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EUROPEAN COMMITTEE ON CRIME PROBLEMS (CDPC)

LEGAL OPINION ON THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE AND COUNCIL OF EUROPE'S LEGAL INSTRUMENTS ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS

Note by the Secretariat

Document prepared by the CDPC Secretariat
Directorate General I – Human Rights and Rule of Law

1. By letter dated 30 October 2020, Ms Laurence Fontana Jungo, Vice-Director from the Swiss Federal Office of Justice/*Domaine de direction Entraide judiciaire internationale* requested a legal opinion on a series of questions related to the European Union's European Public prosecutor's office (EPPO) and its relationship with the Council of Europe's legal instruments on mutual assistance in criminal matters. This request was backed by the European Committee on Crime Problems (CDPC) which, at their 78th Plenary session on 3-4 November 2020, instructed the Secretariat to request a legal opinion from the Directorate of Legal Advice and Public International Law (DLAPIL) on certain issues related to immediate and short-term solutions envisaged with regard to co-operation between the EPPO and non-EU member states.

2. The following legal opinion addresses the questions raised. The opinion can only provide the view of DLAPIL. It cannot give an authentic interpretation of the relevant treaties, as only their parties are in a position to do so.

Validity of a declaration in favour of EPPO

3. The first question asks in substance whether the EPPO can be validly presented by means of a notification as a judicial authority for the purposes of mutual legal assistance under the 1959 MLA Convention and its protocols.

4. Article 24 of the 1959 MLA Convention as amended by its 2nd additional protocol (CETS 182, 2001) provides as follows:

*“Any State shall at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by means of a declaration addressed to the Secretary General of the Council of Europe, define what authorities it will, for the purpose of the Convention, deem judicial authorities. **It subsequently may, at any time and in the same manner, change the terms of its declaration.**”¹*

5. According to the Swiss Federal Office of Justice, the term ‘*judicial authority*’ within the meaning of article 24 of the 1959 MLA Convention has to be interpreted in good faith in accordance with the ordinary meaning to be given to this term in the light of its object and purpose (article 31 (1) of the Vienna Convention on the Law of Treaties), in particular in relation to article 1 (1) of the 1959 MLA Convention which provides that “[t]he Contracting Parties undertake to afford each other ... the widest measure of mutual assistance in proceedings in respect of offences the punishment of which ... falls within the jurisdiction of the judicial authorities of the requesting Party.” The term ‘*Contracting Party*’ having to be understood in its ordinary meaning which, according to the Swiss Federal Office of Justice, means that only letters rogatory issued by judicial authorities of the Contracting Parties must be executed. It would follow that only authorities belonging to a contracting party may be ‘*authorities*’ within the meaning of article 24 of the 1959 MLA Convention to be included in the declaration.

6. The EPPO has been established under Council Regulation (EU) 2017/1939² as an independent and decentralised prosecution office of the European Union with the competence to investigate, prosecute and bring to judgment crimes against the EU budget, such as fraud, corruption or serious cross-border VAT fraud (so-called ‘*PIF crimes*’). The Regulation

¹ In bold the text introduced by the Second Additional Protocol.

² Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office.

establishes a system of shared competences between the EPPO and national authorities in tackling such cases. The EPPO consists of two levels. A Central Office at the seat of the EPPO in Luxembourg comprising the European Chief Prosecutor, its two Deputies, the European Prosecutors (one per participating EU member state) and the Administrative Director. The decentralised level consists of European Delegated Prosecutors (EDP) located in the participating EU member states (currently 22). The EDP are taking operational decisions in individual cases. They are the organs responsible for conducting investigations and prosecutions.

7. Under article 13 (1) of the Regulation the EDP have “*the same powers as national prosecutors in respect of investigations, prosecutions and bringing cases to judgment*” and “*shall act on behalf of the EPPO in their respective Member State.*” According to article 17 (2) of the Regulation, the EDP are “*active members of the public prosecution service*” and “*may ... exercise functions as national prosecutors, to the extent that this does not prevent them from fulfilling their obligations under the Regulation*” (article 13 (3) of the Regulation). The EDP will thus be fully integrated in their respective national criminal justice system. This is essential because any criminal proceedings initiated by the EPPO will be conducted according to the laws of one of the participating states. The EDP’s ‘*double hatted*’ status is explicitly acknowledged in article 104 (5) of the Regulation. The EDP continue their functions as national prosecutors and, at the same time, may use their powers as national prosecutors and request legal assistance in criminal matters from the authorities of third countries.

8. This hybrid structure must be taken into account when examining whether the EPPO can be presented by means of a notification as a judicial authority for the purposes of mutual legal assistance under the 1959 MLA Convention and its protocols. While the EPPO is not a judicial authority of any one particular contracting party, it is a prosecuting authority common to 22 contracting parties established within the framework of a supranational organisation. This authority is moreover embedded, through the EDP, in the national judicial systems of all participating states.³

9. Under international law, states are entitled to set up international organisations and to endow them with certain competences. 22 EU member states created the EPPO and transferred certain clearly defined competences to it. Confronted with a similar case, the European Court of Human Rights applied the logic of succession, a well-known concept under international law. The question was whether to apply the ECHR, in particular the right to free elections under article 3 of Protocol No. 1 to the ECHR, to an EU body such as the European Parliament. The European Commission of Human Rights initially rejected the idea arguing that “*to hold Article 3 of Protocol No. 1 to be applicable to supranational representative organs would be to extend the scope of Article 3 beyond what was intended by the drafters of the Convention and beyond the object and purpose of the provision.*” The Court did not follow this view. In *Matthews v UK* [1999], the Grand Chamber delivered a landmark judgment on the relationship of the ECHR with Union law whose principles are applied until this very day. Holding that the Convention is a living instrument, the Court argued that “*mere fact that a body was not envisaged by the drafters of the Convention cannot prevent that body from falling within the scope of the Convention. To the extent that Contracting States organise common constitutional or parliamentary structures by international treaties, the Court must take these*

³ H.H. Herrfeld ‘The EPPO’s Hybrid Structure and Legal Framework: Issues of Implementation – A Perspective from Germany’ European Criminal Law Associations’ Forum (eucrim), Issue 2018/2, 117-121.

mutually agreed structural changes into account in interpreting the Convention and its Protocols" (paragraph 39).

10. The 1947 General Agreement on Tariffs and Trade (GATT), which had been signed by several future members of the European Economic Community (EEC) before the EEC's creation, provides another example. Following the transfer of competences in the area of trade from the national to the EEC level, the EEC took over the position of its member states in the GATT. Other GATT signatories accepted the EEC's '*de facto succession*'⁴ despite the fact that it never led to a formal amendment of the GATT.

11. A similar reasoning as in those cases could be applied when it comes to the establishment of common structures in the area of criminal law. In the area of its competence the EPPO would be considered as the competent judicial authority that replaces, within a narrowly defined area, the national authorities due to succession. The EPPO may thus be regarded as the legal successor, at least partially,⁵ to the national judicial authorities of the 22 participating states for the so-called '*PIF crimes*'. Such an assumption finds support in article 86 TFEU which states that the EPPO is a Union body which "*...exercises the functions of prosecutor in the competent courts of the Member states in relation to such offences.*"⁶

12. Neither the wording of article 24 of the 1959 MLA Convention, which does not require judicial authorities to be of a purely national character, nor the Convention's object and purpose prevents contracting states from changing their declarations and from including an authority like the EPPO as a judicial authority. It is within the discretion of each contracting state to define what it considers to be its own judicial authorities, as the internal structure of its judicial system lies within national sovereignty and was never meant to be affected by the 1959 MLA Convention. The inherent power of each country to transfer some strictly defined judicial competences to a common judicial authority that is shared with other states cannot be considered as being restricted by the Convention. According to its preamble, the object and purpose of the 1959 MLA Convention is the facilitation of mutual assistance in criminal matters. An interpretation which would exclude a common judicial authority such as the EPPO from the scope of the 1959 MLA Convention would limit the Convention's effectiveness. It would appear to be in the interest of all contracting states if the scope of application of the 1959 MLA Convention will not be reduced if some of them decide to set up a supranational body and to transfer certain competences to it. As the interests of other contracting states are protected by having the possibility to object (see the answer to Question 3), there appears to be no need for a more restricted understanding.

Effects of a declaration in favour of EPPO

13. The Swiss Federal Office of Justice asks whether a declaration under Article 24 of the 1959 MLA Convention would be sufficient to derive rights and obligations for the EPPO under the convention. If so, which rules would apply in case of a violation of the convention, in terms of responsibility, given that the European Union will not be a party to the convention. The Swiss Federal Office of Justice also wants to know whether there have been any

⁴ See CJEU Case C 21-24/72 International Fruit Company ECLI:EU:C:1972:115.

⁵ Under the Regulation, the EPPO's competence is not exclusive, but once the EPPO has initiated proceedings or decided to make use of its right of evocation, it has *de facto* exclusive competence for the investigation in question, see article 25 of the Regulation.

⁶ N Franssen 'The future judicial cooperation between the EPPO and non participating Member States' 9 New Journal of European Criminal Law (NJECL) 291, 295 (2018).

precedents for a declaration relating to the EPPO and if such a declaration would create a precedent for other instruments of the Council of Europe.

14. The Swiss authorities rightly point out that a declaration under article 24 of the 1959 MLA Convention would not lead to an accession of the EU to this convention. This does not mean, however, that there will be no redress for violations of the convention or its protocols. The Regulation contains a '*general regime of liability*' (article 113) which should be seen in conjunction with article 340 of the Treaty on the Functioning of the European Union (TFEU).⁷ Under this regime, the European Union is responsible for any damage caused by it or by its servants in the performance of their duties. However, according to settled case-law of the Court of Justice of the European Union, in order for the European Union to incur non-contractual liability for unlawful conduct, a number of conditions must be satisfied: the conduct must be unlawful, actual damage must have been suffered and there must be a causal link between the conduct and the damage pleaded.⁸ Conduct inconsistent with the MLA Convention and its protocol would probably not be considered "*unlawful*" as the EU is not party to this convention and the convention's rules do not form part of the EU's legal order.⁹ An alleged violation of the 1959 MLA Convention or its protocols may, however, be addressed through diplomatic channels and the CDPC may facilitate a friendly settlement of any difficulties which arise in this context.¹⁰ Following a declaration under article 24 of the 1959 MLA Convention designating the EPPO as an additional judicial authority, the EU member states participating in the EPPO will remain contracting parties and thus continue to be liable for any violations of the convention attributable to them. Considering that investigation and prosecution measures will as a rule be carried out by a particular EDP, it may be possible to hold the EU member state whose EDP actually handled the case responsible. The European Court of Human Rights held that EU member states' responsibility continues even after a competence was transferred to an international organisation.¹¹ Finally, evidence obtained in violation of the 1959 MLA Convention or its protocol may ultimately be found to be inadmissible by the competent national courts.

15. There are so far no precedents of introducing a European Union body by means of unilateral declarations as an authority under any of the Council of Europe treaties. The development of EU law has only exceptionally given rise to formal notifications addressed to the Secretary General of the Council of Europe in her capacity as depositary of Council of Europe treaties. Following the introduction of the European arrest warrant,¹² EU member

⁷ "The contractual liability of the Union shall be governed by the law applicable to the contract in question. In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.

Notwithstanding the second paragraph, the European Central Bank shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or by its servants in the performance of their duties.

The personal liability of its servants towards the Union shall be governed by the provisions laid down in their Staff Regulations or in the Conditions of Employment applicable to them."

⁸ See CJEU, judgment of 9 September 2008, Joined cases C-120/06 P and C-121/06 P, *FIAMM and Others v Council and Commission*, paragraph 106; EGC, judgment of 11 July 2007, *Schneider Electric v Commission*, T-351/03, ECR, EU:T:2007:212, paragraph 113.

⁹ See, *mutatis mutandis*, CJEU, judgment of 21 December 2011, C-366/10, *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change*, ECLI:EU:C:2011:864.

¹⁰ Committee of Ministers [Rec\(99\)20 concerning the friendly settlement of any difficulty that may arise out of the application of the Council of Europe conventions in the penal field](#) (15/09/1999).

¹¹ *Matthews v. UK*, judgment of 18 February 1999, [1999] ECHR 12, § 32.

¹² Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA).

states notified the Council of Europe that they will henceforth apply the European arrest warrant and the corresponding surrender procedures between EU member states and no longer the European Convention on Extradition and its protocols.¹³ Similar declarations have however not been made following the implementation of Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters although this directive replaced, as from 22 May 2017, the corresponding provisions of the 1959 MLA Convention and its protocols (see article 34 (1) (a)).

Binding force and scope of application of the declaration

16. The Swiss Federal Office of Justice asks for clarifications regarding the binding force and scope of application of a declaration relating to the EPPO under article 24 of the 1959 MLA Convention. Specifically, it is asked whether other contracting parties may oppose such a declaration under international law and which procedure would have to be followed by states which would not accept such a declaration as a legal basis for cooperation with the EPPO.

17. Third states are not bound by any obligations under the EPPO regulation, primary EU law or the PIF directive. Third states can therefore not be forced to work with the EPPO. The general rule that a treaty cannot create obligations for third states applies.¹⁴ Therefore, any form of judicial cooperation of the EPPO with third state authorities will depend on the consent of this state.

18. Any notification to the effect that the EPPO is a competent authority under the 1959 MLA Convention should be as complete as possible, indicating clearly its scope and purpose as well as the intended legal consequences. It would also be important to indicate whether reservations or other declarations made by some of the 22 participating states will apply to the EPPO. It may also be useful to address other issues such as conditions or restrictions on the use of information and evidence or obligations of the requesting party under article 12 of the convention. Information and evidence to be obtained by an MLA request will eventually not remain in the hands of the EPPO but will be introduced in the courts of a member state. The second additional protocol contains certain provisions on investigation measures which may affect the interests not only of the EPPO, but also of the member state of the acting EDP, for example by imposing certain obligations on that state's judicial authorities (see in particular articles 13, 14, 20 and 23 of the second additional protocol).

19. Confronted with a notification of the EPPO as a new judicial authority, third states can and might simply refuse to cooperate by issuing a counter-declaration. Even though the designation of the EPPO as a new judicial authority cannot be equated to a reservation, other contracting parties will be able to object to the introduction of a new judicial authority which is not a judicial authority of one of the contracting parties. Any such objections that will be addressed to the Secretary General of the Council of Europe will be notified by her under article 30 (c) of the 1959 MLA Convention to the member states of the Council of Europe and other states which have acceded to the convention. However, it would also appear possible

¹³ The relevant notifications are available at the [Council of Europe's treaty office website](#).

¹⁴ Article 34 of the 1969 Vienna Convention on the Law of Treaties: "A treaty does not create either obligations or rights for a third State without its consent."

that a contracting party simply refuses to execute letters rogatory emanating from the EPPO without having made a formal objection to the designation of the EPPO as a judicial authority.

20. It may thus be concluded that a declaration under article 24 of the MLA Convention appears to be legally possible for the purposes of establishing the EPPO as a judicial authority under the 1959 MLA Convention and its protocols. However, other contracting states would have the right to refuse cooperation with the EPPO.

21. There are, however, legal uncertainties resulting from the fact that the European Union as such will not be party to the convention. The possibility of establishing the EPPO as a judicial authority by means of unilateral declarations should therefore be seen only as the beginning and not the end of a closer integration of the European Union and its bodies into the framework of judicial cooperation under Council of Europe treaties. Given its competences in the field, it would only be natural for the Union itself to become a party to the relevant Council of Europe conventions.