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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

COMMITTEE OF EXPERTS
ON THE OPERATION OF EUROPEAN CONVENTIONS
ON CO-OPERATION IN CRIMINAL MATTERS
(PC-OC)

LEGAL OPINION
DRAFT AGREEMENT FOR COOPERATION WITH EPPO

Prepared by the Directorate of Legal Advice and Public International Law

1. The Secretary to the PC-OC requested a legal opinion on the compatibility with the Council of Europe treaty practice of a self-standing agreement concerning co-operation between non-EU States Parties to the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30) and the European Public Prosecutor's Office ('EPPO'). A draft agreement on the application of the European Convention on Mutual Assistance in Criminal Matters and the additional Protocols thereto for the cooperation with the EPPO ('draft agreement') prepared by the Swiss delegation and revised by the PC-OC Mod at its 33rd meeting (28 February-2 March 2023) was attached.
2. There is no precedent for such an agreement in the Council of Europe treaty practice. Council of Europe treaties are usually amended by additional or amending protocols. At the same time, there are no peremptory norms of international law prohibiting the conclusion of an agreement complementing existing Council of Europe treaties. On the contrary, the Vienna Conventions on the Law of Treaties provides for the possibility to amend and supplement multilateral treaties (see articles 40 and 41 of the 1969 VCLT and articles 39 and 40 of the 1986 VCLT between States and International Organizations or between International Organizations).
3. The question arises how such an agreement would relate to the declarations made by EU member states, stating that the EPPO qualifies as a judicial authority under the 1959 Mutual Assistance Convention and its protocols. In particular, would states be able to provide mutual assistance on the basis of the declarations made - without this new agreement - until the ratification of such an agreement?
4. Furthermore, in the event that such an agreement is concluded, the EU member states would be obliged to withdraw the notifications already made with effect, however, only vis-à-vis the third states (the non-EU states) that have ratified this new agreement. On the one hand, the question could arise as to why the EU member states would be obliged to do so, even though they themselves are not supposed to become party to the new agreement. On the other hand, there is the question of what the EU member states would have to declare in this case. They could not comprehensively withdraw the declarations they have already made, according to which the EPPO is one of their judicial authorities, but only in relation to the third countries that have already ratified the new agreement. All this would certainly not contribute to legal certainty.
5. Another basic problem is that the draft gives the impression that it concerns the entire Union on the EU side, although the EPPO only has powers of intervention in the member states that participate in the establishment of the EPPO (currently 22). In general, the draft agreement leaves the precise competences of the EPPO unclear and 'postpones' the clarification to a declaration to be made upon ratification by the EU (art. 6 para. 3). It is not clear what is meant by "extent of its competence" at this point. This presumably covers the substantive competence of the EPPO (art. 22 EPPO Regulation). It is more difficult with the 'personal' competence (art. 23 EPPO Regulation), as this in turn partly depends on the law of each EU member state concerned. Moreover, even if the EPPO has competence (see articles 22 and 23 EPPO Regulation), it may not exercise it in certain cases (article 25 (2) and (3) EPPO Regulation). Furthermore, there is the question of intervention competences, which the EPPO in any case only has in the states participating in its establishment, but not in the so-called "non-participating member states". Moreover, with regard to third states, the problem arises as to what extent the EPPO has "competence" to take investigative measures at the request of a third state and to transmit the results of the investigation

to the requesting third state. This is a question of delimitation of competence between EPPO (EU) and the EU member states on whose territory the requested measure would have to be taken. The EPPO Regulation does not provide for such a competence of the EPPO. The draft agreement leaves this question entirely open.

6. In terms of content, article 3 of the draft agreement leaves many questions unanswered or is simply inaccurate. What does article 3 (2) mean, for example, when it stipulates that these terms “in relation to the European Union, be construed as references to the European Union and to the EPPO”? Presumably, what is meant is only such an interpretation in the context of a request that falls under the new agreement. But even then, “in relation to the European Union” gives the impression that the whole Union is meant and not only the Union in the form of the enhanced cooperation under which EPPO was established. And what does “references to the Union” mean? Who is the “judicial authority” or “Ministry of Justice” in the case of the Union?
7. In article 3 (2), it should be made clear for the uninformed reader from a third country that the legal provisions applicable on the part of the Union also include national legal provisions in accordance with the EPPO Regulation, namely those of the member state of the competent European Delegated Prosecutor (‘EDP’) who is determined by the application of the EPPO Regulation in the case of EPPO requests. Again, however, it is not regulated which EDP will be responsible for any incoming requests and thus also which member state law applies (since the EPPO Regulation does not contain any regulations on incoming requests, this question is also not regulated there).
8. In addition, there are special problems which are addressed in the declarations by EU member states, but not in the draft agreement. These concern the provisions of article 11 of the 1959 Convention (transfer of a prisoner for interrogation) and article 33 (2) of the 2nd Additional Protocol (formation of JITs). At least in these two cases, the EPPO cannot act alone in terms of mutual legal assistance law but requires the cooperation of the member state(s) concerned. Therefore, the notifications stipulate that requests must be made via the competent authority of the member state or require its consent.
9. Article 3 also leaves open a whole series of further questions, such as the language in which any requests to the EPPO are to be made. Or whether evidence received by the EDP of a member state in response to a request addressed to a third state may be forwarded within the EPPO (or even the EU in general) (since the EPPO is a ‘single office’) or whether the speciality protection of the 1959 Convention then applies (and the third state has provided evidence in response to a request “to the EU” and not to an EU member state. It remains also unclear to what extent data protection provisions of Convention 108+ shall apply.
10. In summary, unless comprehensively revised, the draft agreement raises more questions than it solves. It may also be questioned why the Council of Europe should engage in this process which concerns primarily the European Union. Alternatively, it would be for the Union itself to prepare and conclude, where necessary, additional agreements with third states. Such agreements could also regulate the applicability of other Council of Europe conventions (e.g. the Budapest Cybercrime or the Money Laundering Conventions) to the cooperation between the EPPO and third states.