerns raised by the EDPs/EPs seem to relate to the lack of clarity and harmonised interpretation of several provisions of the Regulation. This is particularly illustrated by the pending CJEU case regarding the interpretation to be given to Article 31(3) and the approach to follow regarding judicial authorisation in cross-border cases. In addition to CJEU interpretation, issues regarding the clarity of certain provisions may be also alleviated by other means, such as administrative guidance or training, in order to increase awareness regarding the competence and the tasks of the EPPO.

Moreover, it was noted that several issues may arise from limited financial resources, which can hinder the effective functioning of the EPPO Regulation. As some of these issues can be attributed to a lack of resources for the EPPO at the national level, a possible solution would be increasing the Central Office’s budget so that they can assist the national authorities where needed so that the EPPO can effectively carry out its tasks.

Lastly, issues arise from a lack of compliance of Member States’ national legislation with the EPPO Regulation, which in turn hampers the fulfilment of the EPPO’s tasks. This is due to national
authorities in several Member States maintaining their investigative and prosecutorial powers, which means that the EPPO cannot be fully independent of national authorities.
1. Introduction

1.1. Objectives of the extension

This document constitutes a follow-up to 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’.

As such, the present document is the Extension of 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. This Extension Report provides an overview of the findings of the extension and illustrates the methodology and tasks conducted.

The main objective of this Extension is to assess certain aspects of EPPO Regulation that may impact the effectiveness of the EPPO and its working practices.

This report contains six chapters. Chapter 1 introduces the methodological approach taken in the Extension of the Study. Chapter 2 describes the findings on the independence of the EPPO, specifically regarding the EPPO’s independence from national authorities and EU IBOAs. Chapter 3 provides the findings on the material competence of the EPPO, in particular on the competence of the EPPO regarding criminal organisations, the lack of competence regarding national direct taxes, and the exercise of competence regarding inextricably linked offences. Chapter 4 outlines the findings on the operations of the EPPO, specifically focusing on the right of evocation and access to information. Chapter 5 describes the findings on cross-border investigations, particularly exploring judicial authorisation in cross-border proceedings, admissibility of evidence obtained in another Member State, and translations for the purpose of cross-border investigations. Finally, Chapter 6 contains the conclusions on the findings of the Extension of the Study.

1.2. Methodological approach

The Commission requested the present Extension of the Study, which intends to cover certain aspects of the EPPO Regulation relating to the effectiveness of the EPPO and its working practices. Further to the assessment of the legal framework at national level, as performed during the original Study, the Extension looked at the functioning of the EPPO on the basis of the relevant provisions of the Regulation. As such, the Study Team carried out the steps described below.

Step 1 involved the selection of the specific provisions to be assessed. The Commission suggested Articles 6(1), 22(4), 25(3), 27, 31(3), 37(1) and 43(2) of the Regulation. These Articles were then further discussed with the EPPO (in particular, with the Deputy Chief Prosecutor and Head of the Legal Service) during the workshop held as part of the Study to better understand the issues at hand and assist with determining the objectives that should be considered when assessing these Articles. As well as the above Articles, the EPPO pointed out practical constraints related to Article 22(2) and translations in cross-border investigations. As a result of these discussions, these two aspects were added alongside those provisions originally suggested by the Commission.

After the workshop, the objectives of the assessment for each specific aspect were agreed upon between the Study Team and the Commission:
The second step involved gathering input on how these specific aspects operate in practice and the way in which their functioning impacts the EPPO’s working practices. To gain such information, the Study Team organised interviews with EDPs/EPs, as well as with representatives from the Operations and College Support Unit at the EPPO’s central level. The Study Team drafted a targeted questionnaire for each interviewee, taking into account the previous input provided as part of the original Study. For the EDPs/EPs, the questions focused on all the specific aspects identified except for Article 43(2). The questions on Article 43(2) were posed to the representatives from the Operations and College Support Unit at the central level, for whom a separate questionnaire was also drafted.

Interviews were then conducted with the relevant stakeholders. The Operations and College Support Unit at the central level provided written responses, following a call with the Study Team, to the questions on Article 43(2). The majority of EDPs/EPs were interviewed, with some providing written responses instead. Of the EDPs/EPs interviewed, the EE EDP only provided written responses and the MT EP was interviewed on Article 6(1) and provided written responses for the other aspects. It should also be noted that for LV, MT and NL, the EPs, rather than EDPs, were interviewed, and for DE, the EP, who also holds the position of Deputy ECP, was interviewed. Furthermore, for IT, both an EDP and the EP, who also at the time held the position of Deputy ECP, were interviewed. The interviews were held via Microsoft Teams and involved posing the drafted

Table 1 – The objectives considered for the purpose of assessing the specific aspect selected

<table>
<thead>
<tr>
<th>Article</th>
<th>Objective</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 6(1)</td>
<td>To verify the existence of legal/institutional and/or practical constraints to the EPPO’s independence.</td>
</tr>
<tr>
<td>Article 22(2)</td>
<td>To assess whether the EPPO has experienced any legal and/or practical constraints regarding its competence for offences regarding participation in a criminal organisation.</td>
</tr>
<tr>
<td>Article 22(4)</td>
<td>To assess whether the EPPO’s activities were somehow affected by the lack of competence for criminal offences in respect of national direct taxes, including offences inextricably linked thereto.</td>
</tr>
<tr>
<td>Article 25(3)(a)</td>
<td>To assess whether the EPPO has experienced any legal and/or practical constraints in exercising its competence concerning and non-PIF offences inextricably linked to PIF offences, when the maximum sanction provided by national law for the PIF offence is equal or less severe than the maximum sanction for the inextricably linked offence.</td>
</tr>
<tr>
<td>Article 25(3)(b)</td>
<td>To assess whether the EPPO has experienced any legal and/or practical constraints in exercising its competence if 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.</td>
</tr>
<tr>
<td>Article 27</td>
<td>To assess whether the EPPO has experienced any legal and/or practical constraints in exercising its right of evocation vis-à-vis national authorities.</td>
</tr>
<tr>
<td>Article 31(3)</td>
<td>To assess whether, in practice, this rule would make it more cumbersome for the handling EDP to collect evidence in cross-border cases where a judicial authorisation is required under the law of the assisting EDP than it would be in accordance with mutual recognition instruments.</td>
</tr>
<tr>
<td>Article 37(1)</td>
<td>To assess whether the EPPO has experienced any legal and/or practical constraints in obtaining the admissibility of evidence collected by the EPPO in cross-border cases due to the evidence being gathered in another Member State or in accordance with the law of another Member State.</td>
</tr>
<tr>
<td>Article 43(2)</td>
<td>To assess whether, in practice, the EPPO is able to obtain information that is stored in databases and registers of IBOAs and that concerns crimes falling within its competence.</td>
</tr>
<tr>
<td>Translation issues</td>
<td>To assess whether, in practice, the EPPO has experienced any issues involving the translation of documents when handling case files or transferring them from one participating Member State to another, in particular, with regard to the varying criminal procedure requirements set out in each participating Member State.</td>
</tr>
</tbody>
</table>
questions to the interviewees, as well as providing follow-up questions where necessary. At the end of the interview, the floor was left open to the interviewees to provide any other elements that they perceive impact the EPPO and its working practices. Once the interviews were finished, the written responses were sent to the EDPs/EPs for any amendments or additional input.

The third step involved the compiling of information and the drafting of the Extension Report. The structure of the Extension Report was discussed and agreed upon by the Commission and the Study Team. The Extension Report provides an overview of each specific aspect and any supplementary materials useful for understanding how the Regulation should operate in practice. The input provided by the EDPs/EPs in the interviews is subsequently presented before finally concluding on the effectiveness of the specific provision in practice. Where interviewees provided input via the open question at the end of the questionnaire, the information generally related to one of the aspects listed in Table 1 above, and is incorporated in the corresponding chapters of the present Report. In other cases, the replies referred to issues of legal compliance that were already covered in the original Study and that are explained in the Final Report for the Study. No other specific issues on the EPPO and its working practices were raised.

The Draft Extension Report was submitted on Friday 14 July 2023. The Commission provided written comments on its content that were further discussed with the Study Team during a Final Extension Meeting, held on Thursday 10 August 2023 (on Microsoft Teams). Following the incorporation of any feedback from the Commission, the revised Extension Report was submitted on Friday 8 September 2023.
2. Independence of the EPPO – Article 6(1)

2.1. Introduction

This Chapter outlines any issues identified that may have a consequence on the independence of the EPPO. The independence of the EPPO is crucial for its overall effectiveness and legitimacy. It is an important safeguard against abuse of power, and if the EPPO is not able to exercise its powers independently, especially in those cases with a political dimension, the exercise of its tasks and compliance with the rule of law could be undermined. Furthermore, the undermining of the EPPO’s independence may consequently result in the EPPO being unable to act solely in the interests of the Union.

The independence of the EPPO is enshrined in Article 6, which provides that the EPPO should not receive or seek to receive, in the exercise of its tasks, any instructions from individuals or institutions external to the Office, either from the Member States or the IBOAs. In particular, Article 6(1) provides the following:

“...The EPPO shall be independent. The European Chief Prosecutor, the Deputy European Chief Prosecutors, the [EPs], the [EDPs], 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.”

Recital 18 of the Regulation stipulates that the independence of the EPPO is complemented by strict accountability. Article 6(2) of the Regulation outlines that the EPPO shall be accountable to the European Parliament, to the Council of the European Union (hereinafter: the ‘Council’), and to the Commission for its general activities. Thus, as much as the EPPO must be capable of exercising its investigative and prosecutorial powers without any undue external interferences and in the interest of the Union as a whole, Recital 16 also outlines that there needs to be checks and balances on the EPPO’s independence to ensure its legitimacy and compliance with the rule of law.

Since 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.

This Chapter focuses on the independence of the EPPO. It outlines whether the EPPO is able to exercise its functions in complete independence from the Member States and IBOAs, including whether the EDPs/EPs may be seen as receiving any order, guidance or instruction from the Member States. The independence from national authorities and, thus, the Member States is addressed in Section 2.2 and from IBOAs in Section 2.3. Section 2.4 concludes with the findings regarding the independence of the EPPO.

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4 Please note that Article 5(2) of the Regulation provides that: ‘[t]he EPPO shall be bound by the principles of rule of law and proportionality in all its activities’. 
2.2. Independence from national authorities

Article 6(1) establishes the independence of the EPPO. The overall principle posited by Article 6(1) is that the EPPO shall be independent. As such, the personnel of the EPPO, both at the centralised and decentralised levels, are bound to act only in the Union’s interests. In the context of the EPPO Regulation, in order to act only in the Union’s interests when carrying out their tasks, the personnel of the EPPO must adhere to the basic principles of the EPPO’s activities, under Article 5 of the Regulation. The Member States must also respect the independence of the EPPO by not seeking to influence the exercise of the EPPO’s tasks. Article 6(1) further conveys that all personnel of the EPPO must neither seek to take instructions from anyone external to the EPPO or any EU Member State and, thus, guarantee that the personnel of the EPPO can exercise their functions in full independence. An instruction does not constitute advice but rather authoritative guidance that imparts direction on how the EPPO should operate its activities.\(^5\)

The assessment under this Section shall verify the existence of any legal/institutional and/or practical constraints to the EPPO’s independence from national authorities.

The independence of the EPPO is reiterated in the Recitals of the Regulation. Recital 16 emphasises 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’. Furthermore, Recital 17 reiterates that ‘[t]he EPPO should act in the interest of the Union as a whole and neither seek nor take instructions from any person external to the EPPO’.

The independence of the EPPO could be compromised, as referred to in the Final Report for the Study,\(^6\) due to other national authorities maintaining their investigative and/or prosecution powers, thus, resulting in the EDPs/EPs being unable to exercise such powers. For example, the MT EP highlighted the fact that the inquiring magistrate’s secret inquiry’ allows the Attorney-General to have the power to have access to the EPPO’s investigations. When the national authorities maintain their investigative powers, the EPPO cannot act in the interests of the Union as a whole, as prescribed in Article 6(1) of the Regulation.

Additionally, as provided in the Final Report for the Study,\(^6\) beyond cases where judicial or administrative authorities take the lead in investigations and prosecutions, there are instances where the agreement of other national authorities is required before the EPPO can perform its tasks under Article 4 of the Regulation. The NL EP explained that, for very specific measures, NL law requires the approval of the NL Prosecutor General and/or the Minister of Justice. It was also highlighted in the interview that, in NL, there is unwillingness at the national level to change the present setup. On the other hand, some EDPs/EPs mentioned that, even though national legislation was not amended in line with the Regulation, these provisions which seem to compromise the EPPO’s independence have not been applied to EPPO proceedings in practice. For example, in LV, the pre-existing legislation that provides that the instructions,

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\(^5\) Hans Holger-Herrnfeld, Dominik Brodowksi and Christoph Buchard, European Public Prosecutors Office: Article-by-Article Commentary, see footnote 3, p. 34.

\(^6\) See Section 4.1.3. of the Final Report for the Study.

\(^7\) The Court of Magistrates is informed when the investigators (police officers) are investigating a criminal behaviour which is punished with more than three years of imprisonment and during such investigation, the preservation of certain evidence and an expert opinion is required. In these cases, an inquiring magistrate is informed with the case, and if the magistrate deems it fit, he/she will start an in genere inquiry, which by its nature is secret and hence its existence is not even accessible to the EDPs (EPPO). MT criminal law entrusts the magistrate to receive, analyse, sieve, and filter the substance of the evidence. This is to determine whether there are enough grounds for the accused to be subject to indictment. See Section 3.2. of the Final Report for the Study. See also Section 2.16 of Annex I to the Final Report for further information on legal sources.

\(^8\) See Section 4.1.3. of the Final Report for the Study.
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 principle, also bound by decisions from the Prosecutor General. However, the LV EP explained that, in practice, this provision does not apply to the EPPO. Similarly, in BE, the Minister of Justice has in principle the right to order the public prosecutor’s office to initiate prosecutions in specific cases (the so-called ‘positive injunction right’). Despite the fact that the national legal framework has not been adapted to exclude this prerogative in EPPO cases, a BE EDP explained that this legislation is not applied, in practice, to EPPO cases.

A comparable concern identified by EDPs/EPs involves the need to report to other national authorities on the EPPO’s activities, including where the authorisation from national authorities is not necessary for the execution of the EPPO’s tasks. The need for the EDPs/EPs' activities to be reported to national authorities may compromise the EPPO’s independence from external influences, even if such risk to independence is less than where an agreement is required from national authorities. For example, in AT, the police are required to report their investigations, including the analysis of seized data, to their superiors and then to the Minister of the Interior or Finance. An EDP explained that this is a feature of the AT prosecution service’s hierarchy that applies to any investigations, including in the context of EPPO cases. Although this has not happened yet, the EDP pointed out that in politically sensitive cases, this may ultimately have implications on the independence of the EPPO as the Minister, who is a member of the Government, will already be aware of the details of the ongoing investigation against another political figure. Other points were raised on the hierarchical structure of the national prosecution services. In accordance with Article 24 of the Regulation, the national competent authorities shall without undue delay report directly to the EPPO any criminal conduct in respect of which the EPPO could exercise its competence in accordance with the Regulation. This means that, in cases where the national competent authorities are required to review a case file before forwarding it to the EPPO, there could be a risk to the EPPO’s independence. For example, in PT, an EDP explained that rather than sending cases directly to the EPPO, the junior prosecutors have to send cases that they think are within the EPPO’s competence to their superior. The EDP indicated that this is a feature of the PT prosecution service’s hierarchy, which does not allow the decisions of junior prosecutors to be binding until their superior has reviewed these. Therefore, it is only once the permission is granted that the case can be sent to the EPPO. The EDP viewed the system as internal work procedure and not an obstacle to independence, as the mechanism is in place to ensure that no mistakes are made when reporting to the EPPO.9

Article 6(1) is a sufficiently clear provision stipulating that the EPPO should be independent. However, it should also be noted that the safeguards on the EPPO’s external independence go beyond Article 6(1). There is a variety of complementary provisions that intend to further safeguard the EPPO’s independence. One of these provisions concerns the procedures for the selection and appointment of staff. It is stipulated in Recital 40 that ‘[t]he procedure for the appointment of the ECP and [EPs] should guarantee their independence […]’. It is directly stipulated in the relevant provisions that the candidates for the position of ECP and EPs must be independent beyond doubt.10 Furthermore, the ECP and EPs have non-renewable terms,11 with the aim of upholding their independence, and can only be dismissed should the CJEU find that they are no longer able to perform their duties or they are guilty of serious misconduct.12

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9 See Section 4.1.3. of the Final Report for the Study.
10 EPPO Regulation, Articles 14(2)(b) and 16(1)(b).
11 EPPO Regulation, Articles 14(1) and 16(3).
12 EPPO Regulation, Articles 14(5) and 16(5).
In relation to the appointment procedures, some concerns were raised with regard to transparency. In Recital 40, it is provided that ‘[t]he procedure for the appointment of the […] [EPs] should guarantee their independence’. Article 16 outlines the procedure for the appointment and dismissal of EPs. Each Member State shall nominate three candidates for the position of EP who are active members of the public prosecution service or judiciary, whose independence is beyond doubt, and who possess the qualifications required for appointment to high prosecutorial or judicial office in their respective Member States, and who have relevant practical experience of national legal systems, of financial investigations and of international judicial cooperation in criminal matters. The selection panel provided for by Article 14(3) of the Regulation provides its reasoned opinion, ranking the three candidates. Subsequently, it is for the Council to select and appoint the EPs. If the selection panel finds that a candidate does not fulfil the conditions required for the performance of the duties of a European Prosecutor, its opinion shall be binding on the Council. The research found that this procedure is not always entirely transparent as to the reasons why, in some circumstances, the Council appointed candidates who were not ranked first by the selection panel. For example, the EPs appointed in 2020 for BE, BG and PT, and in 2023 for IT were not ranked first by the selection panel. The reason why these candidates were chosen instead of the first-ranked candidates is not publicly available and is only available to the Council. It should be noted that the choice to appoint an EP who was not the first-ranked candidate does not necessarily mean that there is a risk to the EPPO’s independence. However, should the information be publicly available, the increased transparency would likely contribute to ensuring that the reason for the selection is not founded on reasons that may compromise the EPPO’s independence and, thus, may help to reduce any such concerns.

Some concerns were also raised by interviewees with regard to the national career guarantees for EPPO-personnel, specifically the ECP and EPs, following the termination of their mandate. It should firstly be noted that the Regulation does not shed light on how the return of the ECP or EPs to the national judiciary or public prosecution service should be regulated. This may raise independence concerns due to the potential for the ECP and EPs exercising their roles with caution in order to safeguard their future careers post-EPPO. Furthermore, it was indicated in the interview with a LT EDP that there is no guarantee as to the position that the EPs may get after serving their mandate at the EPPO. It is provided under LT law that a former public prosecutor who has been dismissed following the appointment as EP may be appointed, without selection, to the same or lower level of public prosecutor[…]. The lack of national career guarantees for the EPs raises questions of independence as their future return to the judiciary or public prosecution service at the same level than before their EPPO’s mandate is not assured. An example of a good practice can be seen in PT, where the status of and guarantees for the EPs and EDPs are regulated. In particular, the PT law provides that, for all purposes, including seniority, career advancement, retirement or pension system, the length of service at the EPPO shall be deemed to have been performed as part of their original national career. As such, their term as EPs or EDPs does not have any negative impact on their career when returning to the national prosecution services.\textsuperscript{15}

In some Member States, there are difficulties in getting the national authorities to approve a request for more EDPs. As per Article 13(2) of the Regulation, after consulting and reaching


\textsuperscript{15} See Articles 16 and 17 of Law no. 112/2019, of 10 September (Lei n.º 112/2019, de 10 de Setembro), available at https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?artigo_id=3184A0017&nmid=3184&tabela=leis&pagina=1&ficha=1&so_miolo=&versao=#artigo (last accessed on 05 September 2023).
an agreement with the relevant authorities of the Member States, the ECP shall approve the number of EDPs. The Final Report for the Study\textsuperscript{16} refers to a couple of legal obstacles where these types of difficulties may arise – for example, in IT, where the EDPs mandate is limited to a maximum of 10 years, rather than a renewable term of 5 years, and, in LU, where it is provided in law that there should be only 2 EDPs. The NL EP highlighted practical difficulties in this regard. In NL, in accordance with Article 13(2), the Ministers have to approve a request for more EDPs. It was pointed out by the EP that the Ministers are reluctant to open vacancies for the EPPO, even if necessary for the effective execution of their tasks, due to a lack of human resources within the national public prosecutor’s office. There are discussions ongoing in NL for an additional EDP, but so far, due to the above, there has been little avail.

The EDPs are also expected to act on behalf of the EPPO in their respective Member States and, thus, act independently. As per Article 17(2) of the Regulation, the EDPs, from the time of their appointment until dismissal, shall be active members of the public prosecution service or judiciary in their Member State. Their independence should be beyond doubt,\textsuperscript{17} but the fact that the EDPs have to rely on the tools and operations of their national prosecution service and exercise their tasks within the national prosecution services increases the potential risk of external pressure.\textsuperscript{18} This risk is further exacerbated by the fact that the national authorities provide the EDPs with their necessary resources and equipment, as well as their financial resources; thus, there is a chance that these could be used by the national authorities to control – or at least influence – the EDPs’ activities.

Indeed, as per Article 96(6) of the Regulation, the competent national authorities are the ones that provide the EDPs with their resources and equipment, including supporting staff, ‘necessary’ to exercise their functions, as well as provide the ‘adequate’ arrangements for social security, pension, and insurance coverage. The competent national judicial authorities are also responsible for the general working conditions and work environment of the EDPs.

With regard to staffing issues, some EDPs/EPs identified concerns in relation to the provision of ‘necessary’ resources and equipment in their Member States, which may have wider ramifications on their independence. The main issues result from the EDPs’ reliance on the national authorities for such resources. An example of such reliance can be seen in IT, where the national authorities have not organised any specific travelling or transportation tool to support the EDPs’ activities. Instead, the EDPs have to rely on the same facilities as national prosecutors; this is despite travel being necessary for EPPO personnel for operational reasons. An IT EDP explained that an efficient transport service for their tasks, as well as for the transportation of case files and documents, is necessary for the effective execution of their tasks, which, as of the present, is in the hands of the national authorities and, thus, creates dependence on the use of financial and technical resources.

A frequent concern identified by the EDPs/EPs in relation to the provision of ‘necessary’ resources and equipment involved the NEDPAs. The main point raised referred to the fact that the national assistants come from the national prosecution office and, therefore, are not fully integrated within the EPPO structure. In some Member States there were concerns identified on the basis that the national prosecution offices determine the number of assistants to the EDPs. For example, in MT, the EP highlighted that they do not always have NEDPAs, and in FR, an EDP indicated that they only have 4 NEDPAs for 5 EDPs. Therefore, in some circumstances, the EDPs are not able to have NEDPAs constantly supporting them because there are either not enough or, at times, not any NEDPAs available to support them. Pursuant

\textsuperscript{16} See Section 4.2. of the Final Report for the Study.

\textsuperscript{17} EPPO Regulation, Article 17(2).

to Article 46 of the Regulation, the NEDPAs cannot access the Case Management System (hereinafter: ‘CMS’) and, thus, cannot always support the EDPs in all their tasks. Furthermore, the salary of NEDPAs is to be determined by the national prosecution office, which in some Member States, in light of the high expectations and assistance required, is not sufficient. These issues relating to NEDPAs may have a roll-on-effect on the independence of the EPPO as via the NEDPAs, whose role, status and salary are decided upon by the national prosecution service, the national authorities may be able to influence the operations of the EDP’s office in the Member States. A potential solution, as suggested by one EDP/EP, is to integrate the NEDPAs into the EPPO’s structure. Some EDPs/EPs indicated concerns when it comes to the national authorities ensuring that the ‘adequate’ arrangements are in place for the EDP’s social security, pension and insurance coverage. In these Member States, despite amendments and clarifications provided by national law, problems and uncertainties still persist in practice. For example, in BE, there are multiple elements that are still uncertain, such as: the position of the EDPs, in terms of seniority, in their corps and their ability to participate in internal promotion vacancies; and the responsibility by the State for the payment of replacement income in the event of illness or disability, a survivors pension in the event of death, health insurance contributions, and contributions to the occupational accident insurance cover, as well as the extent of that cover. In FR, the uncertainties concern how to calculate social security as the remuneration of EDPs is detached from the system of national public prosecutors for social security.

With regard to financial issues, some EDPs/EPs pointed out concerns resulting from the national authorities allocating their budget. The EDPs’ work is financed by the competent national authorities, and therefore, the everyday management depends on the public prosecutor’s offices in the Member States. The national authorities cover the costs of the tools needed for the EPPO’s work, including the administrative tools (see above in relation to the NEDPAs and for the cost of translations, see Section 5.4). The main concern resulting from the national authorities’ allocation of the EDPs’ budgets is that, as long as this is the case, and the EDPs are not financially independent, they cannot be logistically independent either. A restrictive budget allocation may thus impact the EPPO’s activities, even if not done intentionally. An example of such potential influence can be seen in IT, where the authorisation of travel expenses provides discretionary power to the General Prosecutor and, as much as the IT Ministry’s guidelines point out that the authorisation must be granted unless specific reasons occur, an authorisation of a national authority related to operational expenses borne by the EPPO could be a reason for concern and risk jeopardising the independence of the EPPO.

2.3. Independence from IBOAs

As outlined above in Section 2.1, Article 6(1) provides for the independence of the EPPO not only from the Member States but also from the EU IBOAs. Specifically, Article 6(1) provides that the personnel of the EPPO shall not seek nor take instructions from ‘any institution, body, office or agency of the Union in the performance of their duties under [the] Regulation’. In addition, ‘the institutions, bodies, offices and agencies of the Union shall respect the independence of the EPPO and not seek to influence it in the exercise of its tasks’.

Furthermore, as stipulated above in Section 2.1, the independence of the EPPO is reiterated in the Recitals of the Regulation, in particular, in Recitals 16 and 17.

The EDPs/EPs did not raise any specific problems when it comes to the EPPO’s independence from IBOAs; thus, indicating that the EPPO is able to exercise its functions in complete
independence from the IBOAs. It should be noted that it was mentioned by the Central Office of the EPPO that there are some issues with regard to the EPPO’s access to information stored on the IBOAs’ databases. The issues posed by access to such information are analysed below in Section 4.3.

### 2.4. Conclusions

#### Overview of the issues identified

The below table provides an overview of the conclusions on the legal/institutional and practical constraints identified with regard to the independence of the EPPO.

<table>
<thead>
<tr>
<th>Independence from national authorities</th>
<th>Independence from IBOAs</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Other authorities maintaining their investigative and/or prosecutorial powers in the context of the EPPO investigations.</td>
<td>No issues identified.</td>
</tr>
<tr>
<td>2. Reporting and agreements required from the national authorities before the EPPO can execute and perform its tasks.</td>
<td></td>
</tr>
<tr>
<td>4. Lack of national career guarantees following the EPs (or ECP) finishing their mandate.</td>
<td></td>
</tr>
<tr>
<td>5. The national authorities’ control over the ‘necessary’ resources and equipment of the EDPs.</td>
<td></td>
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<tr>
<td>6. The national authorities’ provision of ‘adequate arrangements’ for social social security, pension and insurance coverage.</td>
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</tbody>
</table>

#### Overall conclusions on the independence of the EPPO

To conclude, the findings show that the main risk to independence of the EPPO results from any external influence that could be exerted by the national authorities. The findings on the independence of the EPPO from IBOAs were limited, with no specific concern raised by EDPs/EPs on the matter.

With regard to the independence of the EPPO from national authorities, it seems that the EPPO Regulation leaves open the potential for the Member States to interfere with the work of the EPPO in various ways. The wording of Article 6(1) itself is not the problem: it is considered a sufficiently clear provision. The issues with the independence of the EPPO from the Member States generally stem from indirect practices. It should be noted, however, that there are some more direct interventions in the form of other authorities maintaining their investigative and/or prosecutorial powers and where agreements from or reporting to the national authorities are required before the EPPO can execute some of its tasks. The indirect means identified, which leave the EPPO vulnerable to influence by the Member States, are the following: the selection and appointment of staff, the provision of necessary resources and/or equipment, and the budget.
There are concerns with regard to the selection and appointment of staff. There is a lack of transparency in the appointment procedure for EPs, where the Council is able to select the candidate not ranked first by the selection panel with no requirement to provide publicly/to the EPPO any reasoning for why they chose a different candidate. The transparency of the procedure could be improved by requiring the publication of the reasoning for the appointment of any future second/third-ranked candidates, as this would mean that the reasoning is provided with due regard to the fact that it will be published. However, the publication of the reasoning would, of course, require a political agreement which could be difficult to achieve, and would require balancing other competing interests, such as the need to protect the candidates' data protection rights. Furthermore, there are some concerns with regard to the lack of national career guarantees for EPPO-personnel, specifically with regard to the EP and EPs, following the termination of their mandate. The Regulation does not regulate the manner in which the ECP/EP should return to their national judiciary or public prosecution service; however, it may improve independence to provide in national law that they should be able to return to the national judiciary or public prosecution service following the termination of their tasks at the EPPO. If the matter is regulated in national law, it would allow the ECP and EP to act freely when exercising their tasks and not be cautious as a result of future considerations about their career.

In addition, some issues were also identified in the fact that the national authorities have to approve a request for more EDPs, which they may be reluctant to approve on the basis that they will have to provide the necessary resources. According to some interviewees, this situation could be alleviated by leaving the final decision on whether more EDPs should be provided in the hands of the EPPO, rather than resting on the agreement between the EPPO and the national authorities. An issue here, however, is, of course, that such a change is dependent on political agreement and the willingness of the national authorities to foresake such powers, which would likely only happen if the EPPO provided the necessary resources and adequate arrangements for the new EDPs. Furthermore, the fact that the EDPs remain part of the national prosecution service leaves them at risk of external pressure. The EDPs are part of the decentralised level of the EPPO and their role involves them exercising their tasks within the national legal frameworks. To ease independence concerns, it could be an idea to bring the status of EDPs into the centralised level of the EPPO to protect them from any external pressure. This would mean that, instead of the national authorities providing the EDPs with their necessary resources and equipment, as well as their financial resources, these would come from the EPPO directly, hence ensuring their operational independence. However, if this was to occur, in addition to budget considerations, there would need to be assurances made so that the EDPs can still work in close proximity and hand-in-hand with the national law enforcement authorities when carrying out investigations and prosecutions.

There are additional concerns with regard to the Member States' influence on the resources and social security provided, as well as the social security rights granted, to EDPs. There were issues raised in relation to the EDPs' reliance on the national authorities for 'necessary resources'. On this point, concerns were raised in relation to the NEDPAs coming from the national prosecution service and the prosecution service's control over their role, status, and salaries. The issue with 'necessary resources' could be improved by these being provided by the EPPO rather than the national authorities, to ensure that the EDPs and NEDPAs have the 'necessary resources' to support the execution of the EPPO's tasks. The NEDPAs could also have a direct contractual relationship with the EPPO to ensure that their role, status and salaries reflect the degree of the support they need to provide.

As aforementioned, some issues were reflected with the national authorities being the ones to ensure that 'adequate' arrangements are in place for the EDP's social security, pension and insurance coverage. On the provision of the 'adequate' arrangements for the EDP's social security, pension and insurance coverage, some concerns were raised where these are uncertain, even in spite of these being outlined in national legislation. This uncertainty leaves
the EDPs’ futures in doubt and could also provide a disincentive for national prosecutors to become EDPs. For this reason, it is important to ensure that the ‘adequate’ arrangements for the EDPs’ social security, pension and insurance coverage are provided. Such an assurance could be gained by bringing the status of EDPs within the central level. If this was the case, the EPPO would then cover the social security of EDPs, which would prevent any indirect influence resulting from EDPs’ concerns about their future should they return to their national prosecution services.

There are concerns related to financial resources more generally, which are also linked to many of the points above. The general concerns raised involved the fact that the national authorities allocate the budget of the EDPs’ offices, covering the tools necessary for the execution of their work. This means that the EPPO’s lack of sufficient tools could ultimately result in the national authorities intentionally or unintentionally influencing the EPPO’s activities. It may be considered better to ensure that such allocation is provided via the EPPO following negotiations with the national authorities to determine what is considered an appropriate amount.

With regard to the independence of the EPPO from IBOAs, there were no concerns raised in relation to the EPPO’s independence from the IBOAs. It seems as though the EPPO is able to exercise its functions in complete independence from the IBOAs. Overall, it seems that the IBOAs are much more likely than the national authorities to accommodate the EPPO and its tasks, finding productive solutions to resolve any issues.
3. Material competence of the EPPO

3.1. Introduction

The material competence of the EPPO is laid out in Article 22 of the Regulation. In accordance with Article 22(1) of the Regulation, the EPPO is competent in respect of the criminal offences provided for in Directive (EU) 2017/1371 on the fight against fraud to the Union’s financial interests by means of criminal law 19 (hereinafter: the ‘PIF Directive’). For the offences provided by point (d) of Article 3(2) of the PIF Directive (revenue fraud arising from VAT own resources), the EPPO is only competent when these offences are cross-border and involve a total damage of at least 10 million EUR.

The PIF Directive aims to harmonise definitions, sanctions and limitation periods of criminal offences affecting the EU’s financial interests. Therefore, there is a close relationship between the EPPO Regulation and the PIF Directive and its implementation into national law, thus, meaning that the transposition of the latter is key to the effective functioning of the former, as the EPPO does largely rely on national law for the exercise of its substantive competence.

However, it should be noted that the EPPO’s competence goes beyond the PIF Directive and includes those offences inextricably linked thereto, as per Article 22(3) of the Regulation. The rules governing how the EPPO should exercise its material competence, as provided under Article 22, are outlined in Article 25.

Under Article 22(2), the EPPO is also competent for offences regarding participation in a criminal organisation as defined in Framework Decision 2008/841/JHA, 20 as implemented in national law, if the focus of the criminal activity is to commit PIF offences.

The EPPO, as per Article 22(4), is not competent for criminal offences in respect of national direct taxes, including offences inextricably linked thereto. The structure and functioning of the tax administration of the Member States shall not be affected by the EPPO Regulation.

The following sections look at the functioning of the EPPO’s working practices in relation to Article 22(2)-(4) on the EPPO’s material competence in Sections 3.2 and 3.3, respectively and at the exercise of the EPPO’s material competence regarding inextricably linked offence, as provided under Article 22(3), in Section 3.4. Overall conclusions on the material competence of the EPPO and the exercise of such competence are presented in Section 3.5.

3.2. Competence of the EPPO regarding criminal organisations – Article 22(2)

Article 22(2) lays down the material competence of the EPPO for offences regarding participation in a criminal organisation. The provision specifically stipulates the following:

‘The EPPO shall also be competent for offences regarding participation in a criminal organisation as defined in Framework Decision 2008/841/JHA, as implemented in

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national law, if the focus of the criminal activity of such a criminal organisation is to commit any of the offences referred to in paragraph 1'.

The following assessment will discuss any legal and/or practical constraints experienced by the EDPs/EPs regarding the competence of the EPPO for offences regarding participation in a criminal organisation.

Recital 57 states that 'the notion of offences relating to participation in a criminal organisation should be subject to the definition provided for in national law in accordance with Council Framework Decision 2008/841/JHA, and may cover, for example, membership in, or the organisation and leadership of, such a criminal organisation.' Article 1(1) of the Framework Decision defines a ‘criminal organisation’ as the following: ‘a structured association, established over a period of time, of more than two persons acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit.’ Nonetheless, while the notion should be in accordance with the Framework Decision, the rules applicable to criminal organisations are not uniform across the Member States. Indeed, while the aim of Framework Decision 2008/841/JHA was to reduce the divergence of national legislation on the matter, the impact in practice has been limited, as the Commission acknowledged in its recent Report on the implementation of the Framework Decision. Potential issues could, hence, arise from diverging implementation and the interpretation of the aforementioned Framework Decision across the Member States.

Furthermore, Article 25(2)(a) of the EPPO Regulation states that '[w]here a criminal offence that falls within the scope of Article 22 caused 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) the case has repercussions at Union level which require an investigation to be conducted by the EPPO […].’ This should be read in conjunction with Recital 59, which explains what is meant by ‘having repercussions at the Union level’, which is, namely, where a criminal offence has a transnational nature and scale and where such a threat involves a criminal organisation. It can also be noted that while the Regulation provides that, in principle, the EPPO cannot exercise its competence where there is 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 (see Section 3.4.2 below), Recital 60 indicates that ‘The EPPO could appear better placed, inter alia, where […] the criminal offence involves a criminal organisation’.

Moreover, the EPPO’s competence regarding criminal organisations comes into play if ‘the focus of the criminal activity of such a criminal organisation is to commit any of the offences referred to in paragraph 1’. It should be noted that the Regulation does not further elaborate nor clarify the notion of the ‘focus’ of the criminal activity in neither its recitals nor provisions. The concept is thus left open for interpretation by the national authorities, which can lead to diverging interpretations across the Member States.

This diverging interpretation was highlighted by a BE EDP. In BE, several cases have been identified that concern the involvement of criminal organisations in money laundering, which in turn stems from different offences. In BE, to assess whether the EPPO should have

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competence, it must be examined whether the predicate offence of money laundering is a PIF offence to determine if the ‘focus of the criminal activity of such a criminal organisation’ is to commit a PIF offence. This is challenging as, at the beginning of investigations, it is difficult to determine whether a PIF offence is the predicate offence.

Furthermore, a representative of the EPPO’s Central Office acknowledged that the focus of a criminal organisation is a new concept under EU law, which means that each Member State has a different set of criteria for determining what such focus is. While Guidelines have been issued under Annex I of the College Decision 029/2021 on the EPPO’s investigation and evocation policy, amended by College Decision 007/2022, they solely establish that the EPPO shall initiate the investigation regardless of the concurrent presence of other underlying offences, and regardless of the damage caused or likely to be caused to the financial interests of the Union by the offences not referred to in Article 22(1). Thus, a decision of the CJEU would provide more clarity and set a standard to follow.

Despite this situation, most of the EDPs/EPs did not encounter any practical difficulties regarding the EPPO’s competence under Article 22(2) for offences regarding participation in a criminal organisation. Some have indicated that the reason for the lack of issues encountered stems from the fact that there have not been cases involving a criminal organisation so far. Some of the EDPs/EPs have stated the definition itself does not cause any difficulties. In FR, the participation in a criminal organisation is either an offence as such (association de malfaiteurs) or an aggravating circumstance (crimes committed en bande organisée). According to a FR EDP, it is easier to qualify and prosecute participation in a criminal offence as an aggravating circumstance to other offences. This in turn means that issues related to the term ‘criminal organisation’ are not as relevant in FR as in other Member States. Similarly, in HR, organised crime to commit a smuggling offence is prosecuted as a single offence. An EDP indicated that, when the damage is higher to the national budget than the Union budget, pursuant to Article 25(4), in conjunction with Article 25(3)(b) (see Section 3.4.2), the national authorities generally give consent to the EPPO to exercise competence for criminal organisations that involve smuggling.

Nonetheless, one EP raised difficulties regarding the implementation of the competence of the EPPO for criminal organisations, resulting from the restrictive definition under national law. In DE, there is an offence concerning the ‘participation in a criminal organisation’, however, this is not necessarily applicable in EPPO cases. Indeed, the jurisprudence has set out specific criteria to ascertain which conduct may fall under ‘participation in a criminal organisations’. In particular, there must be a cohesive element, such as a shared ideology, that goes beyond having criminal gains arising from a criminal act, for an offence to fall within the scope of participation in a criminal organisation. This makes the threshold very high, and, thus, it is difficult for an offence to fall within the scope of Section 129 of the German Criminal Code.

Another EDP pointed out that, while there have been no practical difficulties in LU, the delineation of competence in cases involving large-scale criminal organisations may raise some questions, particularly in cases such as the Admiral case, where there are ramifications in multiple Member States. It might be difficult, in practice, to divide such cases and determine which Member States’ EDPs are competent.

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3.3. Lack of competence regarding national direct taxes – Article 22(4)

Article 22(4) further shapes the material competence of the EPPO by providing that the EPPO is not competent in cases regarding national direct taxes. Specifically, the provision provides the following:

‘In any case, the EPPO shall not be competent for criminal offences in respect of national direct taxes including offences inextricably linked thereto. The structure and functioning of the tax administration of the Member States shall not be affected by this Regulation’.

The following assessment will discuss whether the EPPO’s activities are somehow affected by the EPPO’s lack of competence for criminal offences in respect of national direct taxes, including offences inextricably linked thereto.

It should be first noted that there are no recitals providing any additional details or considerations on the EPPO’s lack of competence for criminal offences in respect of national direct taxes, as well as any offences inextricably linked thereto. The decision to omit national direct taxes from the EPPO’s competence may have been intended to align the EPPO’s competence with the scope of the PIF Directive. This is because, similarly to Article 22(4), Article 2(3) of the PIF Directive stipulates that ‘[t]he structure and functioning of the tax administration of the Member States are not affected by this Directive’. The stipulation under this Article stemmed from the Member States’ concerns for their sovereignty vis-à-vis the investigation and prosecution of criminal offences that directly affect their national budget.26

The provision itself, as pointed out by some EDPs/EPs, is clear in stating that the EPPO cannot be competent for criminal offences regarding national direct taxes, as well as any offences linked inextricably thereto.

Many EDPs/EPs explained that there had not been any difficulties with the provision in their Member State. However, the main obstacles identified by some of the EDPs/EPs concerned how to proceed in those cases where VAT and national direct taxes are inextricably linked, as the element constituting the offence affecting national direct taxes will automatically fall outside of the EPPO’s competence.

Some particular cases were identified to have caused constraints for the EDPs/EPs when exercising their tasks. One case, in CY, involved ‘Golden Passports’,27 and another case, in BE, was identified in relation to illegal tobacco manufacturing. In CY, it was pointed out by the interviewee that sometimes it is difficult to calculate the damage to VAT and national direct taxes. In this particular case, the Auditor General claimed that there was loss of direct taxes as a result of the Golden Passports scheme. The loss of direct taxes also resulted in the loss of VAT, specifically 200 million EUR. However, despite the damage to the EU’s financial interests, the CY EDP/EPs, following consultation with the Legal Service of the EPPO, were informed that they could not exercise their competence as the offence only took place in CY, hence not fulfilling the requirement that the offence takes place within the territory of two or


27 These are investor citizenship schemes involving the granting of EU citizenship in return for pre-determined payments or investments, without any genuine link to the Member State concerned.
more Member States as per Article 22(1). The other case involved obstacles concerning illegal tobacco manufacturing. In BE, the EPPO cannot be competent for cases involving illegal tobacco manufacturing because these cases mainly give rise to excise duties to be paid, and not necessarily VAT, as these cases involve the production of tobacco, rather than the selling of tobacco. Therefore, as much as these cases would have an impact on the EU’s financial interests, the EPPO cannot act as no VAT fraud has yet taken place, even though it can be predicted that these activities would have had large repercussions on the EU’s financial interests once the tobacco was sold.

Some EDPs/EPs explained that, as VAT and national direct taxes are often inextricably linked, it is unclear how to proceed in practice should the damage to VAT be over 10 million EUR and, thus, fall within the EPPO’s competence. The assumption is that the case would have to be split between the EPPO and the national prosecution office due to the national direct taxes being within national competence. The splitting of the case was of concern to some EDPs/EPs due to the duplication of the same case; this resulted in two ongoing cases with the exact same facts and persons involved. In some Member States, splitting the case conflicts with the principle of ne bis in idem. Additionally, in some Member States, the defendant has the right to request that the prosecution merges the cases, therefore, leaving two possible scenarios: 1) merging the case but, if so, considering that the facts are the same, the question remains whether the EPPO or national prosecution office should investigate and prosecute the case, or 2) leaving the case separated, but denying the defendant’s request, even if the two ongoing cases raise fundamental rights concerns, specifically regarding to the principle of ne bis in idem.

Some EDPs/EPs mentioned that, in some cases, it is unclear whether the national authorities would report where there is a concern that a case involving national direct taxes is inextricably linked to a PIF offence. For example, the provision makes it clear that the EPPO does not have competence, which means that it is more difficult for the EPPO to get an overview of the national cases where there could be a link between PIF offences and national direct taxes. For example, in LU, the EDPs heard in the press about a case regarding tobacco seizing where the EPPO might have been competent. They contacted a high official within the customs authority that indicated that they were unaware of the possibility that the EPPO could be competent. The LU tax administration authorities are very cautious when having to report potential criminal activities, and thus, this instance may not be EPPO-specific. It should be noted that the hand-over of cases may depend on the willingness of the national competent authorities. For instance, in FI, there is excellent cooperation between the EPPO and the national prosecution service and, in the case of any doubts, the national prosecution service will contact the EPPO to ask how best to proceed.

One way proposed by EDPs/EPs which may resolve both the aforementioned problems is to allow the national authorities to give their consent for the EPPO to investigate and prosecute cases involving national direct taxes. This would, therefore, constitute a similar mechanism as that provided under Article 25(4) for inextricably linked offences (see Section 3.4.2 on Article 25(3)(b) for more information). Allowing the national authorities to provide their consent would avoid splitting the case, but also will not force the case to be merged, for those inextricably linked offences. Moreover, consulting the EPPO may increase awareness of the national authorities if an inextricably linked case does arise, as even if they ask the EPPO whether the case is within their competence, the power is still with the national authorities to decide whether or not to investigate and prosecute the case. For example, in CZ, there were discussions with the national authorities to decide who was best placed to investigate a case involving direct taxes. The national authorities indicated that, if the damage to direct taxes is minor in comparison to the damage to VAT, they would be willing to allow the EPPO to investigate and prosecute both offences. However, the explicit wording of Article 22(4) does not allow such a possibility and, thus, to allow for this possibility, the Regulation would need to be revised.
3.4. Exercise of the competence regarding inextricably linked offences – Article 25(3)

As well as being competent in cases involving the PIF offences and criminal organisations, the EPPO shall also be competent, in accordance with Article 22(3), for any other criminal offence that is inextricably linked to criminal conduct that falls within the scope of these offences.

The notion of ‘inextricably linked’ offences is outlined in Recital 54 of the Regulation, which provides that the notion shall be considered ‘in light of the relevant case-law which, for the application of the ne bis in idem principle, retains as a relevant criterion the identity of the material facts (or facts which are substantially the same), understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together in time and space’. This definition is not aligned with the ‘related criminal offences’ provided in the Regulations on the European Union Agency for Law Enforcement Cooperation (hereinafter: ‘Europol’) and the European Union Agency for Criminal Justice Cooperation (hereinafter: ‘Eurojust’). As these Regulations, ‘related criminal offences’ include those criminal offences committed: 1) in order to procure the means of perpetrating acts in respect of which Europol/Eurojust are competent; 2) in order to facilitate or perpetrate acts in respect of which Europol/Eurojust are competent; and 3) in order to ensure the impunity of those committing acts in respect of which Europol/Eurojust are competent. Hence, these definitions refer to the notion of the ‘related criminal offence’ being instrumental to the ‘main’ criminal offence (i.e. the criminal offence for which Europol and Eurojust are competent).

Recitals 58 and 59 explain why the EPPO should be competent in cases involving inextricably linked offences. Recital 58 provides that ‘[t]he competence of the EPPO regarding offences affecting the financial interests of the Union should take priority over national claims of competence so that it can ensure consistency and provide the steering of investigations and prosecutions at Union level[…]’. Additionally, Recital 59 provides 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.’

The competence with regard to inextricably linked offences may only be exercised in conformity with Article 25(3). Specifically, Article 25(3) provides:

‘The EPPO shall refrain from exercising its competence in respect of any offence falling within the scope of Article 22 and shall, upon consultation with the competent national authorities, refer the case without undue delay to the latter in accordance with Article 34 if:

(a) the maximum sanction provided for by national law for an offence falling within the scope of Article 22(1) is equal to or less severe than the maximum sanction for an

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inextricably linked offence as referred to in Article 22(3) unless the latter offence has been instrumental to commit the offence falling within the scope of Article 22(1); or

(b) there is a reason to assume that the damage caused or likely to be caused, to the Union’s financial interests by an offence as referred to in Article 22 does not exceed the damage caused, or likely to be caused to another victim.

Point (b) of the first subparagraph of this paragraph shall not apply to offences referred to in Article 3(2)(a), (b) and (d) of Directive (EU) 2017/1371 as implemented by national law.

In light of the above, in accordance with Recital 55, the EPPO could exercise its competence where offences are inextricably linked and the offence affecting the Union’s financial interests is preponderant, in terms of the seriousness of the offence concerned, as reflected in the maximum sanctions that could be imposed. The preponderance of the PIF crimes is determined by the national legislation transposing the PIF Directive, which provides for a maximum sanction of at least 4 years for PIF offences. Therefore, whether an offence affecting the Union’s financial interests is determined to be preponderant will depend on whether there are differing sanctions provided for PIF and non-PIF offences under national law.

However, as per Recital 56, even where the PIF offence is not preponderant in terms of sanctions levels, the offence could fall into the EPPO’s competence providing that the inextricably linked offence is deemed to be ancillary in nature, namely it is merely instrumental to the PIF offence. Recital 56 also provides that a non-PIF offence can be determined to be merely instrumental to a PIF offence where the offence has been committed for the main purpose of creating the conditions to commit the offence affecting the financial interests of the Union. It is not further clarified in the Regulation when this would apply, nor what the parameters are for deciding whether the offence has been committed for the main purpose of affecting the financial interests of the Union.

Furthermore, as per Article 25(3)(b), the EPPO shall refrain from exercising its competence where there is a reason to assume that the PIF offence has caused (or is likely to cause) damage to the Union’s financial interests that does not exceed the damage caused, or likely to be caused, to another victim. This provision applies only to revenue fraud other than VAT, money laundering, corruption, and misappropriation affecting the Union budget. Article 25(4) stipulates that if the competent national authorities grant their consent, the EPPO may exercise its competence in such a situation if it appears they are better placed to investigate or prosecute.

The following subsections will look at Articles 25(3)(a) and (b) in more detail. In particular, observing the following points:

- Section 3.3.1 on Article 25(3)(a) will assess whether the EPPO has experienced any legal and/or practical constraints in exercising its competence concerning PIF and non-PIF offences inextricably linked to the latter, when the maximum sanction provided by national law for the PIF offence is equal or less severe than the maximum sanction for the inextricably linked offence; and

- Section 3.3.2 on Article 25(3)(b) will examine whether the EPPO has experienced any legal and/or practical constraints in exercising its competence if 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.
3.4.1. Sanction threshold – Article 25(3)(a)

Article 25(3)(a) provides that the EPPO shall refrain from exercising its competence where the maximum sanction provided for by national law for a PIF crime is equal to or less severe than the maximum sanction for an inextricably linked offence as referred to in Article 22(3), unless the latter offence has been instrumental to commit the PIF crime. Article 25(3)(a) provides the following:

‘The EPPO shall refrain from exercising its competence in respect of any offence falling within the scope of Article 22 and shall, upon consultation with the competent national authorities, refer the case without undue delay to the latter in accordance with Article 34 if:

(a) the maximum sanction provided for by national law for an offence falling within the scope of Article 22(1) is equal to or less severe than the maximum sanction for an inextricably linked offence as referred to in Article 22(3) unless the latter offence has been instrumental to commit the offence falling within the scope of Article 22(1) […]’

The following section will assess whether the EDPs/EPs have experienced any legal and/or practical constraints in exercising their competence concerning offences, affecting the Union’s financial interests and non-PIF offences inextricably linked to PIF crimes when the maximum sanction provided by national law for the PIF offence is equal or less severe than the maximum sanction for the inextricably linked offence.

Pursuant to Recital 55 of the Regulation, the EPPO could exercise its competence where offences are inextricably linked and the offence affecting the Union’s financial interests is preponderant, in terms of the seriousness of the offence concerned, as reflected in the maximum sanctions that can be imposed.

However, if the inextricably linked offence is instrumental to committing the offence falling within the scope of Article 22(1), the EPPO should be able to exercise its competence, even when the penalty provided for the non-PIF offence is higher or equal to that of the PIF offence. An offence is determined to be instrumental where the non-PIF offence has been committed for the purpose of creating the conditions to commit the PIF offence, in accordance with Recital 56 of the Regulation.

Some EDPs/EPs indicated that, in their Member State, the maximum sanction for the inextricably linked non-PIF offences is often equal to that for PIF offences. For example, in Member States such as AT, EE, EL, ES and RO, there are cases where the sanctions for PIF offences are equal to the sanctions for non-PIF offences. In AT, an EDP explained that, with the exception of the offence of expenditure-related fraud when the damage is between 100,000 EUR and 300,000 EUR, the equal sanctions have led to the EPPO having to leave numerous cases with the national authorities. Where there are non-PIF offences with sanctions ‘equal’ to those provided for the PIF offences, the PIF offences fall outside the competence of the EPPO. However, the EPPO Regulation provides that even if the PIF offence is not equal and/or preponderant, the EPPO can still exercise competence if the non-PIF offence is instrumental to creating the conditions to commit the offence affecting the financial interests of the Union.

The challenges are not only posed when the sanctions for the inextricably linked non-PIF offence are equal to the PIF offence, but also when the sanction for the non-PIF offence is more severe. This is the case in Member States such as CY and SK. In SK, an EDP indicated that the fact that the sanction for non-PIF offences is more severe than for PIF offences is quite often a constraint when trying to exercise competence on PIF offences. Multiple examples were provided where this was proven to be an issue in SK – to name one example, the EPPO had to refrain from exercising its competence in a case where the damage caused to the EU’s
financial interests was 808,500 EUR, yet the damage caused to the national interests was 269,500 EUR. Overall, the SK EDP indicated that there had been 42 cases in which the EPPO had to refrain from investigating as a result of the application of Article 25(3)(a). In CY, the sanctions for non-PIF offences are significantly higher than those for PIF offences. However, in CY, the Legal Office of the Republic has acknowledged that the situation poses a significant limitation to the EPPO’s competence and, thus, legislation has been proposed to the CY House of Representatives to increase the sanctions for the PIF offences to be higher than for the non-PIF offences. Therefore, where the Member States have transposed the PIF Directive introducing maximum sanctions of at least 4 years but the pre-existing national law provides for higher sanctions for non-PIF offences, the EPPO is unable to exercise its competence under Article 25(3)(a). This does not result from the incorrect transposition of the PIF Directive but rather from the wording of Article 25(3)(a), which does not consider the manner in which the PIF Directive may be transposed in the Member States.

There were some Member States where no issues were observed due to the sanctions always being higher for PIF offences. For example, in BE, the PIF offences are included as aggravating circumstances to the non-PIF criminal conducts. As they are aggravating circumstances, the sanction for a PIF offence will be usually higher than the non-PIF offence. Similarly, in FI, both the non-PIF and the PIF offences are included in the same national provision with the sanctions for PIF offences always being higher than for the non-PIF offences.

Therefore, the functioning of Article 25(3)(a), in practice, depends on the national law of the Member States, including, but not limited to, the way in which the Member States transposed the PIF Directive and how this implementation relates to offences that do not fall under the scope of the transposition of the PIF Directive. The differing transposition of the PIF Directive across Member States, in combination with other criminal law provisions related to non-PIF offences, may lead to fragmentation where, for the same case, one EDP in one Member State may be competent for the inextricably linked offence but their counterpart in another Member State is not. This would also subsequently result in the inability to effectively cooperate on investigations. Generally speaking, the preponderance of the PIF/non-PIF offence is not determined in a consistent manner across the Member States, even though the PIF Directive was correctly transposed.

However, as mentioned above, if the inextricably linked offence is instrumental to committing the offence falling within the scope of Article 22(1), the EPPO should be able to exercise its competence. The instrumentality test was not mentioned by many EDPs/EPs, with the interviewed EDPs/EPs primarily focusing on the preponderance test. The EE, EL and MT EDPs/EPs highlighted such a possibility, with both the EE and MT EDPs/EPs referencing the fact that the instrumentality test needs to be defined by the CJEU. In EE, an EDP explained that there had also been an instance where the competent national authority, the District Prosecutor’s Office, forwarded a case report, but the EPPO had to refrain from exercising its competence as the sanction provided by national law for the inextricably linked non-PIF offence was preponderant to the one applicable to the PIF offence. In a similar vein, when discussing instrumentality, an ES EDP pointed out that the exception of ‘instrumentality’ is very difficult to assess, and various interpretations are given to this notion. For example, in ES, there was a conflict with an investigative judge from Valencia. The case related to a big criminal organisation that sold oil as fuel to avoid tax on hydrocarbons. There was also a suspicion of PIF VAT fraud in the same case. The EDPs did not exercise the right of evocation because the penalty was the same, in line with Article 25(3)(a) of the Regulation. On the contrary, the investigative judge in Valencia considered that the case fell under the competence of the EPPO and forwarded the case to the Supreme Court. The Supreme Court decided for the competence to the EPPO, arguing that the offence regarding the avoidance of paying hydrocarbon taxes was not the main offence, but it was instrumental to the VAT fraud. The EDPs had instead considered it was the other way around, in particular, because the organisation was dedicated to the importation of oil. It can be seen from this case that the
interpretation on whether the national offence was instrumental to the the offence affecting the financial interests of the Union can be very broad. In order for the EDPs/EPs to use instrumentality to allow the EPPO to exercise its competence, it may be beneficial to clarify the parameters of how to decide whether an offence has been committed for the purpose of creating the conditions to commit a PIF offence.

The relationship between the PIF and non-PIF offences differs depending on the Member State, resulting in potential difficulties and inconsistencies in interpretation. In some Member States, such as CZ, PT, RO, SI, and SK, the PIF and non-PIF offences are regulated by different provisions of the criminal code or other relevant legislation. On the contrary, in Member States, such as FI, FR, IT, LT, LU, LV, and NL, the PIF and non-PIF offences are combined in one single provision of the criminal code or other relevant legislation. There are diverging approaches in some Member States where the PIF and non-PIF offences are provided within the same national provision. For example, in DE, where the PIF and non-PIF offence are in the same provision, the decision regarding whether the EPPO or the national authorities should exercise their competence should be assessed under Article 25(3)(b). This approach allows the possibility for the national authorities to provide their consent for the EPPO to exercise its competence if the EPPO is better placed to investigate or prosecute. However, this interpretation is not adopted in all Member States. For example, in some Member States, where the PIF and non-PIF offence are in the same provision, the approach to determining whether the EPPO or the national authorities should exercise their competence is assessed using Article 25(3)(a) – in these situations, unlike when Article 25(3)(b) is applied, such cases would always fall outside of the EPPO’s competence if it is the same provision with sanctions for the non-PIF offences which are equal or higher than for the PIF offences. Thus, it is unclear how to approach such situations and perhaps a CJEU judgment could provide clarification on this point, thus, resolving any difficulties and inconsistencies.

There have been some circumstances which have indicated that, for some cases, the national authorities consider that the EPPO is better placed to investigate specific cases, despite them falling out of its competence due to Article 25(3)(a). Even though the national authorities would consent to the EPPO exercising its competence, this is not envisaged under Article 25(4) of the EPPO Regulation. The ES EDP/EP pointed out a case involving a conflict of competence with an investigative judge from Valencia (see aforementioned). In this case, the ES courts ruled that the EPPO was competent even though the EPPO chose not exercise its right of evocation due to the penalties for both offences being the same. A way to improve the present situation may be to request the consent of the national authorities so that the EPPO to exercise its competence, similar to Article 25(3)(b) – this suggestion was also put forward by some EDPs/EPs.

3.4.2. Damage threshold – Article 25(3)(b)

Letter (b) and the last paragraph of Article 25(3) further define the exercise of the competence of the EPPO vis-à-vis inextricably linked offences and establish the following:

‘The EPPO shall refrain from exercising its competence in respect of any offence falling within the scope of Article 22 and shall, upon consultation with the competent national authorities, refer the case without undue delay to the latter in accordance with Article 34 if:

[...] (b) there is a reason to assume that the damage caused or likely to be caused, to the Union’s financial interests by an offence as referred to in Article 22 does not exceed the damage caused, or likely to be caused to another victim.
Point (b) of the first subparagraph of this paragraph shall not apply to offences referred to in Article 3(2)(a), (b) and (d) of Directive (EU) 2017/1371 as implemented by national law.

Articles 3(2)(a), (b) and (d) of the PIF Directive relate to expenditure fraud and revenue fraud arising from VAT own resources. As such, Article 25(3)(b) of the Regulation applies to revenue fraud for revenue other than that arising from VAT own resources as per Article 3(2)(c), as well as for money laundering, corruption and misappropriation, as per Article 4 of the PIF Directive. Hence, in principle, the EPPO shall exercise competence for other criminal offences that are inextricably linked to revenue fraud other than that arising from VAT, money laundering, corruption and misappropriation only if the damage to the financial interests of the Union is preponderant over the damage to national financial interests.

Additionally, Article 25(4) of the EPPO Regulation introduces a way to compensate for the lack of competence of the EPPO for such offences. It provides that ‘The EPPO may, with the consent of the competent national authorities, exercise its competence for offences referred to in Article 22 in cases which would otherwise be excluded due to application of paragraph 3(b) of this Article if it appears that the EPPO is better placed to investigate or prosecute’. Recital 60 provides further details on this possibility: ‘[w]here the EPPO cannot exercise its competence in a particular case because there is 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 EPPO should nevertheless be able to exercise its competence provided that it would be better placed to investigate or prosecute than the authorities of the respective Member State(s). The EPPO could appear to be better placed, inter alia, where it would be more effective to let the EPPO investigate and prosecute the respective criminal offence due to its transnational nature and scale, where the offence involves a criminal organisation, or where a specific type of offence could be a serious threat to the Union’s financial interests or the Union institutions’ credit and Union citizens’ confidence. In such a case the EPPO should be able to exercise its competence with the consent given by the competent national authorities of the Member State(s) where damage to such other victim(s) occurred’.

It should be first observed that the EDPs/EPs have diverging experiences when it comes to situations falling under Article 25(3)(b). A number of EDPs/EPs indicated that they have not encountered any cases of inextricably linked offences for which the damage to the national financial interests was likely to be higher than the damage to the Union’s interests. In these Member States, a few EDPs/EPs considered that it would be unlikely to experience cases where the damage to the national interests would be higher than the damage to the Union budget, as the latter damage is largely preponderant in practice. One EDP/EP also indicated that they usually do not even get to consider the damage and the rules under Article 25(3)(b) due to the lack of competence stemming from Article 25(3)(a). In those cases, the competence of the EPPO is excluded, regardless of the amount of the damage, due to the fact that the maximum sanction applicable to inextricably linked offences is equal to or higher than that provided for PIF offences (see Section 3.4.1 above).

On the other hand, several EDPs/EPs reported cases where they had to refrain from exercising competence over inextricably linked offences, in line with Article 25(3)(b). This concerns in particular customs fraud offences and cases of smuggling, and more specifically tobacco smuggling. For example, in one case, cigarettes were smuggled from Belarus to LT, leading to unpaid import taxes. According to LT law, import taxes consist of VAT, customs and excise taxes. In this case, the VAT amount was falling under the 10 million threshold, hence the same material facts constituted a PIF offence with regard to unpaid customs taxes and inextricably linked non-PIF offences with regard to VAT and excise fraud. The amount of unpaid customs taxes was lower than VAT and excise taxes. As such there was a reason to assume that the...
damage caused to the Union’s financial interests did not exceed the damage caused to the national financial interests and that the EPPO had to refrain from exercising competence. However, in this specific case, it was found that the EPPO was better placed due to the transnational dimension of the case and the national authorities granted their consent in line with Article 25(4). Similar issues were raised in BE. An EDP indicated that, at the beginning of the operations of the EPPO, the customs authorities shared with the EPPO an estimate of five cases related to tobacco smuggling that involved PIF offences. However, the EDPs/EPs were not able to exercise competence due to the unpaid excise duties largely exceeding the unpaid customs or VAT taxes, resulting in higher damage to the national budget. The EDPs/EP have, since then, asked the BE customs authorities to limit the reporting of such cases, as they consistently led to a lack of competence of the EPPO.

With regard to customs cases, in EL, an EDP indicated that one single provision criminalises customs fraud affecting either the national budget or the financial interests of the EU. As such, when non-PIF customs offences are inextricably linked to PIF customs cases, the EPPO can exercise competence only if the damage to the EU budget is higher. The EDP clarified that, in practice, the damage to the national financial interests is always higher. They noted that they never received any reporting of customs cases from national authorities. This could raise concerns in the sense that, in such cases, the national authorities do not even leave the opportunity for the EPPO to review the relevant information and assess whether it could exercise its competence.

Additionally, some EDPs/EPs outlined the difficulties relating to the calculation of the damage and the complexity, in particular at the early stages of investigations, to identify whether the damage to the financial interests of the Union is higher. As to VAT offences, it also appears complicated to estimate the damage and establish whether the 10 million EUR threshold is reached and whether the VAT fraud is considered a PIF offence or an inextricably linked offence affecting the national financial interests. This may create uncertainty and potential delays to the exercise of the EPPO’s competence. It can also be noted that, in cross-border investigations, the calculation of the damage may lead to situations where, for the same case, the EPPO may be competent in one Member State and the national authorities in another. As mentioned by a FR EDP, determining the amount of the damage is most often a case-by-case assessment that can evolve depending on the developments of the investigations. The early assessment of the damage is difficult, for example, in cases where offences are related to funds that were initially provided by the EU and were later found to be reimbursed by the national authorities. As such, depending on the progress of the investigations and the level of information collected in different Member States, EDPs/EPs may reach different conclusions as to whether the damage to the financial interest of the Union is higher. Additionally, some interviewees pointed out that it is not clear, from the wording of the Regulation, whether the damage should be calculated with regard to a single criminal conduct or for a whole offence. However, with regard to VAT fraud, it appears that, in line with Recital 4 of the PIF Directive, the EDPs/EPs generally apply the 10 million EUR threshold to the entire fraud scheme, rather than to specific criminal conducts.

It should be further noted that the majority of EDPs/EPs facing such cases stated that they do not experience particular constraints to exercise their competence because national authorities easily grant their consent, pursuant to Article 25(4). Several EDPs/EPs raised that, due to lack of internal resources, national authorities are generally inclined to grant their consent and report the cases to the EPPO, even when the damage to national financial interests is significantly higher than to the EU. In DE, for example, the national authorities consistently consider that the EPPO is better placed if the offence has a cross-border impact and if multiple Member States are involved. One EDP/EP pointed out, however, that even if national authorities are not reluctant to give their consent, having to ask for such consent potentially creates additional delays.
Nonetheless, the interpretation and application of Article 25(4) do not appear uniform in all Member States. In a few Member States, the EDPs/EPs indicated that they never obtained or required the consent of national authorities, even though they have encountered cases of inextricably linked offences for which the EPPO may have appeared better placed. The reasons as to why Article 25(4) was not applied in those cases are not clear. In this sense, some EDPs/EPs outlined that due to different legislation and practice in other Member States, while they were granted competence over a case, their counterparts in other Member States did not have the competence and the investigations were carried out by national authorities. This consequently reduced the possibility to conduct efficient cross-border investigations. It is considered that this asymmetry undermines the ability of the EPPO to carry out consistently and thoroughly this kind of investigation. Moreover, even though no specific examples were given by interviewees, there could be a risk of national authorities claiming to be better placed to investigate and prosecute the offence on the basis of their investigations being very advanced, in the case where they initiated the investigation and delayed to report to the EPPO on purpose.

3.5. Conclusions

Overview of the issues identified

The below table provides an overview of the conclusions identified in relation to the (exercise of) material competence of the EPPO. It outlines the legal and/or practical constraints experienced by the EDPs regarding Articles 22(2) and (4). Furthermore, it identifies the legal and/or practical constraints experienced by the EPPO when exercising its competence concerning offences affecting the Union’s financial interests and non-PIF offences inextricably linked to the latter when the maximum sanction provided by national law for the PIF offence is equal or less severe than the maximum sanction for the inextricably linked offence (Article 25(3)(a)) and where 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 (Article 25(3)(b)).
Table 3 - Overview of the conclusions regarding the material competence of the EPPO

<table>
<thead>
<tr>
<th>General conclusions</th>
<th>Material competence</th>
<th>Exercise of the competence regarding inextricably linked offences</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. There are multiple elements to assess whether the case falls within the EPPO’s material competence.</td>
<td>1. Most EDPs/EPs did not encounter any practical difficulties.</td>
<td>1. Maximum sanctions for the inextricably linked non-PIF offence are often equal to or higher than for PIF offences, meaning that PIF offence can fall out of the EPPO’s competence.</td>
</tr>
<tr>
<td>2. A lack of uniform application of the EPPO’s material competence, and the exercise of such competence, by EDPs/EPs and the national authorities.</td>
<td>2. There is a lack of clarity on the notion of the ‘focus’ of the criminal activity of a criminal organisation.</td>
<td>2. Diverging interpretation of whether the national offence is instrumental to the offence affecting the financial interests of the Union.</td>
</tr>
<tr>
<td>3. A lack of awareness of the national authorities as to the material competence of the EPPO.</td>
<td>1. Difficulties in establishing how to proceed in cases where VAT and national direct taxes are inextricably linked.</td>
<td>3. The relationship between the PIF and non-PIF offences differs depending on the Member State, resulting in difficulties and inconsistencies in interpretation.</td>
</tr>
<tr>
<td>4. The fragmentation resulting from the Member States’ diverging criminal law frameworks.</td>
<td>2. It is unclear whether the national authorities would report a case to the EPPO that involves national direct taxes inextricably linked to a PIF offence.</td>
<td>4. In some cases, the national authorities consider that the EPPO is better placed to investigate specific cases, despite such cases falling out of its competence.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1. The EDPs/EPs have diverging experiences when it comes to situations falling under Article 25(3)(b).</td>
</tr>
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<td></td>
<td></td>
<td>2. Several EDPs/EPs reported cases where they had to refrain from exercising competence over inextricably linked offences.</td>
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<td></td>
<td></td>
<td>3. Difficulties relating to the calculation of the damage and the complexity, in particular at the early stages of investigations, to identify whether the damage to the financial interests of the Union is higher.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>4. National authorities easily grant their consent, pursuant to Article 25(4).</td>
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</tbody>
</table>
Overall conclusions on the material competence of the EPPO

Overall, the material competence of the EPPO and its exercise in practice are complex. There are many elements to assess the material competence itself. Article 22(1) provides that the EPPO shall be competent in respect of the PIF offences, yet for VAT fraud, it is only competent when the conduct is cross-border and involves a total damage of at least 10 million EUR. Under Article 22(2), the EPPO is competent for offences regarding participation in a criminal organisation if the focus of the criminal activity is to commit one of the offences mentioned under Article 22(1). Then, under Article 22(3), the EPPO is also competent for any criminal offence that is inextricably linked to criminal conduct falling within the scope of Article 22(1), but this can only be exercised in line with Article 25(3). Finally, Article 22(4) provides that the EPPO shall not be competent for criminal offences in respect of national direct taxes, including offences inextricably linked thereto. This competence may result in a lack of uniform application by EDPs/EPs and the national authorities in determining whether the EPPO is competent. Some EDPs/EPs indicated the lack of awareness of the national authorities as to the material competence of the EPPO, resulting from the complexity of the relevant provisions of the EPPO Regulation. The lack of awareness of national authorities could result in cases not being reported to the EPPO. Therefore, it should be made clearer exactly when the EPPO is competent and when it is not – this could be achieved with further guidance and training to the national authorities, which would result in a greater understanding of the EPPO's competence and, thus, the effective application of the Regulation.

Some issues were identified where the EPPO cannot exercise its competence, yet the national authorities would like it to exercise its competence. For example, regarding Article 22(4), multiple EDPs/EPs suggested that there is confusion over who is competent in cases where national direct taxes are inextricably linked to VAT. The same was mentioned in relation to Article 25(3)(a), in accordance with which the EPPO cannot exercise its competence because the sanction for the non-PIF inextricably linked offence is equal to or higher than that provided for the PIF offence. The main solution envisaged by the EDPs/EPs is the revision of the Regulation by allowing the consent mechanism (or a similar mechanism) under Article 25(4) to apply to Articles 22(4) and 25(3)(a), so that were the national authorities to consent, the EPPO could exercise its competence in these cases.

The need for greater clarification of the EPPO's competence is complemented by the need to provide greater clarification on some concepts. For instance, under Article 22(2), the EPPO Regulation does not provide any further information as to what is meant by 'focus of a criminal activity'. Similarly, under Article 25(3)(a), the "instrumentality" test is unclear with regard to how to determine whether an offence has been committed for the purpose of creating the conditions to commit an offence affecting the financial interests of the Union. Therefore, intended meaning of the concepts posited in the provisions stipulating the EPPO’s material competence may not be clear to the national authorities and cases may fall through the cracks of the EPPO’s competence. Both these issues could be resolved via an interpretation by the CJEU or via the revision of the EPPO Regulation. The issues with the interpretation of ‘focus of criminal activity’ could also be resolved by the ‘lisbonisation’ of Framework Decision 2008/814/JHA and, thus, the revision of the Framework Decision to bring it within the post-Lisbon framework as a Directive/Regulation. Another suggestion to make the concept of ‘inextricably linked offences’ clearer was to link the approach with that of 'related criminal offences' as provided in both the Eurojust and Europol Regulations. This would harmonise the three Regulations and harmonise the parameters to determine whether the commission of the non-PIF offence was ‘instrumental’ to the commission of the PIF offence.

There are also concerns in relation to the fragmentation resulting from the Member States’ diverging criminal law frameworks on which both the PIF Directive and the Regulation rely. The competence under Article 22(2) is determined by Framework Decision 2008/841/JHA, which had a limited impact on the existing national law, thus, resulting in diverging criminal law frameworks across the Member States. Meanwhile, the exercise of competence under Article
25(3)(a) is determined by the sanctions provided in the Member States’ national criminal law frameworks, with some opting to separate the PIF and non-PIF offences and having sanctions for (some) non-PIF offences that are higher or equal to that of (some) PIF offences. Furthermore, the exercise of competence under Article 25(3)(b) poses a similar situation in terms of the diverging interpretations at the national level on how to calculate the damage to the Union’s financial interests – whether the calculation should be for a single criminal conduct or a whole offence. In both circumstances under Article 25(3), this results in fragmentation, with the EDPs in some Member States being competent in a case on which, in another Member State, their counterpart would not be competent.

Due to the divergent national legal frameworks and the fragmentation resulting from this, the criteria of preponderance, as based on the level of sanctions or damage, does not appear the most logical option to ensure the effective exercise of the competence of the EPPO. In light of this, it may be more sensible for greater focus to be placed on the instrumentality of the offence. The issues surrounding Article 25(3) have led to the Legal Office of the EPPO mentioning during the workshop for the Study that they have already drafted a proposal for the revision of this provision, with a greater focus placed on the instrumentality of the offence.
4. Operations of the EPPO

4.1. Introduction

As per Article 8(1) of the Regulation, the EPPO operates as a single office with a decentralised structure. As part of its operations at the central level and decentralised level, the EPPO relies on information obtained from other entities, including national authorities and IBOAs. In particular, along with starting its own investigations as per Article 26, the EPPO can exercise its tasks either motu proprio or following up on the reporting of information from national authorities. As such, Article 27 defines the rules applicable to the right of evocation of the EPPO. Further to the reporting of information from the competent national authorities, the EPPO also relies on access to any relevant information stored in criminal investigation and law enforcement databases. While Article 43(1) provides for access to information from national databases and registries, Article 43(2) sets out the principle of access to information from IBOAs. This Chapter focuses on two specific aspects regarding the operations of the EPPO. In relation to Article 27 on the right of evocation, Section 4.2 assesses whether the EDPs/EPs have experienced any legal and/or practical constraints in exercising their right of evocation vis-à-vis national authorities. With regard to Article 43(2), Section 4.3 assesses whether in practice the EPPO is able to obtain information that is stored in databases and registers of IBOAs and that concerns crimes falling within its competence. Section 4.4 provides conclusions on these two aspects of the EPPO’s operations.

4.2. Right of evocation – Article 27

Article 27 vests the EPPO with the right of evocation. Specifically, Article 27(1) stipulates that:

‘Upon receiving all relevant information in accordance with Article 24(2), the EPPO shall take its decision on whether to exercise its right of evocation as soon as possible, but no later than 5 days after receiving the information from the national authorities and shall inform the national authorities of that decision. The [ECP] may in a specific case take a reasoned decision to prolong the time limit by a maximum period of 5 days, and shall inform the national authorities accordingly’.

Furthermore Article 27(5) states that:

‘Where the EPPO exercises its right of evocation, the competent authorities of the Member States shall transfer the file to the EPPO and refrain from carrying out further acts of investigation in respect of the same offence’.

Recitals 13 and 58 further provide some context regarding the EPPO’s right of evocation. Recital 13 states that the Regulation provides for a system of shared competence between the EPPO and national authorities in combating crimes affecting the financial interests of the Union, based on the right of evocation of the EPPO. Recital 58 ties in with the national authority’s obligation to refrain from carrying out further acts when the EPPO exercises its right of evocation under Article 27(5). It cements the principle of primacy of the EPPO’s competence over national claims of competence, in order to ‘ensure consistency and provide steering of investigations and prosecutions at Union level’. It also states that the national authorities should refrain from acting unless urgent measures are required until the EPPO decides whether to investigate.

The following section will assess whether the EDPs/EPs have experienced any legal and/or practical constraints in exercising their right of evocation vis-à-vis national authorities. The
analysis will focus on the time limit imposed on the EDPs/EPs to make a decision to exercise their right of evocation and on potential issues stemming from national authorities failing to refrain as per Article 27(5).

With regard, first, to Article 27(1), the vast majority of the EDP/EPs shared the view that the 5-day limit is too short to decide whether to exercise the right of evocation, given the complexity of each case. The ‘relevant information’ referred to under Article 27(1) usually contains very long documents to review, and, at times, requires collecting additional information to be able to make an informed decision. The verification of the case’s circumstances is a very time-consuming process. Several EDPs/EPs have raised the issue of the 5-day limit also encompassing the weekend, holidays and public holidays. Other EDPs/EPs have mentioned that it is ambiguous whether the deadline also covers statutory days off, as the Regulation does not explicitly state that the 5-day limit exclusively covers working days. In PT, there is a system of judicial holidays, where the deadlines of cases that are deemed ‘non-urgent’ are suspended. Article 4 of the Portuguese Code of Criminal Procedure does not list EPPO cases as an ‘urgent matter’ and it is unclear whether the deadline would be suspended should it fall on a judicial holiday, during which there would not be anyone available in the Prosecutor’s Office. Moreover, many EDPs/EPs understood that, if an EPPO crime report is received on a Friday afternoon, the weekend accounts for 2 days of the 5-day limit. Furthermore, a few EDPs/EPs have pointed out that, in practice, the deadline for the EDPs is actually limited to 2 days pursuant to Article 40(2) of the Internal Rules of the Procedure of the EPPO as the EDP needs to finalise the verification related to the evocation of an investigation and must reserve 3 days for the Permanent Chamber to make the final decision on whether to evoke the case.

Due to the short timeframe, several EDPs/EPs have said that they have had to find solutions to address this issue, as without doing so, the deadline would not have been reached. In BE, CZ, DE and NL, for instance, the national authorities call the EDPs/EPs prior to reporting all the information pursuant to Articles 24(1) and 24(2). This enables the EDPs/EPs to prepare and request other materials so that they can consider the whole context and make an informed decision before the actual timeline is triggered. In DE, the day on which the national authorities send over the case is coordinated in advance between the national authorities and the EDPs/EP, to avoid sending it at an inconvenient time. Furthermore, a BE EDP pointed out that the deadline runs from the moment all relevant information is received, thus, the request for more information will extend the deadline. Similarly, according to the DE EP if not all the relevant information is provided by the national authorities, the EPPO will request the missing information and the time-limit will start running following the receipt of such complete information. Although these arrangements permit the EDPs/EPs to reach the deadline, the timeframe, as set out in Article 27(1) of the Regulation, remains problematic and impractical. Most of the EDPs/EPs agree that it prevents the EPPO from working in an effective manner. In this sense, the majority of the EDPs/EPs consider that the deadline should be extended to at least 10 days, with the possibility for a shorter time limit when justified for cases of an urgent nature. Several EDPs/EPs also suggested that the provision of the Regulation should refer explicitly to ‘working’ days.

Interestingly, despite the perceived short timeframe, most of the EDPs/EPs have not made use of the extension of five additional days that can be granted by the ECP, as per the last sentence of Article 27(1). The reasons for not making use of the extension are unclear. It was used in EL and LT. In LT, it was used in a case related to VAT.

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Regarding Article 27(5), most of the EDPs/EPs did not report any experiences of national authorities not refraining when the EPPO exercised its right of evocation under Article 27(5). However, in CY and MT, the EDPs/EPs raised the fact that the national authorities are predominantly involved in the investigation, as provided in Section 4.4.1 of the Final Report for the Study and Section 2.2 above, which poses issues under Article 27(5).

In CY, the prosecutors and Attorney-General cannot conduct the investigations. Instead, due to its common law system, the police conduct the investigation. Even in cases where the EPPO evokes the case, the Police and Economic Crime Unit will resume the investigation, albeit under the supervision of the EDP. Furthermore, the file cannot be *stricto sensu* transferred and kept with the EDP as the police would then not be able to conduct the investigation. The EDPs act in the same capacity as the Attorney-General in these cases, with the police investigating on their own and reverting to the EDP if there are any legal issues that require their support. This essentially means that the EDPs do not participate in the investigation but rather give instructions to avoid problems at the later trial stage.

In MT, the Inquiring Magistrate’s investigation is conducted in secret prior to the information being forwarded to the EPPO, which denies the EPPO of exercising its competence and creates issues when the EDP is required to open an inquiry into an investigation and request the appointment of an expert. In such cases, the EDP is not informed of the outcome of the expertise requested, as the documentation and evidence gathered therein is accessible to the Inquiring Magistrate leading the inquiry, the police, if they are assisting the Inquiring Magistrate (who are bound not to share the information), and with the Attorney General; thus, it does not include the EDP/EP. This is due to the fact that the EDP only has the same powers as the Attorney-General when prosecuting the offences and not during the investigation. Furthermore, there has been a case, where the Inquiring Magistrate was conducting an inquiry that was suspected to be within the competence of the EPPO, which the EPPO became aware of through the media and a witness. The EPPO was not granted access to the inquiry when the EDP informed the Inquiring Magistrate of the initiation of an investigation (on the same facts).

Furthermore, most of the EDPs/EPs did not report any situations where new facts have arisen and national authorities refrained from informing the EPPO of these new facts, despite having a reason to believe the EPPO could exercise its competence. Some EDPs/EPs pointed out that the rare occurrences of potential lack of reporting, in practice, rather stemmed from a lack of awareness on the national authority’s part regarding the competence of the EPPO in general and that a given case may fall within the EPPO’s competence. Furthermore, national authorities may also potentially be unaware of their reporting obligations. In MT, there had been three instances where the EPPO was informed through media articles or information received from private parties. Following the discovery of this information, the EDP asked the national authorities about these cases and was informed that there was already an investigation ongoing. In EE, there had been situations where the national law enforcement authority did not inform the EPPO about an investigation possibly falling under EPPO competence, which was perhaps due to a lack of information or attention and, thus, was not done intentionally.

While this has not happened in AT, EE, or PT, EDPs of these Member States do acknowledge that this issue could potentially occur in the future. In AT, the national authorities often do not realise that they have the obligation to report and that in a given case there might be an implication on the EU budget. As mentioned in Section 3.5 above, a solution could be to provide training for the national authorities so they can become familiar with the material competence of the EPPO. In this regard, a FR EDP stated that as a consequence of numerous training initiatives, more revenue cases are being reported to the EPPO, which shows that national authorities are recognising the scope of the EPPO’s competence and reporting accordingly.
It should be stressed that, contrary to Article 27(1), the potential practical difficulties, such as the national authorities not refraining from conducting their activities when the EPPO exercises its right of evocation or refraining from reporting information to the EPPO do not stem from the way that the Regulation is drafted. These stem rather from the applicable national legal framework and the lack of awareness from the national authorities. Thus, it is a question of ensuring national authorities are duly informed and aware so that the material competence of the EPPO cannot be impinging upon.

4.3. Access to information – Article 43(2)

Article 43(2) grants the EPPO access to information stored in databases and registers of IBOAs. Specifically, it states:

‘The EPPO shall also be able to obtain any relevant information falling within its competence that is stored in databases and registers of the institutions, bodies, offices and agencies of the Union.’

Recital 101 provides an almost verbatim reiteration of the EPPO’s right to access information, stating that ‘The EPPO should be able to obtain any relevant information that falls within its competence stored in databases and registers of the institutions, bodies, offices and agencies of the Union.’ Articles 100(3) and 101(5) further vest the EPPO with the right to indirectly access information in Eurojust’s and OLAF’s CMS on the basis of a hit/no-hit system, respectively. The hit/no-hit system means that, whenever a match is found between the data entered into the CMS by the EPPO and data held by Eurojust or OLAF, the match shall be communicated to both Eurojust and the EPPO, and in the case of the OLAF’s CMS, to OLAF and the EPPO. In the case of Eurojust, this shall also be communicated to the Member State that provided the data to Eurojust. In both cases, the EPPO shall take appropriate measures to enable Eurojust or OLAF to have access to information in its case management system on the basis of a hit/no-hit system.

Furthermore, Articles 14-16 and 18 of Regulation (EU) 2019/816 provide rules on EPPO’s access to the ECRIS-TCN, a centralised system to identify the Member States holding information on the previous convictions of third-country nationals.

The following section will assess the input received from the EPPO Central Office and the analysis will focus on whether, in practice, the EPPO is able to obtain information that is stored in databases and registers of IBOAs and that concerns crimes falling within its competence.

It should be noted that the EPPO has concluded a bilateral ‘Cooperation Agreement’ with the Commission and ‘Working Arrangements’ with OLAF and Eurojust.

First, the EPPO has signed a Cooperation Agreement with the European Commission to establish and maintain a cooperative relationship as envisaged under Article 103(1) of the EPPO Regulation to protect the financial interests of the Union. The Agreement, thus, sets out the modalities for their cooperation.

Article 9 elaborates on the EPPO’s access to information concerning crimes that fall within its competence which is stored in the databases and registers of the Commission. It stipulates

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that ‘Annex VIII lists the relevant databases to which the EPPO can have, respectively, direct or indirect reading access, subject to possible limitations.’ Thus, it is important to note that there is a distinction made with regard to the type of access the EPPO has to the information – it is either direct or indirect. When it comes to indirect access, pursuant to Article 9(2), the EPPO shall submit requests for information stored in databases and registers of the Commission to the contact point(s) indicated in Annex I. According to the Central Office, since the EPPO signed the aforementioned Agreement with the European Commission, the EPPO has strived to extend the scope of Annex VIII in order to obtain direct, rather than indirect, access to databases.

While the EPPO has, in principle, indirect access to most of the databases, it is still unable to access the information contained in some of them in practice. This can be exemplified by ARACHNE, a database on data mining which serves to support administrative controls in the area of European investment and structural funds. Pursuant to Annex VIII of the Cooperation Agreement with the European Commission, the EPPO should have indirect access. However, in practice, there are limitations placed on EPPO’s access to relevant data. A potential reason for this is that several Member States abstain from using the database, citing stricter national rules on data confidentiality. This is the case for AT, DE, DK, FI and SE, where Member States have not consented for the system to be used for criminal investigations, meaning information is not available to the EPPO, which in turn potentially hinders its operations. For PL, a potential reason for not using the database is the plan to develop an alternative national system.32

Furthermore, the EPPO has also strived to expand its access to more databases; in particular, the ECRIS-TCN and databases managed by Eurofisc from which it is effectively barred. As mentioned above, Article 14(3) of Regulation (EU) 2019/816 provides the EPPO with direct access to the information contained in ECRIS-TCN and Article 7(3) states that: the EPPO are entitled to query ECRIS-TCN to identify the Member States holding criminal records information on a third-country national in accordance with Articles 14 to 18. However, they shall not enter, rectify or erase any data in ECRIS-TCN.’ In practice, this has not been the case. Given more urgent cooperation mechanisms requiring IT development, granting such access to the EPPO has been de-prioritized as most EDPs are able to request information via their national channels in their capacity as members of the national prosecution system. However, this solely concerns EDPs, while the Central Office of the EPPO does not have direct access to these data. Without such access, there is no full overview of TCNs, as EDPs solely have access to the information in their Member State and do not have a comprehensive harmonised and cross-border record of information. Moreover, while EDPs can have access to information via their national channels, it is not clear to what extent they can share this information with their counterparts from other Member States in the case of cross-border investigations. The benefit and relevance of giving direct access to the database for the operations of the EPPO cannot be denied, as it would facilitate the establishment of a full record of criminal convictions of third-country nationals as well as determining recidivism, and assist the determination of predicate offences, or removing the possibility for offenders to escape the consequences of their previous convictions, especially in cross-border criminality. This, in turn, hinders the EPPO’s work. Thus, it appears that further IT developments should be put in place so that the EPPO, as a whole, is granted direct access to the ECRIS-TCN database.

In the same vein, the cautious stance of some of the Member States, which are data owners, prevents the EPPO from cooperating with Eurofisc. This could potentially be due to the stricter data protection rules of several Member States that pre-date the EPPO; the Member States

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being data owners may not have consented to sharing data to be used in criminal investigations; or due to the administrative burden resulting from the need for the EDPs to obtain consent from national authorities to access data. Furthermore, Eurofisc are not covered under Article 43(2) on the basis that they are a ‘network’ rather than an IBOA. This is problematic as cooperating with Eurofisc is crucial for EPPO investigations, especially for those related to large-scale VAT fraud carousels. Eurofisc uses an advanced analytics tool that facilitates information exchanges under the name Transactions Network Analysis (‘TNA’). Thus, no formal cooperation channel has been established yet. However, according to the Central Office of the EPPO, receiving support from Eurofisc in the form of information exchanges has been identified as beneficial for the EPPO. Recent joint events also paved the way for better coordination and exchange of information. It should be emphasised that not having access to the information of Eurofisc has a serious impact on the related EPPO investigations. For this reason, ensuring a common understanding of the obligations stemming from Article 43(2) of the EPPO Regulation and amending the framework under which Eurofisc operates might be necessary.

The EPPO has also signed a Working Arrangement with OLAF, as per Article 101(5), when it comes to the exchange of any relevant information stored in databases and registers. While Point 4.6 of the Working Arrangement provides for the rules on reciprocal indirect access, the access of the EPPO to databases and registers of the IBOAs is regulated by the Agreement signed with the European Commission. Pursuant to Annex VIII of the Agreement, the EPPO has indirect access to four of the databases managed by OLAF, namely: CIS (Customs Information System), CSM (Container Status Messages) directory, IET (Import, Export, Transit) directory, including ATIS (Anti-Fraud Transit Information System) and OLAF IMS (Irregularity Management System). According to the Central Office of the EPPO, in practice, most EPPO requests concern data held in customs-related databases.

OLAF only stores and provides access to information on customs operations that it had initially obtained from national customs authorities from cases it had handled in the past. Further access limitations are imposed by data retention rules. This effectively means that the EPPO may obtain more complete and accurate customs-related information if it addressed its requests directly to the national customs authorities concerned in each case. Currently, there is no available database that integrates information on all customs operations throughout the territory of the EU. This, thus, signals a potential hindrance, as the EPPO needs to liaise with the national authorities to get additional information, rendering their operations potentially less effective.

However, when it comes to cash controls module of the CIS database, the EPPO is expected to gain direct access in the near future. Albeit a marginal change, direct access significantly streamlines the exchange of information by reducing the time and human resources necessary to respond to database queries.

In general, according to the Central Office, the exchanges of information under Article 101(5) are carried out efficiently and expeditiously, both offices having allocated resources and established dedicated teams to handle them; however, these exchanges can be further improved if the EPPO had easier access to all customs operations throughout the territory of the EU.

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33 Working Arrangement Between the European Anti-Fraud Office (OLAF) and The European Public Prosecutor’s Office (EPPO) available at: https://www.eppo.europa.eu/sites/default/files/2021-07/Working_arrangement_EPPO_OLAF.pdf (last accessed on 10 July 2023)
Lastly, the EPPO has also a Working Arrangement with Eurojust,\footnote{Working Arrangement Between The European Public Prosecutor’s Office (EPPO) and the European Union Agency for Criminal Justice Cooperation (Eurojust) available at: https://www.eurojust.europa.eu/sites/default/files/2021-02/d210016.pdf (last accessed on 10 July 2023)} per Article 100(3). According to the Central Office, the exchanges of information between the EPPO and Eurojust concerning matches between the case management systems of Eurojust and EPPO (based on a hit-no-hit system) are not yet automated, meaning they need to be conducted through regular communication. The two bodies are currently engaged in bilateral consultations over key technical and data protection aspects in view of deploying a streamlined and efficient system in the near future, similar to that already operating between the EPPO and OLAF.

### 4.4. Conclusions

**Overview of the issues identified**

The below table provides an overview of the conclusions identified with regard to 1) the legal and/or practical constraints that the EDPs/EPs have experienced in exercising their right of evocation vis-à-vis national authorities under Article 27 of the Regulation, and 2) the input received from the EPPO Central Office on whether, in practice, the EPPO is able to obtain information concerning crime that is stored in databases and registers of IBOAs and that concerns crimes falling within its competence.

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<thead>
<tr>
<th>Right of evocation – Article 27</th>
<th>Access to databases – Article 43(2)</th>
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<tbody>
<tr>
<td>1. 5-day time limit is too short for the EPPO to decide on, and inform the national authorities, whether to exercise its right of evocation after receiving the information from the national authorities.</td>
<td>1. Lack of direct access to databases that are beneficial to the EPPO’s work, as opposed to indirect access.</td>
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<td>2. Lack of awareness of national authorities about the material competence of the EPPO, as well as their reporting obligation.</td>
<td>2. Inability to access the analytical tool TNA managed by Eurofisc.</td>
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<tr>
<td>3. Lack of direct access to the ECRIS-TCN in practice.</td>
<td>4.</td>
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**Overall conclusions on the operations of the EPPO**

To conclude, the findings show that, in some circumstances, it is difficult for the EPPO to conduct its operations as effectively as possible. The specific points covered involved the right of evocation under Article 27 and access to databases under Article 43(2) of the Regulation.

Firstly, with regard to the **right of evocation**, the wording of Article 27(1) results in legal and/or practical constraints by providing a time limit of 5 days for the EPPO, after receiving the information from the national authorities, to decide on whether to exercise its right of evocation, as well as inform the national authorities of this decision. The reason for this is twofold. Firstly, the 5-day deadline is very short, and the EDPs/EPs need to review a large number of documents to reach a decision on whether they want to exercise their right of evocation. This causes the EDPs/EPs to make alternative arrangements in order to respect the deadline, such as partaking in informal talks with the national authorities, where they are informed of the case, prior to receiving all relevant documents. Without these arrangements, the deadline would not be met. Thus, the current timeframe is neither practical nor feasible and should be revised.
Secondly, as the Regulation does not provide whether the 5-day time limit encompasses only ‘working days’, it remains unclear if statutory holidays are considered. The Regulation should also be revised in this respect, to offer clarity as to what exactly is meant by the 5-day time limit for the EPPO to decide whether to exercise its right of evocation.

Potential issues can also arise from a lack of awareness of national authorities about the material competence of the EPPO, as well as their reporting obligation. If national authorities are not aware of this, the EPPO has to get information from other sources, such as the media, which is cumbersome and not conducive to their operations. Thus, to remedy this, reporting obligations should be enforced at the national level. Lastly, in a selected number of Member States, issues stem from the national law not permitting the EPPO to conduct investigations independently, which is in contravention of Article 27. This also requires changes to be made at the national level.

Secondly, with regard to the EPPO’s access to databases, the effectiveness of the EPPO’s operations can potentially be compromised; this is due to the EPPO having predominantly indirect access to databases that are beneficial to its work, as opposed to direct access. This is due to the reluctance of Member States to give consent for the databases to be used. In this case, giving direct access to these databases would facilitate the EPPO’s work. In addition, the EPPO does not have access at all to the database managed by Eurofisc, which severely impacts the EPPO’s operations. Access to Eurofisc’s analytical tool TNA would be instrumental to the work of the EPPO and, thus, should be given. Similarly, the EPPO also does not have access to the ECRIS-TCN in practice, despite being vested with direct access rights under Regulation (EU) 2019/816. Such access would greatly benefit its work; thus, it should be ensured that the EPPO is not restricted from using the system.
5. Cross-border investigations

5.1. Introduction

As set out in Article 8(1) of the Regulation, the EPPO is an indivisible Union body operating as one single Office. As such, the members of the EPPO operating at the decentralised level, i.e. the EDPs, and, to some extent, the EPs, shall also act as a single office. Article 31(1) provides that '[t]he [EDPs] shall act in close cooperation by assisting and regularly consulting each other in cross-border cases'. In this setting, EDPs handling EPPO cases in their Member State can, thus, assign, via the CMS, investigative measures to other EDPs who will conduct the measures in other Member States, acting then as assisting EDPs. While Article 31(2) of the Regulation indicates that '[t]he justification and adoption of such measures shall be governed by the law of the Member States of the handling [EDP]', specific rules apply when the assigned measures require judicial authorisation in one of the Member States. In this regard, Section 5.2 looks into the rules applicable to judicial authorisation in the context of cross-border investigations and the potential practical constraints stemming from Article 31(3) of the Regulation. Once investigative measures are conducted in the Member States of the assisting EDPs, Section 5.4 also assesses whether EDPs/EPs face any difficulties regarding the admissibility of such evidence obtained in other Member States, as per Article 37(1). Additionally, Section 5.4 reflects on the multilingualism necessary for the operations of the EPPO as a single office with 22 participating Member States and the issues related to translations in the context of cross-border investigations. Lastly, Section 5.5 summarises the main issues and potential solutions identified with regard to cross-border investigations.

5.2. Judicial authorisation in the context of cross-border investigations – Article 31(3)

Article 31(3) sets out the principle with regard to investigative measures requiring judicial authorisation in the context of cross-border investigations. In particular, it states:

'If judicial authorisation for the measure is required under the law of the Member State of the assisting European Delegated Prosecutor, the assisting European Delegated Prosecutor shall obtain that authorisation in accordance with the law of that Member State.

If judicial authorisation for the assigned measure is refused, the handling European Delegated Prosecutor shall withdraw the assignment.

However, where the law of the Member State of the handling European Delegated Prosecutor does not require such a judicial authorisation, but the law of the Member State of the handling European Delegated Prosecutor requires it, the authorisation shall be obtained by the latter European Delegated Prosecutor and submitted together with the assignment.'

As such, Article 31(3) sets out the rule when judicial authorisation is required in only one of the Member States involved in cross-border cooperation. If the authorisation is required in the Member State of the assisting EDP, it should be obtained in this Member State. Conversely, when required in the Member State of the handling EDP (but not in the Member State of the

35 Article 53, Internal Rules of Procedure of the EPPO, see footnote 29.
assisting EDP), the authorisation shall be obtained in the Member State where the case is handled and the authorisation shall be transmitted together with the assignment.

On the other hand, the wording of the Regulation does not delineate a clear rule for the situation where an investigative measure requires judicial authorisation in the Member State of both the handling and the assisting EDP. In this regard, it should be noted that Recital 72 of the Regulation provides that ‘[w]here judicial authorisation is required for such a measure, it should be clearly specified in which Member State the authorisation should be obtained, but in any case there should be only one authorisation’. Thus, reading the first paragraph of Article 31(3), in combination with Recital 72, it seems that, when required, the judicial authorisation should be obtained solely in the Member State of the assisting EDP, regardless of whether such authorisation is also required in the Member State of the handling EDP. This interpretation of the Regulation could lead to more cumbersome cross-border cooperation than with the application of the existing instruments giving effect to the principle of mutual recognition, such as the European Investigation Order (hereinafter: ‘EIO’). Indeed, with EIOs36 or freezing and confiscation orders,37 based on the principle of mutual recognition, the judge of the State of the execution only reviews the certificate sent by the judicial authority requesting the measure. Yet, in EPPO investigations, if the judge in the Member State of the assisting EDP is the only one issuing a judicial authorisation, it may be more cumbersome to obtain such authorisation. Indeed, the judge of the Member State of the assisting EDP then does not only have to rely on and recognise a judicial decision from another Member State but rather has to examine the case to issue a judicial authorisation, which is necessarily more time-consuming.

Moreover, it can be noted that Article 32 of the Regulation states that ‘[t]he assigned measures shall be carried out in accordance with this Regulation and the law of the Member State of the assisting [EDP]. Formalities and procedures expressly indicated by the handling [EDP] shall be complied with unless such formalities and procedures are contrary to the fundamental principles of law of the Member State of the assisting [EDP].’ However, in light of Article 31(2), which says that ‘[t]he justification and adoption of such measures shall be governed by the law of the Member States of the handling [EDP],’ the courts of the Member State of the assisting EDP should not assess the justification, necessity or proportionality of the measure. This could subsequently mean that legal remedies in respect of the substantive reasons for the measure would not be granted in the Member State of the handling EDP, contrary to Article 42(1) of the Regulation and Article 47 CFREU that protect the right to an effective remedy for the accused person. In particular, Article 42(1) of the Regulation states that procedural acts of the EPPO that are intended to produce legal effects vis-à-vis third parties shall be subject to judicial review. The interpretation of the Regulation according to which judicial authorisation should be obtained only in the Member State of the assisting EDP, would, thus, create a legal gap due to the competent judicial authorities not being in a position to assess the substantive reasons for the measure.

In light of the above, the College of the EPPO issued internal guidelines on the application of Article 31 in January 2022.38 Pursuant to Point 10 of the internal guidelines, the College considers that ‘Recital 72 of the EPPO Regulation cannot be applied in all situations, because

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it would be in violation of Article 47 [CFREU] and of Article 42(1) of the EPPO Regulation’. Points 21 and 22 of the internal guidelines provide that, when required, judicial authorisation should also be obtained in the Member State of the handling EDP, even if such authorisation is required in the Member State of the assisting EDP. In such cases, the handling EDP should submit the authorisation issued to the assisting EDP, together with the assignment and translated into the language of the assisting EDP.

The complexity and legal uncertainty relating to the wording of Article 31(3) gave rise to the first case on the interpretation of the EPPO Regulation before the CJEU. In Case C-281/22, an AT court (the Oberlandesgericht Wien) submitted a reference for a preliminary ruling in April 2022 to obtain clarifications as to the extent of judicial review in the context of cross-border investigations. In this case, investigations were conducted by a DE EDP (the handling EDP), who required assistance to perform searches from his counterpart in AT (the assisting EDP). As required under DE law, a search warrant was obtained from the DE courts and transmitted to the assisting EDP. According to AT law, such searches must be authorised by the competent judicial authority and the assisting EDP requested judicial authorisation, which was obtained. The persons under investigation then appealed against the AT court’s approvals of the search warrants. The appellants claimed a lack of serious evidence that the offence had been committed, hence relating to the substantive reasons of the measure and not to a question regarding strictly the execution of the measure.

According to the Oberlandesgericht Wien, the EPPO Regulation is unclear as to which extent AT courts can verify the measure under their national law. It considered that ‘[t]he EPPO is one single office and a measure to be executed in a State other than that of the EDP handling the case must normally be executed in accordance with the law of the State where the assisting EDP operates; if the latter law provides, then, for the measure to be examined by a judge, either for the purposes of prior authorisation or for subsequent approval, the judge of this State must be in a position to examine the entire file’. Nevertheless, the referring court acknowledged that this would result in a more complicated system than the cross-border cooperation tools based on the principle of mutual recognition. As such, the Oberlandesgericht Wien referred the following preliminary question:

Must EU law, in particular the first subparagraph of Article 31(3) and Article 32 of [the EPPO Regulation], be interpreted as meaning that, in the case of cross-border investigations in the event that a court must approve a measure to be carried out in the Member State of the supporting [EDP], all material aspects, such as criminal liability, suspicion of a criminal offence, necessity and proportionality, must be examined?

The opinion of Advocate General Capeta on Case C-281/22 was published on 22 June 2023 and proposes the Court to answer the question as follows: ‘Articles 31(3) and 32 must be interpreted as meaning that, in the case of cross-border investigations, the court approving a measure to be carried out in the Member State of the assisting [EDP] may assess only the aspects related to the execution of an investigative measure [and] must accept the assessment by the handling [EDP] that the measure is justified, whether or not the latter is approved by prior judicial authorisation of the court in the Member State of the handling [EDP]’. Amongst others, Advocate General Capeta invokes the fact that ‘the EPPO Regulation establishes a
highly developed system of mutual recognition’ and that interpretation of EU law must ensure that provisions retain their effectiveness. She also considers that the EPPO Regulation ‘contains various safeguards guaranteeing the protection of fundamental rights’ and that limiting the review of the courts of the assisting EDP to aspects relating to the execution of the measure does not endanger the protection of fundamental rights.

The judgement of the Court is expected with great interest, but, regardless of its outcome, this case already illustrates the great complexity of the legal framework applicable to the EPPO, which operates as a single office but not within a single legal system.\(^{41}\)

In this context, the following assessment will look at whether the EDPs/EPs consider Article 31(3), as it currently stands and independently from the future interpretation from the CJEU, more cumbersome than mutual recognition instruments, where judicial authorisation is required under the law of the assisting EDP.

It should be first underlined that the majority of the EDPs/EPs pointed out that the system put forth by Article 31 is in general attaining its objectives. Excluding the situations relating to judicial authorisation, many EDPs/EPs indicated that the ‘Article 31 requests’ give place to much faster and more efficient operations than the traditional mutual recognition instruments, such as the EIO. EDPs/EPs mentioned that they can directly identify the relevant counterparts to contact, that they know each other well and can easily exchange information, thus, allowing them to go beyond simply cooperating with one another, instead, working together as a single office.

With regard to the general system of Article 31, it can also be mentioned that the involvement of certain national authorities within the operations of the EPPO, as referred to in Section 3.3 of the Final Report for the Study and Section 2.2 above, may also have repercussions on cross-border investigations. In addition to the EPPO not being able to fully exercise its tasks in a given Member State, the involvement of national authorities in these Member States may also jeopardise cross-border cooperation and the operations of the EPPO functioning as a single office. This is the case, for example, in BE, when the investigations are in the hands of national investigative judges or administrative customs authorities for cases for which the EPPO could exercise its competence and for which investigations are led by EDPs in other Member States. In particular, for the cases that the BE authorities recognise as EPPO cases but attribute to ‘specialised’ national investigative judges, the latter necessarily cannot make use of the cooperation tools set out for the EPPO. In such cases, when requiring assistance in another Member State, the investigative judge issues an EIO that is transferred to an EDP and, only then, the EDP, acting as handling EDP, submits an Article 31 request within the CMS. Further to the lack of legal compliance put forth in Section 3.3 of the Final Report for the Study, this situation risks creating additional delays and problems in practice, affecting the effectiveness of the EPPO in cross-border investigations.

Regarding, more specifically, situations where judicial authorisation is required in the Member State of the assisting EDP, many EDPs/EPs indicated that they have not experienced any specific difficulties so far.

It is worth noting that it seems that, in practice, the EDPs/EPs follow the internal guidelines of the College. This is in the sense that, even when required by the law of the assisting EDP, the handling EDPs also request judicial authorisations in their Member State, in order to facilitate the review of the investigative measures by the national courts of the assisting EDP.

Nonetheless, it appears that the interpretation of Article 31(3) and the practice of the national courts, when authorising measures for the assisting EDP, vary a lot from one Member State to the other.

On one hand, in a number of Member States, the EDPs/EPs indicated that the national courts are not reluctant to authorise investigative measures relying only on the judicial authorisation already obtained in the Member State of the handling EDP. For example, in ES, the national courts require only authorisation from the courts of the handling EDP in the original language and translated into Spanish. One other EDP pointed out that, in FR, it is always the same national judge who is competent to hear such requests and the judge became quite familiar with the work of the EPPO, hence facilitating the obtention of judicial authorisations.

Some EDPs/EPs also explained that the national courts in their Member States are quite flexible with regard to the language requirements to request authorisations. This is the case, for example, in BE where requests can be submitted in either French, German or, Dutch and in LU where requests can be submitted in either French or German. In NL, the information and decision coming from the handling EDP are even accepted in English. Moreover, in BE, DE or LU, it was indicated by the EDPs/EPs that, in urgent cases, requests can be submitted first in English, and translated in the official language only at a later stage. This way, based on the request in English, the national courts can authorise the measure in a steady way, even before receiving the translation. Nonetheless, other EDPs/EPs indicated that the national courts accept only sworn translations, for example in BG. This highlights the impact of the diversity of criminal procedural law traditions and judicial culture across Europe on the EPPO’s activity.

On the other hand, some national courts require extensive information in order to authorise an investigative measure. This is the case of AT, for example, where, according to national law, the investigative judge must review the whole case before authorising such measures, meaning that the whole case needs to be translated into German. This is considered to be much more cumbersome than the mutual recognition tools and causes major constraints on the effectiveness of the investigations. The position of the AT court in the context of Case C-281/22 is further provided above.

One EDP/EP pointed out that the level of detailed information to submit in order to obtain authorisations vary greatly from one judge to the other within the same Member State. In SI, even though authorisations had been granted based on the decision of the handling Member State several times for similar cases, in one case, the judge requested extensive information and supporting documents, to be translated into Slovenian. The national judge considered that they were competent to review all the conditions of the case. It shows the diversity of interpretations given to Article 31(3) and the lack of common standards as to the procedure to follow for cross-border investigations in practice.

Moreover, additional constraints may appear in some Member States due to the regional organisation of judicial authorities. In AT or DE, in particular, depending on where investigative measures such as searches and seizures must be performed, judicial authorisations have to be obtained in each of the regional competent courts. Hence, if, for the same assignment, searches have to be performed in several regions, different first-instance courts will decide on the measures, with possibly divergent assessments of whether the specific measure is justified. This could, thus, lead to conflicting decisions within the Member State of the assisting EDP.

Beyond the situations of double judicial authorisations, it appears that EDPs/EPs have a very limited experience with situations where judicial authorisation is required in the Member State of the assisting EDP but not in that of the handling EDP, i.e., where the handling EDP does not transmit a judicial authorisation together with the assignment. In this regard, it should be noted that, in the majority of Member States, judicial authorisation is required for all the ‘intrusive’ investigative measures that may produce legal effects vis-à-vis natural persons.
In any case, it should be pointed out that the system set up in the internal guidelines of the College and applied by the EDPs/EPs may not allow for cross-border investigations to be conducted in the most efficient way. While it provides for an intermediate solution, in practice, to limit the constraints weighing on the obtaining of judicial authorisation in the assisting Member State and to ensure the protection of the right to effective remedy, it requires two judicial authorisations and the additional obligation for the handling EDP to translate the decision submitted together with the assignment. In relation to the double judicial authorisations, one EDP/EP expressed concerns as to the potential issues it may cause when it comes to the appeal of such decisions in different Member States. Case C-281/22 gives an illustration of an appeal submitted towards a judicial authorisation in AT, while that same investigative measure was also authorised in DE.

Additionally, a few EDPs/EPs also pointed out that obtaining judicial authorisations in both Member States does not necessarily facilitate cross-border cooperation. One EDP/EP considered that this system increases the workload and slows down the investigations. Two other EDPs/EPs referred to the difficulties caused by the different legal approaches towards judicial authorisation and the execution of the investigative measures across the national legislation. While the College guidelines on the application of Article 31 lists the minimum elements that Article 31 requests should contain, further uncertainties relate to the content of the decisions from the judicial authorities. In some Member States, in particular, in ES, the authorisations issued by the investigative judge give a large mandate to the Police to perform investigative measures. This is due to the fact that precise internal rules exist to instruct the ES Police on how to carry out specific investigative acts. In return, in other Member States, such as LU, the Police can only execute the specific orders issued by the investigative judge and the judicial authorisations are way more detailed. In one example from SK, a SK judge did not issue a search warrant because the items that were subject to search were not sufficiently specified in the decision provided by the ES judge in the Member State of the handling EDP. It is noted that this issue does not arise in the context of EIO, as specific investigative measures always have to be detailed anyway.

With regard to the requirement for the handling EDP to translate the decision into the language(s) of the assisting EDP(s), one EDP/EP raised the fact that EAWs and EIO can, on the contrary, be submitted in English. The translation of the judicial authorisation obtained in the Member State of the handling EDP in the language(s) of the assisting EDP(s) can, as such, create an additional burden on the investigations of the handling EDP, in particular, when requiring assistance in several Member States and translating decisions in several languages. Further considerations on the consequences for such translation obligations and potential issues stemming from multilingualism in general are provided in Section 5.3 below.

Finally, it should be noted that a number of EDPs highlighted the complexity and legal uncertainty pertaining to the application of Article 31(3) in practice as to the procedure to follow when judicial authorisation is required and consider that further clarifications should be provided.

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42 See footnote 29.
5.3. Admissibility of evidence obtained in another Member State – Article 37(1)

Article 37(1) sets out the principle regarding the admissibility of evidence obtained in another Member State. The provision states the following:

‘Evidence presented by the prosecutors of the EPPO or the defendant to a court shall not be denied admission on the mere ground that the evidence was gathered in another Member State or in accordance with the law of another Member State’.

The following assessment will look at whether whether the EPPO has experienced any legal and/or practical constraints in obtaining the admissibility of evidence collected by the EPPO in cross-border cases due to the evidence being gathered in another Member State or in accordance with the law of another Member State.

The provision of the Regulation itself appears sufficiently straightforward with regard to the principle of admissibility and is reaffirmed in Recital 80, which provides ‘[t]he evidence presented by the EPPO in court should not be denied admission on the mere ground that the evidence was gathered in another Member State or in accordance with the law of another Member State, provided that the trial court considers its admission to respect the fairness of the procedure and the suspect or accused person’s rights of defence under the Charter.’ However, it should be noted that Article 37(1) does not refer to the criteria for exclusion of evidence that would be considered unfair in light of fundamental rights.

In this regard, it should be noted that the EPPO is quite a recent body and after two years of operations, none of the interviewed EDPs/EPs have experienced a situation where the evidence presented by the EPPO was deemed inadmissible because it was gathered in another Member State or in accordance with the law of another Member State.

Furthermore, many EDPs/EPs do not foresee any issues in the future with regard to the admissibility of evidence collected in other Member States. One EDP/EP pointed out that the admissibility of evidence in an EPPO case does not raise any additional difficulties compared to admissibility in the context of mutual legal assistance. Some EDPs/EPs clarified that they do not envisage any problems in this regard because their national legal system is based on the liberty of proof. For example, in LU, the rules regarding the admissibility of evidence are based on a list of criteria developed by the Supreme Court to balance the appreciation of admissibility, taking into account, for example, the rights of the defence, equality of arms, or trustworthiness of the evidence. Hence, the fact that evidence was obtained in another Member State or in accordance with the law of another Member State would not constitute, per se, an obstacle to admissibility.

Conversely, other EDPs/EPs raised that difficulties may arise in the future with regard to admissibility in cross-border cases, outlining the differences in criminal procedural rules across the Member States. Indeed, further to the question of required judicial authorisation (see above Section 5.2), some national laws include specific rules on how certain evidence shall be obtained, as opposed to the principle of freedom of proof. For example, in HR and SI, it is mandatory to have witnesses present during house searches. It was indicated by the interviewees that this rule could surprise EDPs/EPs from other Member States and could potentially lead to concerns of privacy for the defendant in front of courts outside of HR or SI. To avoid any potential issues in front of the SI courts, a SI EDP mentioned that EDPs always put an emphasis on how house searches should be conducted in the assignment when requesting such investigative measures to assisting EDPs. Another difference was noted with regard to the role of public prosecutors in CZ and DE. While hearings of public prosecutors may be required by DE courts, public prosecutors are not allowed to speak about the case in CZ.
Additionally, one EDP/EP explained that, while they do not expect any constraints with regard to admissibility, the defence may raise the fact that the whole case has not been brought to their attention. Indeed, Article 41(2) provides that ‘[a]ny suspected or accused person in the criminal proceedings of the EPPO shall, at a minimum, have the procedural rights provided for in Union law, including directives concerning the rights of suspects and accused persons in criminal procedures, as implemented by national law, such as: […] (b) the right to information and access to the case materials, as provided for in Directive 2012/13/EU […]’. The EDP/EP noted that issues may arise when EDPs/EPs verify the content of another EPPO case because it contains relevant information but do not provide the whole case materials to the judge and other parties.

5.4. Translations for the purpose of cross-border investigations

As a body of the EU, the EPPO is necessarily characterised by its linguistic diversity and relies on the principle of multilingualism. As a single office with decentralised structures in 22 participating Member States, the EPPO operates in 20 languages. When applied to investigations and prosecution of criminal offences, embedded in the national systems of criminal procedure, the principle of multilingualism gives rise to further considerations. Indeed, it implies the translation of case materials, including assignments, pieces of evidence and supporting documents, as well as judicial authorisations. As such, this Section will assess whether the EPPO has experienced any issues involving the translation of documents when handling case files or transferring them from one participating Member State to another.

It should be first recalled that Article 107 sets out rules on language arrangements and Article 107(3) provides that ‘[t]he translation services required for the administrative functioning of the EPPO at the central level shall be provided by the Translation Centre of the bodies of the European Union, unless the urgency of the matter requires another solution. [EDPs] shall decide on the modalities of translation for the purpose of investigations in accordance with applicable national law.’ This Article highlights that, yet again, the EPPO relies on the rules applicable at the national level with regard to the requirements applicable to translations in the context of criminal procedures.

As per the costs of translation, Article 91(5) of the EPPO Regulation indicates that ‘[w]here [EDPs] act within the framework of the EPPO, the relevant expenditure incurred by the [EDPs] in the course of those activities shall be regarded as operational expenditure of the EPPO. […] The operational expenditure shall also include the setting up of a [CMS], training, missions and translations necessary for the internal functioning of the EPPO, such as translations for the Permanent Chamber’. While Recital 112 indicates that ‘[t]he costs of investigation measures undertaken by the EPPO should in principle be covered by the national authorities carrying them out’, Recital 113 confirms that ‘[o]perational expenditures of the EPPO should be covered from the budget of the EPPO. These should include the cost of operational communication between the [EDP] and the central level of the EPPO, such as mail delivery costs, travel expenses, translations necessary for the internal functioning of the EPPO, and other costs not previously incurred by Member States during an investigation which are caused only due to the EPPO having assumed responsibilities for investigation and prosecution. However, the costs of the [EDPs]’ office and secretarial support should be covered by the Member States’.

Article 3 of the Internal Rules of Procedure of the EPPO provides for additional translation modalities. It states that ‘1. For case-related and urgent administrative translations required for the functioning of the EPPO in accordance with Article 2, the EPPO shall seek appropriate solutions aimed at ensuring that high quality and speedy translations are delivered within a secure environment. 2. For non-urgent administrative translations, the Translation Centre for
the Bodies of the EU shall be used. 3. Translation modalities shall comply with data protection requirements and the EPPO’s obligation to ensuring the latter.’

With regard to the operational and administrative activities of the EPPO, Article 1 of College Decision 002/2020\(^{44}\) establishes that the working language shall be English. Further, the College Decision 006/2022 on the application of Article 31\(^{45}\) provides additional modalities regarding translations in the context of cross-border investigations. It makes the following distinction:

- Investigative measures different from those listed in Article 30 of the EPPO Regulation, which do not require judicial authorisation and that do not produce legal effects vis-à-vis third parties: the assignment of these measures should be done in English;\(^{46}\)

- Investigative measures listed in Article 30 and other measures which require judicial authorisation either in one or more Member States: the assignment from the handling EDP to the assisting EDP(s) should be translated by the handling EDP and submitted in the language of the latter.\(^{47}\)

Additionally, as explained in Section 5.2 above, when the handling EDP submits the authorisation of the court of their Member State together with the assignment, the judicial authorisation should also be translated. The guidelines of the College also provide that ‘the authorisation issued in the Member State of the handling EDP should not be translated if, following prior consultation between the EDPs concerned, it appears that this is not necessary in the Member State of the assisting EDP where a judicial authorisation is issued.’\(^{48}\) Lastly, it is agreed that ‘the EPPO should, inter alia, bear the costs related to the following activities: [...] translation of the assignment [from one EDP to another] and of all eventual related documents, including those resulting from the execution of the measure by the assisting EDP. It has to be noted that, in principle, the assignment should not be subject to sworn translation in any Member States because [the EPPO Regulation] is a new and autonomous EU legal instrument, which belongs to the autonomous EU legal order. Since the EU legislation does not foresee this requirement, it is arguable that the judicial authorities in the Member States should not request that the assignment may be subject to certified or sworn translation’.\(^{49}\)

In this context, many EDPs/EPs indicated that they regularly request translations via the EPPO’s Central Office and the Translation Centre for the Bodies of the EU and that translations are provided in a speedy manner. However, several EDPs/EPs pointed out that these translations are machine-based and may not always satisfy high-quality standards. In particular, such translations are not always sufficient to be submitted to national courts to obtain judicial authorisations.

In relation to judicial authorisations, it appears that the requirements regarding translations, as provided in national legislation, vary across the Member States. In AT, for example, national law requires translations issued by authorised translators to be registered in national case files. As mentioned in Section 5.2 above, BG courts require official sworn translations. In FR, national courts accept ‘working’ translations provided by experts that do not necessarily qualify

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\(^{45}\) Decision of the College of the European Public Prosecutor’s Office of 26 January 2022 adopting guidelines of the College of the EPPO on the application of Article 31 of Regulation (EU) 2017 /1939, see footnote 38.

\(^{46}\) Ibid., Point 12.

\(^{47}\) Ibid., Point 15.

\(^{48}\) Ibid., Point 23.

\(^{49}\) Ibid., Point 29.
as official sworn translations. EDPs/EPs consider that when official translations are required, this causes considerable delays in the handling of the EPPO investigations. For example, an EDP from SK referred to a case where the handling EDP from ES was not able to provide a translation of the decision of the ES judge in less than one week. Yet, the assignment provided for an investigative measure to be carried out urgently. One EDP/EP underlined that the burden and related delays of translation depend on the language, as certain EU languages are poorly covered by available translators. This is additionally more complicated for translations from an EU language other than English. For example, high-quality translation from Lithuanian to Greek may be difficult to obtain. It is also pointed out that, when looking at very long supporting documents, it is difficult to assess what are the relevant elements to be translated. Moreover, in complex, large-scale cross-border cases, such as the Admiral case, the translation of the case material into the languages of many Member States requires considerable time and resources.

A number of EDPs declared that, so far, when translations other than those that are machine-based are required, translation costs have been borne by national authorities. Exchanges between the EPPO and the Commission have confirmed that the EPPO should bear the responsibility for translations’ costs. However, it seems that it is not clear how these shall be reimbursed by the EPPO when national authorities paid in advance for translations. This creates further uncertainty and risks of delay in conducting investigations. Interestingly, in RO, the national public prosecutor’s office did not have any translation services, hence, in the context of EPPO cases, translators are specifically appointed by EDPs and, so far, the national authorities bore the costs of translation.

Other EDPs/EPs have not experienced any constraints with regard to translation so far. This is the case, in particular, for Member States where documents are generally provided in English, such as CY and MT. An EDP from LU also indicated that their Member State shares official languages with most of its neighbouring countries. The majority of Article 31 requests come from these countries and, as such, do not require any translation to be directly applied in LU. Moreover, in LU or NL, while the request form to be submitted to the courts must be in the official language, all other supporting documents (including the decision of the courts of the handling Member State) can be submitted in English. In DE, the courts generally accept machine-based translations if they are understandable. Additionally, in FI, for example, assignments can be transferred to the Police in English. Another EP from NL indicated that they don’t have any issues as handling EDPs, because the judicial authorisations to translate and send to assisting EDPs are only one page long. It is considered that difficulties would arise if supporting documents or the whole case had to be transmitted to the assisting EDP(s).

Further to the aspects relating to handling and transferring case files in cross-border investigations and legality of translations provided in courts, multilinguality should also be considered with regard to third parties and, more specifically, the suspects and accused persons. Pursuant to Recital 83, the EPPO shall ‘respect, in particular, the right to a fair trial, the rights of the defence […], as enshrined in Articles 47 and 48 of the [CFREU]’. Article 41(2) of the Regulation provides that ‘[a]ny suspected or accused person in the criminal proceedings of the EPPO shall, at a minimum, have the procedural rights provided for in Union law, including directives concerning the rights of suspects and accused persons in criminal procedures, as implemented by national law, such as: (a) the right to interpretation and translation, as provided for in Directive 2010/64/EU […]. In particular, Article 3(1) of Directive 2010/64/EU50 establishes that ‘Member States shall ensure that suspected or accused persons who do not understand the language of the criminal proceedings concerned are, within a

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reasonable period of time, provided with a written translation of all documents which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings."

In this respect, a few EDPs/EPs indicated that some difficulties were observed in cases reported by OLAF, as the entirety of the case material had to be translated from English to the language of the handling EDP. One EDP/EP indicated that the working translations they use in their investigations could potentially be challenged by the defence, according to the applicable national law.

5.5. Conclusions

Overview of the issues identified

The below table provides an overview of the conclusions identified in relation to cross-border investigations. It outlines the legal and/or practical constraints experienced by the EPPO regarding the procedures required for judicial authorisation in the context of cross-border cooperation set out in Article 31(3) of the Regulation. Furthermore, it identifies the legal and/or practical constraints experienced by the EPPO in obtaining the admissibility of evidence collected by the EPPO in cross-border cases pursuant to Article 37(1), due to the evidence being gathered in another Member State or in accordance with the law of another Member State. Lastly, the below table highlights the issues involving the translation of documents when handling case files or transferring them from one participating Member State to another, in particular, with regard to the varying criminal procedure requirements set out in each participating Member State.

Table 5 - Overview of the conclusions regarding cross-border investigations

<table>
<thead>
<tr>
<th>Judicial authorisation in the context of cross-border investigations</th>
<th>Admissibility of evidence obtained in another Member State</th>
<th>Translations for the purpose of cross-border investigations</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. The general cooperation mechanism set out by Article 31 is very effective.</td>
<td>1. Diversity of the national laws with regard to criminal procedural rules and the admissibility of evidence.</td>
<td>1. Differences across Member States regarding the extent of the translations required for judicial authorisation in the context of cross-border investigations.</td>
</tr>
<tr>
<td>2. The application of Article 31(3) is more cumbersome than mutual recognition instruments, in the specific case where a judicial authorisation is required under the law of the assisting EDP.</td>
<td>2. No specific issues observed yet regarding the admissibility of EPPO-collected evidence in cross-border cases.</td>
<td>2. Lack of clarity on who should bear the costs of translation.</td>
</tr>
<tr>
<td>3. The procedure that requires the obtention of two judicial authorisations and the translations thereof is time and resource consuming.</td>
<td></td>
<td>3. Important time and cost resources required to ensure effective cooperation and guarantee the right to interpretation and translation for the suspected or accused persons.</td>
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<tr>
<td>4. Lack of legal certainty and diverging approaches regarding the extent of the judicial review of the judicial</td>
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</table>
authorisation obtained in another Member State.
Overall conclusions on cross-border investigations

With regard to the **judicial authorisation in the context of cross-border investigations**, it appears that, while the general cooperation mechanism set out by Article 31 is very effective, the application of Article 31(3) is more cumbersome than mutual recognition instruments, in the specific case where a judicial authorisation is required under the law of the assisting EDP. Unlike the traditional mutual recognition instruments, the mechanism under the EPPO Regulation requires judicial authorisations to be translated into original languages and reviewed by the judge of the assisting EDP and does not rely on the use of standardised forms. Obtaining two judicial authorisations, as per the internal guidelines, and the translation of the decision of the judge of the handling EDP are considered more time-consuming than the mutual recognition mechanisms. This is particularly the case in the Member States where the national judicial authorities examine the case in its entirety to authorise investigative measures in the Member State of the assisting EDP. However, it should be noted that the level of cumbersomeness varies amongst the Member States and is generally alleviated by the good cooperation from national courts and the communication between the EDPs working as a single office.

In line with the existing mutual recognition instruments, such as the EAW, cross-border investigations could be facilitated by the use of standardised documents in English for the judicial authorisations. Along with the Article 31 assignment, the handling EDP could submit a standardised form completed by the judicial authority of its Member State. This would speed up the process for the assisting EDP to obtain judicial authorisation, as the national judicial authorities in the assisting Member State would only have to review the standardised form, based on the principle of mutual recognition. Moreover, relying on standardised documents in English would mitigate the burden that weighs on the handling EDP for the translation of the judicial authorisation in various languages (when requiring assistance in several Member States).

Further to the practical constraints resulting from the mechanism of Article 31(3) itself, issues are caused more generally by the lack of legal certainty and harmonised approach regarding this provision. As illustrated by Case C-281/22 and raised by many EDPs/EPs, the wording of Article 31(3) is not exhaustive (and its application, therefore, complex) as it does not address all the situations that come into play for judicial authorisations in the context of cross-border investigations. This is very clear from the fact that the College adopted internal guidelines to clarify the application of Article 31 and that these guidelines contradict Recital 72 of the Regulation with regard to judicial authorisations when required in both the Member States of the handling and assisting EDPs. The replies from the EDPs/EPs show that, in addition to the different national criminal procedural laws applicable, national judicial authorities have diverging interpretations of the Regulation regarding the extent of the judicial authorisation in the Member State of the assisting EDP, including within the same Member State. The judgement from the CJEU in Case C-281/22 will shed light on this aspect and further guidance provided to national authorities could also allow for more smooth and effective cross-border cooperation.

More specifically, as pointed out in the internal guidelines, the wording of the Regulation does not indicate how the mechanism of cross-border investigations plays out with the protection of fundamental rights, as set up in Article 41 of the EPPO Regulation and Article 47 CFREU. While Article 42(1) generally regulates the judicial review of the procedural acts of the EPPO that are intended to produce legal effects vis-à-vis third parties, such review is necessarily bound by the national law applied by the competent national courts. As discussed above, according to Articles 31(2) and 32 of the Regulation, the law of the Member State of the assisting EDP does not govern the justification and adoption of the investigative measures. As confirmed in the opinion of Advocate General Capeta, the judge of the Member State of the assisting EDP cannot decide on the justification, necessity or proportionality of the measures. Hence, if no judicial authorisation is obtained in the Member State of the handling EDP, it is
not clear how the substantive reasons for the measures could be examined. Nonetheless, Advocate General Capeta points out that an a posteriori judicial review of the measure would be possible so that the right to obtain effective legal remedies in respect of the substantive reasons for the measures is guaranteed for investigative measures authorised in the Member State of the assisting EDP. Even though having to obtain a double judicial authorisation in both Member States has been raised as time and resource consuming, the search for a less burdensome solution should take into account the rights and interests of the persons affected, in particular the right for the accused to obtain legal remedies. In light of the diverging replies of the EDPs/EPs, it seems that there is a need for a harmonised approach on how to balance effective cross-border cooperation with the protection of fundamental rights. Even though Advocate General Capeta considers that the EPPO Regulation ‘contains various safeguards guaranteeing the protection of fundamental rights’, further clarifications on how fundamental rights can be guaranteed in specific investigative situations appear necessary to ensure effective cross-border investigations.

As per the admissibility of evidence obtained in another Member State, the wording of Article 37(1) does not seem to prevent the attainment of its objectives. However, the replies of the EDPs/EPs outline, once again, the diversity of the national laws with regard to criminal procedural rules and the admissibility of evidence. The fragmentation of the legal framework based on which the EPPO operates may create challenges in the future but seems too early to draw reliable conclusions on whether the wording of the EPPO Regulation is sufficient to ensure the admissibility of EPPO-collected evidence in cross-border EPPO cases.

To conclude on translations for the purpose of cross-border investigations, the replies of the EDPs/EPs show discrepancies as to the extent of the translations required for judicial authorisation in the context of cross-border investigations. Depending on the Member States, the number of official languages within one country and the criminal procedure traditions towards language requirements, EDPs/EPs have experienced variable levels of issues involving the translation of documents when handling case files or transferring them from one participating Member State to another. Nonetheless, the requirement for handling EDPs to translate judicial authorisations in the official language of the assisting Member State(s) and the right to interpretation and translation for the suspected or accused persons involve important time and cost resources, which may impact effective cross-border cooperation.

As mentioned in Section 5.2 above, the use of standardised documents in English could alleviate the practical constraints related to translations in the context of Article 31(3). Similar to Article 5(2) of the EIO Directive, the Member States could have the option to indicate which language(s), such as English, in addition to their official language(s), may be used for the purposed cross-border investigations when judicial authorisations are required. More generally, a representative of the EPPO Central Office suggested that the EPPO should be allowed to prepare its own translations and that the Regulation should establish the principle of equivalence of these translations to those required according to national law, and the presumption of fairness of translation. This means that the translations prepared internally by the EPPO should be presumed of sufficient quality and considered as equivalent to the translations required within the criminal procedural laws of the 22 Member States. For example, when BG law provides that only sworn translations can be used in courts, according to this principle, the translations made by the EPPO should be deemed equivalent to such sworn translations and should be accepted within the national criminal procedure. It should be noted that this approach would necessarily require an important increase of the resources available to EPPO’s central activities.

Moreover, there is a lack of harmonised approach with regard to the use of resources for translation. The EDPs/EPs do not seem to have a common understanding and practice with regard to requesting translations either from the EPPO Central Office and the Translation Centre for the Bodies of the EU or from their national prosecution services. The lack of legal certainty as to who bears the costs of translation creates also a risk for EDPs/EPs of not receiving the resources necessary to exercise their functions. Hence, it could be clarified whether translations for the purpose of cross-border investigations fall within the operational expenditure of the EPPO as per Article 91(5) of the Regulation, meaning that the EPPO should bear the costs of such translations and how this would interplay with the support from national authorities when they reimburse translation costs. Exchanges between the EPPO and the Commission seem also to confirm that the EPPO Regulation should be interpreted as conferring to the EPPO the responsibility for translations’ costs necessary in order to allow EDPs to seek assistance from EDPs in another Member State under Article 31 of the EPPO Regulation.
6. Conclusions

Overall conclusions on the findings of the Extension of the Study

The findings of the Extension of the Study were based on data gathered via input on specific aspects of the EPPO Regulation. The aim was to understand how these specific aspects operate in practice and the way in which their functioning impacts the EPPO’s working practices. Data on the following specific aspects of the Regulation were gathered via input from the EDPs/EPs: Articles 6(1), 22(2), 22(4), 25(3), 27, 31(3), and 37(1), as well as on issues experienced with relation to translations. Meanwhile, data was gathered on Article 43(2) via input received from representatives of the Operations and College Support Unit at the EPPO’s central level.

The focus of the report was on practical constraints – for legal compliance of national legislation with the EPPO Regulation, please consult the Final Report of the Study.

In terms of each specific aspect of the Regulation covered, the below will summarise the findings of each assessment.

On the first aspect of the independence of the EPPO (Article 6(1)), the assessment verifies the existence of legal/institutional and/or practical constraints to the EPPO’s independence. It is clear that the main concerns to the EPPO’s independence involve the Member States rather than IBOAs. It is not that the stipulation in Article 6(1) is not sufficient to ensure the independence of the EPPO, but rather that the independence of the EPPO could be endangered by the Member States via indirect means. It should be noted, however, that there are some more direct interventions in the form of other authorities maintaining their investigative and/or prosecution powers and where agreements are required from the national authorities before the EPPO can execute its tasks. The indirect means identified which leave the EPPO vulnerable to influence by the Member States are the following: the selection and appointment of staff, decisions on necessary resources and equipment, and budget. On the contrary, with relation to IBOAs, no independence concerns were identified, thus, indicating that the IBOAs are much more likely than the national authorities to accommodate the EPPO and its tasks, finding solutions to resolve any issues.

On the second aspect on the material competence of the EPPO (Articles 22(2)-(4) and Article 25(3)), the assessment focused on the following points:

- On Article 22(2), the assessment focused on whether the EPPO has experienced any legal and/or practical constraints regarding its competence for offence regarding participation in a criminal organisation.
- On Article 22(4), the assessment focused on whether the EPPO’s activities were somehow hindered by the EPPO’s lack of competence for criminal offences in respect of national direct taxes, including offences inextricably linked thereto.
- On Article 25(3)(a), the assessment focused on whether the EPPO has experienced any legal and/or practical constraints in exercising its competence concerning PIF offences and non-PIF offences inextricably linked to the latter, when the maximum sanction provided by national law for the PIF offence is equal or less severe than the maximum sanction for the inextricably linked offence. On Article 25(3)(b), the
assessment focused on whether the EPPO has experienced any legal and/or practical constraints in exercising its competence if 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.

Overall, the provisions regulating the material competence of the EPPO are complex. There are multiple elements that need to be considered in order to assess whether the EPPO is competent for a particular case. This means that Article 22 must be read taking into consideration national legal provisions, the PIF Directive, Framework Decision 2008/841/JHA, Article 25(3) of the Regulation, especially the “preponderance” and “instrumentality” tests, and paying attention to aspects involving national direct taxes that fall outside of the EPPO’s competence. This overall complexity may result in diverging applications of the provisions on material competence by both the EDPs/EPs and the national authorities. Furthermore, the multiple elements requiring consideration when determining the EPPO’s competence could result in some cases not being reported to the EPPO due to the national authorities’ lack of awareness about the cases for which the EPPO would be competent.

The overall complexity also requires the clarification of some concepts. Under Article 22(2), the EPPO Regulation does not provide any further details as to what is meant by ‘focus’ of a criminal activity. Similarly, under Article 25(3)(a), the “instrumentality” test is unclear with regard to how to determine whether an offence has been committed for the purpose of creating the conditions to commit a PIF offence. Therefore, there are certain concepts, all of which are necessary for establishing whether the EPPO is competent, which are unclear to the national authorities – this may result in some cases not being reported to the EPPO.

There are also concerns in relation to the fragmentation resulting from the Member States’ diverging criminal law frameworks on which both the PIF Directive and the Regulation rely. The competence under Article 22(2) is determined by reference to Framework Decision 2008/841/JHA, which had a limited impact on the existing national law, thus, resulting in diverging criminal law frameworks across the Member States. Meanwhile, the exercise of competence under Article 25(3)(a) is determined by the sanctions provided in the Member States’ national criminal laws, with some Member States opting to separate the PIF and non-PIF offences and having sanctions for non-PIF offences that are higher or equal to that of PIF offences. Furthermore, the exercise of competence under Article 25(3)(b) poses a similar situation in terms of the diverging interpretations at the national level on how to calculate the damage to the Union’s financial interests – whether the calculation should be for a single criminal conduct or a whole offence. In both circumstances under Article 25(3), this results in fragmentation, with the EDPs in some Member States being competent in a case on which their counterpart in another Member State would not be competent.

Due to the divergent national legal frameworks across the Member States and the ensuing fragmentation, the criteria of preponderance, as based on the level of sanctions or damage, does not appear the most logical option to ensure the effective exercise of the competence of the EPPO. In light of this, it may be more sensible for greater focus to be placed on the instrumentality of the offence.

On the third aspect of operations of the EPPO, regarding Articles 27 and 43(2), the assessments focused on the following aspects:

- On Article 27, the assessment focused on whether the EPPO has experienced any legal and/or practical constraints in exercising its right of evocation vis-à-vis national authorities.
- On Article 43(2), the assessment focused on whether, in practice, the EPPO is able to obtain information concerning crimes falling within its competence that is stored in databases and registers of IBOAs.
It should first be recalled that the data on Article 27 was gathered via input from the EDPs/EPs, while the data on Article 43(2) was gathered via input from the representatives of the Operations and College Support Unit at the EPPO’s central level.

The wording of Article 27(1) prescribes a time limit of 5 days for the EPPO to decide and inform the national authorities whether to exercise its right of evocation after receiving the information from the national authorities. It is considered that 5 days is too short a time-period for the EDPs/EPs to assess all the documents required to reach a decision on whether to exercise the right of evocation. The deadline refers to all days, and not just specifically to working days, which poses questions about what should happen over weekends, bank holidays, and general time-off for EDPs/EPs. The vast majority of the EDPs/EPs interviewed provided that the time limit was too short and should be extended, with many suggesting at least 10 days.

The main issue under Article 43(2) concerned the EPPO predominantly having indirect access to databases, rather than direct access. The direct access would allow the EPPO to not have to reach out to the Commission or the national authorities every time they want to access a database, thus, speeding up their investigations. In addition, the EPPO does not have access to the database managed by Eurofisc, nor to ECRIS-TCN; both of these databases would be of use to the EPPO’s work.

On the fourth, and final, aspect of cross-border investigations, on Articles 31(3) and 37(1), as well as on issues posed by the translation of documents, the assessments focused on the following aspects:

- On Article 31(3), the assessment focused on whether, in practice, this rule would make it more cumbersome for the handling EDP to collect evidence in cross-border cases where a judicial authorisation is required under the law of the assisting EDP than it would be in accordance with mutual recognition instruments.

- On Article 37(1), the assessment focused on whether the admissibility of EPPO-collected evidence in cross-border EPPO cases is ensured.

- On issues posed by translations, the assessment focused on whether in practice the EPPO has experienced any issues involving the translation of documents when handling case files or transferring them from one participating Member State to another.

Generally, it should be noted that the cross-border cooperation mechanism introduced by the Regulation, and in particular the procedure set out in Article 31, allow the EDPs to operate as members of a single office. This mechanism is considered as an added value in cross-border investigations, when compared to investigations reliant on mutual legal assistance instruments.

However, the findings of the Extension of the Study focused on the wording of Article 31(3) and the specific case where a judicial authorisation is required under the law of the assisting EDP. In this particular context, it seems that the application of Article 31(3) is more cumbersome than mutual recognition instruments. Unlike the traditional mutual recognition instruments, the mechanism under the EPPO Regulation and its current application by the EPPO requires judicial authorisations to be translated into original languages and reviewed by the judge of the assisting EDP and does not rely on the use of standardised forms. However, it should be noted how the cumbersomeness varies amongst the Member States depending on the cooperation of the national courts and the communication between the EDPs.

Further to the practical constraints resulting from the mechanism of Article 31(3) itself, issues are caused more generally by the lack of legal certainty and harmonised approach regarding this provision. The wording of Article 31(3) and its application is complex and does not address all the parameters that come into play for judicial authorisations in cross-border situations. The different national procedure laws result in the national authorities having diverging interpretations of the Regulation regarding the extent of the judicial authorisation required in the assisting EDP’s Member State.
Article 37(1) is a clear provision in terms of wording. The diverging national laws result in the fragmentation of the EPPO’s legal framework, which may result in challenges in future, although no issue has been mentioned by the EDPs/EPs interviewed in that respect.

There are discrepancies across Member States as to the extent of the translations required for judicial authorisation in the context of cross-border investigations. Nonetheless, the requirement for handling EDPs to translate judicial authorisations in the official language of the assisting Member State(s) and the right to interpretation and translation for the suspected or accused persons involve important time and costs resources, that may impact effective cross-border cooperation. Moreover, it is not clear whether translations should be requested from the EPPO Central Office and the Translation Centre for the Bodies of the EU or from their national prosecution services. The lack of legal certainty as to who bears the cost also creates a risk for EDPs/EPs not receiving the necessary resources to exercise their functions.

The overall findings show a variety of practical constraints. For each Article covered as part of the Extension, the findings highlighted the differing approaches by the Member States to various provisions, often resulting from the functioning of the legal systems in practice. The fragmentation of the national legal frameworks result in fragmentation of the EPPO's operations. These operations, as a result, will not be as effective as intended. In particular, the existing fragmentation may result in legal uncertainty, additional delays, and general cumbersomeness. The situation regarding fragmentation, at its most serious, can prevent EPPO cases from being investigated and prosecuted uniformly across the Member State. As such, this may prevent the EPPO from performing its tasks as a single office. The legal uncertainty stemming from fragmentation also raises risks with regard to the right of the defence in the context of EPPO investigations and prosecutions.

It should be noted that such fragmentation is intrinsic to the nature of the EPPO which is a hybrid body, relying on decentralised operations and operating as a single office within 22 different legal frameworks. However, while the EPPO necessarily relies on varying national laws for the execution of its tasks, it is considered that further clarifications should be introduced to ensure more effective operations in the context of a single office with a decentralised structure. Further clarifications on the new concepts and mechanisms introduced by the EPPO Regulation (such as ‘focus of the criminal activity’) could help in better regulating the interplay between the EPPO and the national authorities.

Overall, a variety of practical constraints were identified by the EDPs/EPs and, for Article 43(2), by the Operations and College Support Unit at the EPPO’s central level. For the effective functioning of the EPPO, it is necessary to adopt the appropriate solutions to clarify any legal uncertainties and prevent any consequences resulting from fragmentation of the national legal frameworks.

Potential ways to address the issues identified as part of this Extension of the Study

In order to address the issues identified as part of this Extension, some different options require consideration. In the interim conclusions for each Chapter, we have suggested some ways to help alleviate the identified problems; these are: 1) revision of the Regulation; 2) resolving problems posed by limited financial resources; 3) clarifications via CJEU interpretations of specific provisions or using other measures, such as, administrative guidance, and awareness training for national authorities, and 4) ensuring legal compliance with the present Regulation in the Member States.

Firstly, the revision of the Regulation would be required to alleviate some issues identified. This suggestion was made by some EDPs/EPs. It should be noted that the revision of the Regulation would be an option requiring the highest level of intervention from the European Commission, as per the Better Regulation Guidelines and Better Regulation Toolbox, and would also require the unanimity of the 22 Member States participating in the EPPO.
revision of the Regulation may be the most adequate way to resolve the issues concerning the EPPO’s material competence. For instance, the current wording of Article 25(3)(a) of the Regulation leads to fragmentation due to the Member States’ diverging criminal law frameworks. This is with particular regard to the fact that, in some Member States, the PIF offences are punished with equal or lower sanctions than non-PIF offences, thus, indicating the preponderance of the national offence over the PIF offence. The provision in its current form is, therefore, hampering the exercise of the EPPO’s tasks in some Member States, as inextricably linked offences are punished as severely as – or more severely than – PIF offences, with the consequences that both (PIF offences and non-PIF offences) fall out of the EPPO’s exercise of competence. The EDPs/EPs explained that in order to alleviate the situation, Article 25(4) could be amended to also allow the national authorities to consent to the EPPO exercising its competence under Article 25(3)(a), even where the non-PIF offence is preponderant according to national legislation. Furthermore, the Legal Office of the EPPO also believes the revision of Article 25(3)(a) is necessary, and they mentioned during the workshop for the Study that they have already drafted a proposal for the revision of this provision, with a greater focus placed on the instrumentality, rather than preponderance, of the offence. In general, it should be noted that the issues identified that would require the revision of the Regulation are those where the objectives of the Regulation, specifically the exercise of the EPPO’s tasks, cannot be met via any alternate means (e.g., via CJEU interpretation, administrative guidance, or ensuring Member State compliance).

Secondly, many of the issues raised linked back to the EPPO’s financial resources. These issues could be alleviated via the increase of the budget for the EPPO Central Office. One example of an issue, which is linked to a lack of financial resources preventing the effective functioning of the EPPO, is the NL authorities’ reluctance to open vacancies for the EPPO, even if necessary for the effective execution of their tasks, due to a lack of human resources within the national public prosecutor’s office. The issues relating to the provision of necessary resources/equipment seem to relate back to the lack of financial resources available for the EPPO at the national level. One way to prevent such setbacks could be to increase the Central Office’s budget so they can step in to assist the national authorities where necessary for the effective functioning of the EPPO.

Thirdly, clarifications through other (soft law) measures could alleviate some of the problems identified. This could help resolve the fragmentation issues with regard to the different interpretations of certain concepts by different Member States. Arguably the clarifications with the most authority would stem from an interpretation of the CJEU. For Article 31(3), there is a case pending before the CJEU (Case C-281/22) which will shed light on the extent of the judicial authorisation required in the Member State of the assisting EDP. Once this judgment is given, the issues surrounding Article 31(3) will likely be reduced, as the judgment will provide concrete guidance to national authorities on how to interpret the provision, thus, allowing for smoother and more effective cross-border cooperation between Member States. Before the judgment, clarifications were provided by the College of the EPPO in internal guidelines on the application of Article 31. Therefore, for issues for which no Court of Justice decisions are expected in the near future, internal guidelines may help alleviate specific problems. For example, further information could be shed on what is meant by ‘focus of criminal activity’ under Article 22(2), as well as on how to determine whether an offence is “instrumental”, as per Article 25(3)(a), to creating the conditions to commit an offence affecting the financial interests of the Union. Additionally, general increased awareness of national authorities would help alleviate some issues, as EDPs/EPs pointed out that the national authorities are not always aware of when they should report cases to the EPPO.

Lastly, some issues require ensuring legal compliance with the Regulation in the Member States. Some Member States’ national law is not in full compliance with the provisions of the EPPO Regulation, thus, causing constraints to the EPPO’s exercise of tasks. For example, in some Member States, as per national law, national authorities maintain their investigative
and/or prosecutorial powers in the context of EPPO investigations. This, therefore, means that the EPPO cannot exercise its tasks in full independence, as national law provides some level of direct intervention for the national authorities. In order to ensure compliance, the Member States should amend their national law accordingly.
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