Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO')

COUNCIL REGULATION (EU) 2017/1939

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implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO')

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 86 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the notification by Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Germany, Finland, France, Greece, Lithuania, Luxembourg, Portugal, Romania, Slovakia, Slovenia and Spain, by which those Member States on 3 April 2017 notified the European Parliament, the Council and the Commission of their wish to establish enhanced cooperation on the basis of the draft Regulation,

Having regard to the consent of the European Parliament[(1)],

Acting in accordance with a special legislative procedure,

Whereas:

(1) The Union has set itself the objective of establishing an area of freedom, security and justice.

(2) The possibility of setting up the European Public Prosecutor's Office ('the EPPO') is foreseen by the Treaty on the Functioning of the European Union (TFEU) in the Title concerning the area of freedom, security and justice.

(3) Both the Union and the Member States of the European Union have an obligation to protect the Union's financial interests against criminal offences, which generate significant financial damages every year. Yet, these offences are currently not always sufficiently investigated and prosecuted by the national criminal justice authorities.

(4) On 17 July 2013, the Commission adopted a proposal for a Council Regulation on the establishment of the EPPO.

(5) At its meeting of 7 February 2017, the Council registered the absence of unanimity on the draft Regulation.

Changes to legislation: *There are currently no known outstanding effects for the Council Regulation (EU) 2017/1939. (See end of Document for details)*

(6) In accordance with the second subparagraph of Article 86(1) TFEU, a group of seventeen Member States requested, by a letter of 14 February 2017, that the draft Regulation be referred to the European Council.

(7) On 9 March 2017, the European Council discussed the draft Regulation and noted that there was disagreement within the meaning of the third subparagraph of Article 86(1) TFEU.

(8) On 3 April 2017, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Greece, Lithuania, Luxembourg, Portugal, Romania, Slovakia, Slovenia and Spain notified the European Parliament, the Council and the Commission that they wished to establish enhanced cooperation on the establishment of the EPPO. Therefore, in accordance with the third subparagraph of Article 86(1) TFEU, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union (TEU) and Article 329(1) TFEU is deemed to be granted and the provisions on enhanced cooperation apply as from 3 April 2017. In addition, respectively by letters of 19 April 2017, 1 June 2017, 9 June 2017 and 22 June 2017, Latvia, Estonia, Austria and Italy indicated their wish to participate in the establishment of the enhanced cooperation.

(9) In accordance with Article 328(1) TFEU, when enhanced cooperation is being established it is to be open to all Member States of the European Union. It is also to be open to them at any other time, including with regard to an enhanced cooperation in progress subject to compliance with the acts already adopted within that framework. The Commission and the Member States which participate in enhanced cooperation on the establishment of the EPPO (the 'Member States') should ensure that they promote participation by as many Member States of the European Union as possible. This Regulation should be binding in its entirety and directly applicable only in the Member States which participate in enhanced cooperation on the establishment of the EPPO, or by virtue of a decision adopted in accordance with the second or third subparagraph of Article 331(1) TFEU.

(10) In accordance with Article 86 TFEU, the EPPO should be established from Eurojust. This implies that this Regulation should establish a close relationship between them based on mutual cooperation.

(11) The TFEU provides that the material scope of competence of the EPPO is limited to criminal offences affecting the financial interests of the Union in accordance with this Regulation. The tasks of the EPPO should thus be to investigate, prosecute and bring to judgment the perpetrators of offences against the Union's financial interests under Directive (EU) 2017/1371 of the European Parliament and of the Council[(2)] and offences which are inextricably linked to them. Any extension of this competence to include serious crimes having a cross-border dimension requires a unanimous decision of the European Council.

(12) In accordance with the principle of subsidiarity, combatting crimes affecting the financial interests of the Union can be better achieved at Union level by reason of its scale and effects. The present situation, in which the criminal prosecution of offences

against the Union's financial interests is exclusively in the hands of the authorities of the Member States of the European Union, does not always sufficiently achieve that objective. Since the objectives of this Regulation, namely, to enhance the fight against offences affecting the financial interests of the Union by setting up the EPPO, cannot be sufficiently achieved by the Member States of the European Union, given the fragmentation of national prosecutions in the area of offences committed against the Union's financial interests but can rather, by reason of the fact that the EPPO is to have competence to prosecute such offences, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 TEU. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives and ensures that its impact on the legal orders and the institutional structures of the Member States is the least intrusive possible.

(13) This 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.

(14) In the light of the principle of sincere cooperation, both the EPPO and the competent national authorities should support and inform each other with the aim of efficiently combatting the crimes falling under the competence of the EPPO.

(15) This Regulation is without prejudice to Member States' national systems concerning the way in which criminal investigations are organised.

(16) 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.

(17) The 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.

(18) Strict accountability is a complement to the independence and the powers granted to the EPPO under this Regulation. The European Chief Prosecutor is fully accountable for the performance of his/her duties as the head of the EPPO and as such he/she bears an overall institutional accountability for its general activities to the European Parliament, the Council and the Commission. As a result, any of these institutions can apply to the Court of Justice of the European Union (the 'Court of Justice'), with a view to his/her removal under certain circumstances, including in cases of serious misconduct. The same procedure should apply for the dismissal of European Prosecutors.

(19) The EPPO should issue a public Annual Report on its general activities, which at a minimum should contain statistical data on the work of the EPPO.

(20) The organisational structure of the EPPO should allow quick and efficient decision-making in the conduct of criminal investigations and prosecutions, whether they involve one or several Member States. The structure should also ensure that all national legal systems and traditions of the Member States are represented in the EPPO, and that prosecutors with knowledge of the individual legal systems will in principle handle investigations and prosecutions in their respective Member States.

Changes to legislation: *There are currently no known outstanding effects for the Council Regulation (EU) 2017/1939. (See end of Document for details)*

(21) To that end, the EPPO should be an indivisible Union body operating as a single office. The central level consists of a European Chief Prosecutor, who is the head of the EPPO as a whole and the head of the College of European Prosecutors, Permanent Chambers and European Prosecutors. The decentralised level consists of European Delegated Prosecutors located in the Member States.

(22) In addition, to ensure consistency in its action and thus an equivalent protection of the Union's financial interests, the organisational structure and the internal decision-making process of the EPPO should enable the Central Office to monitor, direct and supervise all investigations and prosecutions undertaken by European Delegated Prosecutors.

(23) In this Regulation, the terms 'general oversight', 'monitoring and directing' and 'supervision' are used to describe different control activities exercised by the EPPO. 'General oversight' should be understood as referring to the general administration of the activities of the EPPO, in which instructions are only given on issues which have a horizontal importance for the EPPO. 'Monitoring and directing' should be understood as referring to the powers to monitor and direct individual investigations and prosecutions. 'Supervision' should be understood as referring to a closer and continuous oversight of investigations and prosecutions, including, whenever necessary, intervention and instruction-giving on investigations and prosecution matters.

(24) The College should take decisions on strategic matters, including determining the priorities and the investigation and prosecution policy of the EPPO, as well as on general issues arising from individual cases, for example regarding the application of this Regulation, the correct implementation of the investigation and prosecution policy of the EPPO or questions of principle or of significant importance for the development of a coherent investigation and prosecution policy of the EPPO. The decisions of the College on general issues should not affect the duty to investigate and prosecute in accordance with this Regulation and national law. The College should use its best efforts to take decisions by consensus. If such a consensus cannot be reached, decisions should be taken by voting.

(25) The Permanent Chambers should monitor and direct investigations and ensure the coherence of the activities of the EPPO. The composition of Permanent Chambers should be determined in accordance with the internal rules of procedure of the EPPO, which should allow, among other things, for a European Prosecutor to be a member of more than one Permanent Chamber where this is appropriate to ensure, to the extent possible, an even workload between individual European Prosecutors.

(26) Permanent Chambers should be chaired by the European Chief Prosecutor, one of the deputy European Chief Prosecutors or a European Prosecutor, in accordance with principles laid down in the internal rules of procedure of the EPPO.

(27) The allocation of cases between the Permanent Chambers should be based on a system of a random distribution so as to ensure, to the extent possible, an equal division of workload. Deviations from this principle should be possible to ensure the proper and efficient functioning of the EPPO on a decision by the European Chief Prosecutor.

(28) A European Prosecutor from each Member State should be appointed to the College. The European Prosecutors should in principle supervise, on behalf of the competent Permanent Chamber, the investigations and prosecutions handled by the European Delegated Prosecutors in their Member State of origin. They should act as liaison between the central office and the decentralised level in their Member States, facilitating the functioning of the EPPO as a single office. The supervising European Prosecutor should also check any instruction's compliance with national law and inform the Permanent Chamber if the instructions do not do so.

(29) For reasons of workload linked to the high number of investigations and prosecutions in a given Member State, a European Prosecutor should be able to request that, exceptionally, the supervision of certain investigations and prosecutions in his/her Member State of origin may be assigned to other European Prosecutors. The decision should be taken by the European Chief Prosecutor with the agreement of the European Prosecutor who would take over the cases concerned. The criteria for such decisions should be laid down in the internal rules of procedure of the EPPO, and should include the requirement that the European Prosecutor taking over the cases has sufficient knowledge of the language and legal system of the Member State concerned.

(30) The investigations of the EPPO should as a rule be carried out by European Delegated Prosecutors in the Member States. They should do so in accordance with this Regulation and, as regards matters not covered by this Regulation, in accordance with national law. European Delegated Prosecutors should carry out their tasks under the supervision of the supervising European Prosecutor and under the direction and instruction of the competent Permanent Chamber. Where the national law of a Member State provides for the internal review of certain acts within the structure of the national prosecutor's office, the review of such decisions taken by the European Delegated Prosecutor should fall under the supervision powers of the supervising European Prosecutor in accordance with the internal rules of procedure of the EPPO. In such cases, Member States should not be obliged to provide for review by national courts, without prejudice to Article 19 TEU and Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

(31) The functions of prosecutor in competent courts apply until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspect or accused person has committed the offence, including, where applicable, sentencing and the resolution of any legal action or remedies available until that decision has become definitive.

(32) The European Delegated Prosecutors should be an integral part of the EPPO and as such, when investigating and prosecuting offences within the competence of the EPPO, they should act exclusively on behalf and in the name of the EPPO on the territory of their respective Member State. This should entail granting them under this Regulation a functionally and legally independent status which is different from any status under national law.

(33) Notwithstanding their special status under this Regulation, the European Delegated Prosecutors should, during their term of office, also be members of the prosecution