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Cooperation between the Council of Europe member States and the EPPO – The Swiss Perspective

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Introduction

Excellencies, colleagues, ladies and gentlemen

It is a pleasure to meet with you today and to bring you the Swiss perspective on the EPPO – even if it is only through a screen. I deeply miss personal meetings with all of you, especially the feeling of being able to travel freely from one State to another, from Switzerland to our neighbors and friends. So the current pandemic has at least one positive aspect: We have started to realize how “natural” it has become to be in close contact. Because all of a sudden this contact is missing. And we **really** miss it. Europe, ladies and gentlemen, is not just a political concept; it is above all a simple fact. We live on one continent, we do business together, we play football together – and we fight crime together. Because we simply cannot do it alone anymore. So I am glad to be here with you today, at least virtually, to be able to present to you what **could** be called a “third country’s” perspective on the cooperation with the EPPO.

I am thankful to German Presidency of the Council of Europe for having invited me to speak to you today – and I am glad they haven’t called me the representative of a “third country”. Because here, at the Council of Europe, the CoE Member States not members of the EU are not third countries. What we are talking about today is our common approach as CoE Member States to our cooperation with the newly established Public Prosecutor’s Office of an entity of international law separate from **all** of us: the European Union.

So let me give you the Swiss perspective on the cooperation with the EPPO. It is the perspective of Member State of the CoE who is not a Member State of the EU.

For us in the Mutual Legal Assistance Central Authority of Switzerland, the EU is a trusted partner. We profit from our cooperation within the Schengen area, Eurojust has

become very dear to us over the last years and more than 80% of our requests for MLA and extradition go to Member States of the EU. And what may be of predominant importance in the context of the offences within the competence of the EPPO: In furtherance of our Government's strategy for a clean financial market, we have set a focus in our own strategy for expansion of Switzerland's treaty network in the field of MLA and extradition on the cooperation with other financial centers. Switzerland wants to be a reliable partner in the transnational fight against financial and economic criminality.

Legal Analysis of the EPPO Regulation

So it is with this in mind that we started our exploration into the EPPO when its outlines became visible, in the spring of 2017, more than four years ago.

We have at first taken a look at the entire draft regulation. We were interested in finding out what exactly was the plan of the EU and its Member States. Was it really the establishment of a proper Prosecutor's Office – or merely of an institution with that name? And was it truly "European" in the sense that it was to be attributed to the legal entity "EU" under international law – as opposed to its Member States? You will not be surprised that we came to the conclusion: Yes, the EPPO *will* be a true Public Prosecutor's office. And yes also to the second question: The EPPO is according to art. 8 para. 1 of the final version of the EPPO Regulation [and I quote] "**an indivisible Union body operating as one single Office with a decentralized structure**" [end of quote]. Thus, the EPPO is an organ of the EU – not one of its Member States. And – at least from a Swiss point of view – the EU has its own legal personality and is in that sense – under public international law – a different legal subject from its Member States.

After such first assessment of this new partner's legal status, we continued our analysis and found what is today art. 104 EPPO Regulation, thus the article dealing with "relations with third countries and international organisations". Of course we now devoted our full attention to that article. But allow me one **general remark** first: For Switzerland, our relation with the EU is a *bilateral* one. The basis of this relation is public international law. This is particularly also true in the field of international cooperation in criminal matters. For Switzerland, the EU is an equal partner under international law. As is any sovereign State of the world. However, the EU is a

particularly challenging partner, strictly legally spoken, because Swiss MLA cooperation is focused on the cooperation with **States**. And the EU is, according to the analysis of virtually any legal writer, not a State. We will perhaps touch upon that issue at the end of my presentation.

But let us first turn back to art. 104. According to our analysis, art. 104 contains three different options for cooperation:

1. Para. 3 proposes the application of MLA treaties between the EU and the respective third country also for the cooperation with the EPPO.
2. If there is no such bilateral MLAT between the EU and the third country in question, the EU Member States shall recognize and, where applicable, notify the EPPO as a competent authority for the purpose of the implementation of international agreements concluded by them. Reserved are the “acceptance” of the third country as well as the fact that such notification is “permitted under the respective agreement”. If need be, the agreement may be amended to make such notification possible. That is what is contained in art. 104 para. 4.
3. Finally, para. 5 suggests that if that way is also blocked, [and I quote] the “handling European Delegated Prosecutor, in accordance with art. 13 para. 1, may have recourse to the powers of a national prosecutor of his/her Member State to request legal assistance in criminal matters from authorities of third countries, on the basis of international agreements concluded by that Member State or applicable national law [of that Member State]. The European Delegated Prosecutor shall inform and where appropriate shall **endeavor to obtain** consent from the authorities of third countries that the evidence collected on that basis will be used by the EPPO for the purposes of this regulation. In any case, the third country shall be **duly informed** that the final recipient of the reply to the request is the EPPO [end of quote].

So, ladies and gentlemen, let us now examine whether this art. 104 allows for cooperation with Switzerland.

Option 1, the application of a bilateral MLAT between Switzerland and the EU, is quickly dealt with: There is currently no such treaty. Switzerland and every single Member State of the EU primarily cooperate on the basis of the CoE instruments, in the case of some neighboring States complemented by supplementary bilateral

agreements. Some further supplements are contained in the Association Agreement of Switzerland to the Schengen cooperation and the Convention implementing the Schengen Agreement. Schengen dates back to the times when the EU was based on three pillars and was part of the inter-governmental pillar. In the field of MLA and extradition, it supplements the CoE instruments and thus reinforces the relations between Switzerland and the EU Member States – but it does not create legal obligations in that field between Switzerland and the **EU**.

So to *option 2, the application of existing multilateral treaties*: Already back in 2017 Switzerland assumed that the authors of art. 104 aimed at the CoE instruments when they came up with para. 4. In our analysis, we divided option 2 into an option 2a and an option 2b. **Option 2a** is the direct “recognition” of the EPPO as a competent authority under the respective agreement. However, we did not agree with the understanding that, based on art. 104 para. 4, any party to the respective agreement should be capable of unilaterally recognizing the Public Prosecutor’s Office of another legal entity as a competent authority. We had taken note of the DLAPIL’s opinion that the EU can be seen as a successor of the EU Member States and in this sense, obligations, rights and duties of the EU Member States particularly arising out of the European Convention on Mutual Assistance in Criminal Matters, I will in the future speak of the 1959 Convention, do also apply to organs of the EU. But after our analysis of the legal situation, Switzerland does not share that appreciation. Switzerland has in the past concluded several agreements with the EU in fields where it already had bilateral agreements with some or all of the EU Member States. The logic of succession had so far not been an argument brought forward by either the European Commission or the EU Member States.

According to our analysis, the EPPO could only be notified as a competent authority under art. 24 of the 1959 Convention, if the **EU itself** were a member of the Convention. When this question was debated in the PC-OC in the spring of 2020, Switzerland immediately signaled its openness to the accession of the EU to that Convention. Unfortunately, this idea was not pursued any further. Thus, the EPPO is an EU body, not one of its Member States. If certain Member States of the Council of Europe now notify the EPPO as a competent authority under art. 24, Switzerland sees in that act the notification of a Public Prosecutor’s Office of a non-member of the 1959 Convention. This is legally not possible, as it is not foreseen under the 1959

Convention. As a consequence, we will have to advise the Government of Switzerland to oppose to any such unilateral notification of the EPPO as a competent authority under the existing CoE instruments.

Thus, there is **option 2b**: Amending the Convention so that a notification of EPPO as a judicial authority will be possible – or what may be easier: creating a new instrument within the CoE-framework to make the cooperation between Contracting Parties of the 1959 Convention on the one hand and the EPPO on the other hand possible. Switzerland believes that any amendment to the 1959 Convention creating rights for the EPPO without the EU's accession to that Convention will be very difficult to achieve. But a **new instrument** to be elaborated would according to our understanding be a possible solution to solve the problem. The terms of cooperation could be negotiated equally between all partners and it would be an act of every party's sovereignty whether or not it would enter into that new instrument. Switzerland will thus support the elaboration of such a new instrument in that sense as it has been discussed recently in the CDPC and the PC-OC. This to us seems to be the most promising way out of the current situation.

And, ladies and gentlemen, what about *option 3*, where a **European Delegated Prosecutor has recourse to the competences of a national prosecutor of his or her Member State**? Art. 104 para. 5 refers to art. 13 para. 1 of the EPPO-Regulation. That article states that European Delegated Prosecutors shall have the same rights as national prosecutors. We came to the conclusion that such approach would not be acceptable for Switzerland. A legal entity that is in no way party to – or author of – the legal base on which MLA would be requested would in the end be the beneficiary of that MLA. The prosecutors of the EPPO may have recourse to the procedural law of the Member State they are investigating in. But of course this **internal** regulation cannot have any impact on the **external** relation between the EPPO and a State that is not member of the EU. Because from the perspective of this third country, the European Delegated Prosecutor remains a prosecutor of the EU – even if he has the right to apply for example the German Code of Criminal Procedure for an investigation in Germany. And the EU is – as we have explored before – legally not congruent with its Member States. From the Swiss perspective, additional issues arise from the provision that the European Delegated Prosecutor shall only where appropriate endeavor to obtain the concerned third country's consent. **Who decides if and when**

it is appropriate? Furthermore, para. 5 ends with the rather cryptic notion: “In any case, the third country shall be **duly informed** that the final recipient of the reply to the request is the EPPO.” We believe that with this, the EPPO would assume an implicit waiver of the principle of speciality if the third country proceeded with the execution of the MLA request: The requested State knows that the requesting EU Member State will transfer the received information or evidence to a different entity under international law. If it still goes ahead with the execution of the request, it agrees to the transmission of the information or evidence to that other entity. This understanding would, however, not be compatible with national MLA legislations of most States, where an **explicit and in many cases even written waiver** of the speciality principle is required. Switzerland will thus not be able to cooperate with the EPPO on the basis of option 3.

Before I come to a conclusion, allow me to mention one last question that arises from a non-EU member state’s perspective in the context of art. 104: All of us assembled here know that reciprocity is actually one of the most fundamental principles in MLA. In para. 6, the article mentions what the EPPO can actually do for third countries. It reads: “Subject to other provisions of this Regulation the EPPO may, upon request, provide the competent authorities of third countries or international organizations for the purpose of investigations or use as evidence in criminal investigations, with information or evidence **already in the possession** of the EPPO.” So the EPPO is only in a position to edit information that is already in its possession. Will Third States thus also only edit information already in their possession? Or would our side be asked to **collect** evidence actively for the EPPO?

Conclusion: Vital role of the Council of Europe

So, dear colleagues, to bring all these ends together: Switzerland commits to further developing MLA in Europe. We are particularly convinced that economic and financial crime, including criminality against our legal entities’ budgets, should not pay. In this sense, Switzerland welcomes the EPPO as a new actor to the scene. We further believe that it is of utmost importance that all of us assembled here look for a suitable way to cooperate with the EPPO. **Mutual** is the first word in Mutual Legal Assistance. Mutuality is described by the Oxford Dictionary as “*the fact of being **shared** by two or more people – or States, for that matter – **equally** or **affecting** two or more people **equally**.*” In the context before us, both elements matter: First, Switzerland believes

that cooperation – also with the EPPO – should be mutual in the sense that the terms of that cooperation are ***truly agreed between all partners on an equal basis***. Second, we believe that our cooperation should be mutual in the sense of affecting both partners equally. The principle of ***reciprocity*** should be guarded also in the cooperation with the EPPO.

Thus, ladies and gentlemen, we see an ***important role for the Council of Europe***, also in the cooperation between the EPPO and the Member States of the Council of Europe – or the Contracting Parties of the 1959 Convention more precisely. The Convention and its Additional Protocols may provide for a suitable legal basis for the cooperation with the EPPO. Because they are well-used and proven tools for international cooperation in criminal matters. But they are at the end of the day tools of international law. We should thus strive for a solution that respects the understanding of some of the most important principles in that law by all Member States of the Council of Europe. We need, ladies and gentlemen, a way forward that is truly ***mutual***.

Switzerland is committed to supporting the Council of Europe in the process of creating a ***new legal instrument*** for the cooperation with the EPPO, possibly based on the 1959 Convention and its additional protocols.

This is our preferred solution for the future MLA cooperation between Switzerland and the EPPO. As Switzerland's national MLA Act is for the time being limited to cooperation with **States** and the EU is not a State, we do currently not have a legal base allowing for MLA with the EPPO. We have pointed this out in the PC-OC and the CDPC before. We thus hope for a rapid solution and count on the support and the understanding of all CoE Member States as well as the institutions of the EU to achieve a common solution acceptable to all parties. Crime must not pay and our cooperation cannot be hindered by legal obstacles. Where there is a will, there is a way. And if there is a hill, we climb it. Together.

Thank you.