

## **Emilio Sánchez Ulled**

Senior Public Prosecutor

Justice Counsellor at the Permanent Representation of Spain to the European Union

European Public Prosecutor's Office's Implementation in Spain

---

### **EUROPEAN PUBLIC PROSECUTOR'S OFFICE'S IMPLEMENTATION IN SPAIN**

**Abstract:** The establishment of the EPPO is an unprecedented milestone in the area of freedom, security and justice in the EU. The EPPO is not a body for mere coordination or even collaboration between judicial authorities, but a fully-fledged, supranational, procedural actor, separate from the respective national prosecutors' offices, with its own structure, bodies and material resources, which acts independently of both the EU itself and its Member States in criminal proceedings. The EPPO is therefore facing a major challenge, which is the need to combine in the same criminal procedure the European Regulation and the respective national procedural laws of the participating Member States. Investigation and prosecution will be carried out by the EPPO in accordance with the Regulation and, as regards matters not covered by it, in accordance with national procedural law; the trial, however, will take place before the competent national courts in accordance with the corresponding national procedural law.

Recital 15 of the EPPO Regulation excludes any intention to change the organisation of criminal investigation in the participating Member States. However, the fact is that participating Member States have had to find their own way to "insert" the EPPO into their respective existing procedural systems. Although the EPPO Regulation is, as such, directly applicable in the participating Member States, it has determined, to a greater or lesser extent, a need for substantial legal reforms in national systems. The implementation of the EPPO constituted a particularly substantial challenge for those Member States where an investigating judge has the leading role in the pre-trial phase of criminal proceedings, as is the case in Spain. In none of its precepts does, the Regulation exclude the intervention of an investigating judge. Nevertheless, it was clear that it could imply, at the very least, a redefinition of the perimeter of the investigating judge's powers, if not the establishment of a new and specific procedural framework for offences where the EPPO exercises its competence. The latter is what has happened in Spain.

This paper describes the pathway followed in Spain to implement the EPPO and the different solutions adopted, as challenges have emerged. Only experience will

show whether those legal solutions are the right ones. Further modifications cannot be excluded in the future, as experience might show potential dysfunctions.

**Keywords:** The European Public Prosecutor's Office, the EPPO regulation, the European Union's financial interests, transposition

---

## **1. The Establishment of the European Public Prosecutor's Office as an Unprecedented Milestone in the Area of Freedom, Security and Justice in the EU**

The Article 86 of the Treaty on the Functioning of the European Union<sup>1</sup>(TFEU) allowed the Council the possibility of establishing

---

<sup>1</sup> Treaty on the Functioning of the European Union  
Article 86

1. In order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust. The Council shall act unanimously after obtaining the consent of the European Parliament.

In the absence of unanimity in the Council, a group of at least nine Member States may request that the draft regulation be referred to the European Council. In that case, the procedure in the Council shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council for adoption.

Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft regulation concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

2. The European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests, as determined by the regulation provided for in paragraph 1. It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences.

3. The regulations referred to in paragraph 1 shall determine the general rules applicable to the European Public Prosecutor's Office, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions.

4. The European Council may, at the same time or subsequently, adopt a decision amending paragraph 1 in order to extend the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension and amending accordingly paragraph 2 as regards the perpetrators of, and accomplices in, serious crimes affecting more than one Member

a European Public Prosecutor's Office (EPPO) in order to combat crimes affecting the financial interests of the Union. The Council was obliged to act unanimously and to obtain the consent of the European Parliament.

A Proposal for a Council Regulation on the establishment of the EPPO, presented by the European Commission, came in July 2013.<sup>2</sup> After several years of negotiation within the Council, however, the required unanimity was not reached. The Council registered the absence of unanimity in February 2017, which was confirmed by the European Council the following month. Subsequently, a group of Member States undertook an enhanced cooperation<sup>3</sup> in April 2017, which culminated in December 2017, where 16 Member States adopted the Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the EPPO.<sup>4</sup> Today, 22 Member States participate in the European Prosecutor's office (hereinafter EPPO): Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Greece, Lithuania, Luxembourg, Portugal, Romania, Slovakia, Slovenia, and Spain from the outset; Latvia joined later, followed by Estonia, Italy and Austria, as well as the Netherlands and Malta. The United Kingdom did not participate, having later left the Union. Sweden and, recently, Poland have expressed their willingness to join the EPPO.

The EPPO is an indivisible body of the Union with its own legal personality, independent of both Union institutions and Member States,

---

State. The European Council shall act unanimously after obtaining the consent of the European Parliament and after consulting the Commission.

2 <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A52013PC0534>, access 7.5.2024.

3 Enhanced cooperation (Article 20 of the Treaty on European Union and Title III of the Treaty on the Functioning of the EU) is a procedure where a minimum of nine EU Member States are allowed to set up advanced integration or cooperation in a particular field within the EU, when it has become clear that the EU as a whole cannot achieve the goals of such cooperation within a reasonable period. This allows them to move at different speeds and towards different goals than those Member States who decide to stay outside the fields of enhanced cooperation. The procedure is designed to overcome stalemate where a particular proposal is blocked by one or more Member States who do not want to take part. It does not, however, allow for an extension of powers outside those permitted by EU Treaties. Authorisation to proceed with the enhanced cooperation is granted by the Council as a last resort, on a proposal from the European Commission and after obtaining the consent of the European Parliament. As of February 2013, this procedure was being used in the fields of divorce law, patents and financial transaction tax, and to protect the financial interests of the EU by setting up the European Public Prosecutor's Office (EPPO). Eur-Lex glossary, [https://eur-lex.europa.eu/EN/legal-content/glossary/enhanced-cooperation.html#:~:text=Enhanced%20cooperation%20\(Article%2020%20of,the%20EU%20as%20a%20whole](https://eur-lex.europa.eu/EN/legal-content/glossary/enhanced-cooperation.html#:~:text=Enhanced%20cooperation%20(Article%2020%20of,the%20EU%20as%20a%20whole), access 7.5.2024.

4 <https://eur-lex.europa.eu/eli/reg/2017/1939/oj>, access 7.5.2024.

having its seat in Luxembourg. The EPPO is mandated to investigate offences prejudicial to the Union's financial interests, as well as to prosecute and request the initiation of proceedings against those responsible persons. According to Art. 86(4) TFEU, EPPO's mandate may be extended to include serious crime having a cross-border dimension.<sup>5</sup> The EPPO Regulation provides for a system of shared competence (since certain thresholds must be met for its exercise) 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.<sup>6</sup> EPPO's competence is limited to the offences provided for the 'PIF Directive',<sup>7</sup> as transposed by the Member States. EPPO is also competent for offences regarding participation in a criminal organisation, if the focus of the criminal activity of such a criminal organisation is to commit any of the 'PIF offences', and for any other criminal offence inextricably linked to 'PIF offences', where the conditions set out in the Regulation are met, when they are of a cross-border nature within the EU. At an organisational level, the EPPO consists of a central level and a decentralised level. The central level consists of the Chief Prosecutor and two deputies, the European Prosecutors (hereinafter EDPs; one for each participating MS), who compose the College (which is the governing body that, amongst others, is competent to adopt the internal rules of procedure of the Office and its case management system), the Permanent Chambers (which are the highest supervisory body for investigations)<sup>8</sup> and the Administrative Director. The decentralised level consists of the European

---

5 In this regard, there have been calls to extend the EPPO's competence to other offences having cross-border impact, such as terrorist offences, environmental crimes or offences consisting of violation of EU restrictive measures (by Council Decision 2022/2332, the violation of EU restrictive measures was added to the catalogue of offences listed in Article 83(1) TFEU, which enabled the Commission to present shortly afterwards a proposal for a Directive harmonising this offence at the European level; in December 2023, under the Spanish Presidency of the Council, provisional agreement was reached with the European Parliament, so the Directive is expected to be formally adopted before the dissolution of the European Parliament in May 2024).

6 Recital 13 of the EPPO Regulation.

7 Directive (EU) 2017/1371 of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law.

8 The Permanent Chambers shall monitor and direct the investigations and prosecutions conducted by the European Delegated Prosecutors (Art. 10(2) of EPPO Regulation). For instance, the Permanent Chambers, after reviewing a draft decision proposed by the handling European Delegated Prosecutor, shall decide whether to file an indictment or to dismiss the case, or to refer it to the national authorities (Art. 10(3) of EPPO Regulation).

Delegated Prosecutors (hereinafter EDPs), who are based in the participating Member States (at least two in each of them).

The establishment of the EPPO is an unprecedented milestone in the area of freedom, security and justice in the EU. The EPPO is not a body for mere coordination or even collaboration between judicial authorities, but a fully-fledged, supranational, procedural actor, separate from the respective national prosecutors' offices, with its own structure, bodies, and material resources, which acts independently of both the EU itself and its Member States in criminal proceedings. No less innovative is its collegiate decision-making system, which is certainly unusual for a public prosecutor's office, based on 'permanent chambers' that are responsible for adopting the main procedural decisions during the investigation.

Let us not forget the multiplicity of factors of various kinds that converged in the decision to create the EPPO, as well as the no less diverse factors that influenced the negotiations of the text, where the Council changed essential elements of the Commission's proposal, notably its institutional design and competence. As a result, the EPPO regime that emerged at the end of the political process is particularly complex, if not self-interestedly ambiguous on many points, given the concerns<sup>9</sup> and sometimes resistance of Member States.<sup>10</sup> All this in a context where public opinion, either through unawareness or through indifference, paid little attention to the EPPO's creation process.

On 1 June 2021, the EPPO started its activities.

## **2. National Implementation of the EPPO Regulation: Bigger Challenge than Expected**

The EPPO is facing a difficult task, not only because of the complexity of the crimes it will prosecute, which is taken for granted, but also, particularly, because of the major challenge posed by the need to combine in the same criminal procedure two different legal systems that have to coexist harmoniously during the investigation: the European Regulation and the respective national procedural laws of the participating Member

---

9 Eleven national Parliaments expressed doubts in relation to the respect of the subsidiarity principle.

10 Indeed, this resistance led to the Council announcing in February 2017 that consensus could not be reached on the text, which then prompted a number of Member States to launch the enhanced cooperation procedure that culminated in the 2017 EPPO Regulation.

States. Investigation and prosecution will be carried out by the EPPO in accordance with the Regulation and, as regards matters not covered by it, in accordance with national procedural law; the trial, however, will take place before the competent national courts in accordance with the corresponding national procedural law. In addition, detection of criminal offences, which, in short, concern the handling of public funds, relies mainly on national authorities (State auditors, tax authorities, etc.). Consequently, the EPPO is in the middle of a chain of actions that has the national authorities both at the beginning and at the end. As a whole, this is complex machinery that will take some time to grease.

In this context, although the EPPO Regulation is, as such, directly applicable in the participating Member States, they have had to find their own way to ‘insert’ the EPPO into their existing procedural system. This has required, to a greater or lesser extent depending on the procedural particularities of each participating Member State, substantial legal reforms in the national procedural frameworks.

It was clear from the outset that the implementation of EPPO would present particularly substantive challenges for those Member States where an investigating judge has the leading role in the pre-trial phase of criminal proceedings. This was the case in Spain but also, perhaps to a lesser extent, in Slovenia and partly also in France and Belgium. In none of its precepts does the Regulation exclude the intervention of an Investigating Judge; moreover, the Regulation<sup>11</sup> excludes any intention to change the organisation of criminal investigation in the participating Member States. Nevertheless, it could imply, at the very least, a redefinition of the perimeter of the Investigating Judge’s powers, if not the establishment of a completely new and specific procedural framework for offences where the EPPO exercises its competence. The latter is the option taken in Spain.

The following lines are only intended to give a vivid picture of the legal and practical challenges that EPPO’s implementation posed to Spain. Some of those challenges were shared challenges with other Member States of the EU, others were specific to Spain. They range from the major structural issue of the ‘insertion’ of the EPPO into national procedural systems to the most basic issue of the ‘administrative’ status of EDPs in Member States. Do not expect, therefore, profound doctrinal reflections on

---

<sup>11</sup> Recital 15 of the EPPO Regulation: ‘This Regulation is without prejudice to Member States’ national systems concerning the way in which criminal investigations are organised’.

abstract procedural matters, nor visionary thoughts on European judicial policy. What follows is no more than a list of legal and practical issues that Spain had to face in implementing the EPPO, from the personal perspective of someone who has seen the process first hand. Many of these questions remain open and solutions given would have to be adapted or modified in the future, should the need arise.

### **3. EPPO's Implementation in Spain**

Spain has always been in favour of the creation of EPPO and has played a particularly active role in its creation, even though being aware of the special difficulties involved in adapting its procedural system to its existence. The EPPO Regulation is based on a model of a public prosecutor fully responsible for the investigation and accusation phase prior to criminal trial, which is the predominant model in the EU environment. This is not the Spanish model, based on the existence of an investigating judge. In fact, the EPPO's implementing process revitalised the everlasting national debate on the need to reform Spanish criminal procedure to bring it closer to that of other EU Member States<sup>12</sup> and now, the EPPO itself, granting public prosecutors full investigative powers. Such a complete change of the procedural paradigm, which would take years to be fully developed, was not feasible at the occasion of the EPPO's implementation. This debate has been going on for more than ten years in Spain, with no clear political outcome. Therefore, a way had to be found to 'insert' the EPPO into the existing system, being extremely different from that defined in the Regulation, and hence the magnitude of the challenge. Assuming that the EPPO Regulation is directly applicable in EU Member States, it was clear that several substantive legal reforms were necessary to fully implement it in Spain.

#### **3.1. Brief Description of the Spanish Criminal Procedure System**

To understand what will be said next, it is worthwhile to first give a hint about the Spanish criminal procedure system.

---

<sup>12</sup> In fact, in previous years various draft projects of laws have been discussed with a view to conferring full investigative powers to the public prosecutor, where a 'judge of guarantees' would decide, objectively and externally, on the most serious measures of interference with fundamental rights. So far, none of the draft laws has reached Parliament.



The investigating judge (*juez de instrucción*) is the key authority in Spanish criminal proceedings up to the moment of the trial. The investigating judge formally opens the criminal proceedings, directs the investigation, and orders the necessary investigative measures, authorises interference with constitutionally protected fundamental rights and, generally, decides whether there are sufficient grounds to give the prosecutor, or other accusing parties, the possibility of formulating an accusation that goes to trial. In short, it is the responsibility of the investigating judge to carry out the activity aimed at clarifying the facts and gathering evidence both for the prosecution and for the defence, which will culminate in a trial before a criminal court. However, the public prosecutor's office (*fiscalía, ministerio público*) may carry out preliminary investigative proceedings whether an investigating judge has not yet instituted criminal proceedings, during which the prosecutor may execute or order investigative measures, except those that the Constitution or the laws reserve to judges and courts because they affect certain fundamental rights. The public prosecutor may not order precautionary personal measures (except for detention, until immediate transfer to the judicial authority) or precautionary patrimonial measures, which have to be requested to the investigating judge. At the end of his/her preliminary investigation, the prosecutor may close the case or bring it to the investigating judge asking to open criminal proceedings formally. If the prosecutor, during preliminary investigations, becomes aware that an investigating judge has launched criminal proceedings for the same facts, he or she must terminate the preliminary investigation and refer all evidence collected to the investigating judge. Once criminal proceedings have been formally opened by an investigating judge, it is the Prosecutor's responsibility to promote the course of the proceedings. The Public Prosecutor, in defence of the public interest, requests the investigative judge to take the necessary investigative steps to clarify the facts, and to adopt the appropriate precautionary measures, and presents the accusation, or opposes the accusation presented by others. The prosecutor is subject to the principle of legality, where the Public Prosecutor's Office is required to prosecute and bring charges whenever it considers that there are grounds to do so. It should be borne in mind that the Prosecutor is not the only possible accusation party. Thus, victims can appear in the proceedings and formulate an accusation, as they can claim satisfaction of civil liability (and note that public administrations can be victims and appear in criminal proceedings formulating their own accusation, something that will normally happen in 'PIF cases'). Moreover, the Spanish Constitution, and this is a notable peculiarity in comparative law, allows any Spanish citizen



to intervene in criminal proceedings as a prosecuting party, even if he or she has not been harmed or offended by the criminal act (*acción popular*).<sup>13</sup> In this context, it is also worth noting the wide range of rights conferred on the person under investigation. From a very early stage, this person must be informed of the existence of criminal proceedings against him or her; has full access to the proceedings, except in the very limited cases where the proceedings are declared secret for a limited period; can file an appeal against practically all decisions taken by the investigating judge.

### 3.2. Structural and Procedural Challenges to Implement EPPO in Spain

Leaving aside those aspects relating to the administrative situation of the members of the EPPO in Spain, to which reference will be made later, it is appropriate to focus now on structural and procedural aspects.

It soon became apparent that changes were needed to the Organic Law<sup>14</sup> of the Judiciary and the Law on the Organic Statute of the Public Prosecutor's Office, for structural issues, and to the Criminal Procedure Act and to the Law 23/2014 on the mutual recognition of criminal decisions in the European Union, for procedural issues.

The implementation of the EPPO in Spain took place by Organic Law 9/2021, of 1 July, implementing Council Regulation (EU) 2017/1939. The provisions of organic law apply to criminal proceedings for offences prejudicial to the financial interests of the European Union in which the EPPO effectively exercises its competence to investigate and prosecute. In all matters not provided for in Organic Law, the provisions of Criminal Procedure Law shall apply in a subsidiary manner. In addition, it was decided to exclude the competence of jury courts over trials on cases whose investigation is taken over by the EPPO.<sup>15</sup> The Penal Code had to be amended also, in order to modify the regime of interruption of the statute of limitations in EPPO investigations.

---

13 This possibility has been finally excluded for cases where the EPPO exercises its competence.

14 'Organic laws' are those relating to certain fundamental matters provided for in the Spanish Constitution. The main difference with 'ordinary' laws lies in the majority required to adopt them. While a simple majority adopts ordinary laws, 'organic laws' require an absolute majority.

15 The offences of embezzlement of public funds and bribery are prosecuted by the jury procedure, but at the same time, they can be offences falling within the competence of the EPPO according to the PIF Directive.

### *Structural Challenges*

From a structural/organisational point of view, different decisions had to be taken in parallel:

- First, to agree the number of European Delegated Prosecutors in Spain.<sup>16</sup>
- Second, directly related to the previous one, whether these prosecutors would have the dual status of EDP and national prosecutor ('double hat', a possibility provided for in the EPPO Regulation).<sup>17</sup>
- Third, whether criminal proceedings under the EPPO's competence would be handled at centralised or decentralised level. This involved, first, a choice between distributing the EDPs throughout Spanish territory, or centralising them in the capital, holding competence over the whole country.
- Finally, to decide whether the competence to hold the trial would be attributed to the courts of the place where the crime was committed, or whether it would be centralised in a court with jurisdiction over the whole country.

At the end, centralisation was the choice:

- As a result of contacts between the Spanish authorities and the European Chief Prosecutor, it was agreed a number of seven EDPs, holding exclusive competence over EPPO matters (no 'double-hat').
- EDPs hold territorial competence over the whole country, having their seat in Madrid.
- The trial phase is attributed to the National High Court (*Audiencia Nacional*); however, in cases of certain high-level officials, competence corresponds to the Supreme Court. Both have their seat in Madrid and have territorial competence over the whole country.

---

<sup>16</sup> According to Art. 13(2) of the EPPO Regulation, there shall be two or more European Delegated Prosecutors in each Member State; the European Chief Prosecutor shall, after consulting and reaching an agreement with the relevant authorities of the Member States, approve the number of European Delegated Prosecutors (hereinafter, EDPs), as well as the functional and territorial division of competences between the European Delegated Prosecutors within each Member State.

<sup>17</sup> According to Art. 13(3) of the EPPO Regulation 'The European Delegated Prosecutors may also exercise functions as national prosecutors, to the extent that this does not prevent them from fulfilling their obligations under this Regulation. (...)'.  

---

### *Procedural Challenges*

As mentioned in a previous paragraph, the peculiarity of criminal proceedings for offences where the EPPO exercises its competence<sup>18</sup> is that two sets of procedural rules combine: the EPPO Regulation and national procedural law. EPPO's investigations are carried out by EDPs in Member States,<sup>19</sup> in accordance with the EPPO Regulation and, for matters not covered by it, in accordance with national law. In the case of Spain, it implies that EDPs, not an investigating judge, lead the investigation.

From the EPPO Regulation it basically follows that EDPs, as a general rule,<sup>20</sup> shall undertake the investigation measures in general and take precautionary measures in respect of assets, or instruct the competent authorities in their Member States to take them. In certain cases, EDPs may need judicial authorisation to take some of those measures, but this does not mean that they lose control over the investigation.<sup>21</sup> Therefore, EDPs are involved in the three procedural phases of investigating, prosecuting, and bringing charges at trial. From a procedural point of view, this required Spain to:

1. create the novel figure of the 'judge of guarantees' for the adoption of those investigative measures for which the Constitution or the criminal procedural law require judicial authorisation;

---

<sup>18</sup> In some cases, the EPPO shall refrain from exercising its competence on offences that are objectively covered by it, in some others the EPPO may not exercise its competence for a variety of reasons. See Art. 22 and Art. 25(1),(2),(3) and(4) of the EPPO Regulation.

<sup>19</sup> 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.

<sup>20</sup> In accordance with Art. 13(1) of the EPPO Regulation, EDPs shall act on behalf of the EPPO in their respective Member States and shall have the same powers as national prosecutors in respect of investigations, prosecutions and bringing cases to judgment, in addition and subject to the specific powers and status conferred on them, and under the conditions set out in the Regulation. However, according to Art. 28(4) of the EPPO regulation, in exceptional cases, after having obtained the approval of the competent Permanent Chamber, the supervising European Prosecutor may take a reasoned decision to conduct the investigation personally when certain criteria are met.

<sup>21</sup> Art. 30 of the EPPO Regulation lists the investigative measures that EDPs 'are entitled to order or request'. This Article also acknowledges that some of these investigative measures may be subject to additional conditions under national procedural law.

2. introduce remedies against EDPs decisions during the proceedings;<sup>22</sup>
3. decide who will resolve on disputes on competence<sup>23</sup> which may arise between the EPPO and national prosecutors or national investigating judges;
4. decide on the procedural framework applicable to investigations conducted by the EPPO, in compliance with the requirements of the Regulation.

### *Judge of Guarantees*

One of the greatest problems in Spain was, precisely, that when an investigative measure requires judicial authorisation and the prosecutor requests it, the prosecutor loses the direction of the investigation, which then goes to the investigating judge. Therefore, one of the central elements of the reform has been to create a ‘judge of guarantees’, who, among other things,<sup>24</sup> authorises those measures for which the Constitution or the laws require judicial authorisation, without assuming the direction of the investigation.

### *Appeals against EDPs Decisions*

Decisions issued by EDPs during the investigation procedure may be challenged before the judge of guarantees in the cases expressly provided for in the law. The decisions of the judge of guarantees are, in turn, subject to appeal in the cases expressly provided for in the law.

---

22 Art. 42 of the EPPO Regulation generally attributes competence for the review of procedural acts of the EPPO to national judicial bodies, with the express exception of decisions to dismiss a case in so far as they are contested directly based on Union law.

23 In accordance with Art. 25(6) of the EPPO regulation, in the case of disagreement between the EPPO and the national prosecution authorities over the question of whether the criminal conduct falls within the scope of Article 22(2) or (3) or Article 25(2) or (3), the national authorities competent to decide on the attribution of competences concerning prosecution at national level shall decide who is to be competent for the investigation of the case. Member States shall specify the national authority which will decide on the attribution of competence.

24 The judge of guarantees e.g. will also authorise precautionary measures of a personal nature, the declaration of secrecy of the proceedings, and will conduct in certain cases a procedural act for securing evidence.

### *Disputes on Competence*

The EPPO Regulation is clear in establishing the competence of the EPPO over PIF crimes with a damage to the EU's financial interests of more than 10,000 euros and cross-border VAT fraud crimes with a damage of more than 10 million euros. There is little room for interpretation here and, in fact, the EPPO Regulation does not provide for any mechanism that would allow the EPPO's exercise of its competence to be questioned. However, it is possible to imagine discrepancies between the EPPO and national authorities when interpreting the different cases in which Art. 25 of the Regulation imposes certain conditions for the exercise of EPPO's competence. In accordance with Art. 25(6) of the EPPO Regulation, Member States shall specify the national authority which will decide who is to be competent for the investigation in the case of disagreement on competence between the EPPO and national prosecution authorities.

It is easily seen that, in the Spanish case, national authorities involved in the conflict of competence can be of two types, investigating judges and prosecutors. For this reason, the Organic Law 9/2021 introduces a double system: in case of discrepancies between the EPPO and national Prosecutor's Office, the General Prosecutor will decide; if discrepancies arise between the EPPO and an investigating judge, the decision will correspond to the Criminal Chamber of the Supreme Court, following a report from the Public Prosecutor's Office.

It is worth remembering that, according to Art. 42(2)(c) of the EPPO Regulation,

The Court of Justice shall have jurisdiction in accordance with Article 267 TFEU to give preliminary rulings concerning... (c) the interpretation of Articles 22 and 25 of the Regulation in relation to any conflict of competence between the EPPO and the competent national authorities,

and that under Article 267 TFEU, only a court or a tribunal may request the Court to issue a preliminary ruling. It is worth asking, therefore, whether the General Prosecutor is competent to request a preliminary ruling or not, which is a question that is valid for all those Member States, not just Spain, in which the decision on the conflict of competence has been attributed to the General Prosecutor.

So far, three conflicts of competence have been raised in Spain, two of them concerned the issue of the 'inextricable link' of an offence

to criminal conduct that falls within the scope of EPPO's competence; the other concerned the question of whether the PIF offence was committed within the temporal scope of the EPPO's competence (which includes offences committed after 20 November 2017).<sup>25</sup> The latter was resolved by order of the Supreme Court Criminal Chamber no. 20424/2022, of 9 June; the conflicts related to the 'inextricable link' were solved, one by order of the Supreme Court Criminal Chamber no. 1764/2023, of 20 February, and the other by Decision of the State Prosecutor General in March 2022. Without going into detail on the specific aspects of the above-mentioned decisions, it is worth pointing out that two things emerge clearly from them: first, that the delimitation of the EPPO's competence is a singularly complex matter; second, that the decision on competence entails procedural consequences that go beyond ordinary ones, because in the case of Spain, as it will be seen below, it entails not only determining the body that investigates, but also the procedural framework that governs the investigation.

### *Criminal Proceedings*

In the abstract, there were two options to insert the investigation model defined in the EPPO Regulation into the Spanish criminal procedure system: either building a specific and completely new procedure that would apply only to proceedings where the EPPO exercises its competence or introducing a limited number of specific amendments to give practical effect to the Regulation. In the end, the resulting organic law followed the first approach.

Organic Law 9/2021 sets out the details of proceedings related to offences where the EPPO exercises its competence, including the system whereby different national authorities that may become aware of offences within the competence of the EPPO must communicate them to it.

As said above, it was decided to design a specific criminal proceedings regime for those offences under EPPO's competence. It was not an easy task, since respect for the detailed procedural requirements contained in the EPPO Regulation had to be combined with other provisions called to develop those aspects that the Regulation left undefined.

---

<sup>25</sup> According to Art. 120 of the EPPO Regulation, the EPPO shall exercise its competence with regard to any offence within its competence committed after the date on which the Regulation has entered into force; the Regulation entered into force on the twentieth day following that of its publication in the Official Journal of the European Union, which took place on the 31 October 2017.

This ended up dispensing with the investigating judge, as the investigation, according to the Regulation, is conducted by the EDPs, who hold powers that go beyond those held by national prosecutors under current legislation.

The EPPO Regulation mandates EDPs to investigate and prosecute in EPPO cases (cf. Arts. 13(1), 26 to 34 and 36 of the Regulation), and requires Member States to ensure that their EDPs actually have the status and powers necessary to exercise their role. According to Organic Law 9/2021, EDPs shall direct the investigation, ordering all the acts of investigation and securing provided for in the Spanish Criminal Procedure Act, except those reserved to the judicial authority by the Constitution and the rest of the legal system, which shall be authorised by the Judge of Guarantees. Investigative acts, therefore, shall be carried out in accordance with the provisions of the Criminal Procedure Act, except for the specialities expressly established in Organic Law 9/2021. As said above, this implied, in fact, a completely new pre-trial investigative phase, led by the EDPs, where a 'judge of guarantees' holds those functions of judicial review expressly provided for in the law, which are mainly related to the adoption of investigative measures restricting fundamental rights, the adoption or ratification of precautionary measures adopted as a matter of urgency, or the securing of evidence in certain cases. The judge of guarantees also decides on the remedies against the orders of the EDPs in cases expressly provided for by law. Decisions of the judge of guarantees are, in turn, subject to appeal as well.

Title VI of Organic Law 9/2021 provides for an 'intermediate phase' between the prosecution and the trial, where persons against whom the accusation or the request for civil liability is directed can challenge the admissibility of taking the case to trial. Once the EDP, after concluding the investigation, considers that the case has to be sent to trial and, therefore, issues the indictment, he or she asks the judge of guarantees to send the file to the competent court for trial. Then, the indictment is forwarded to the private accusations and the civil plaintiff. After that, the indictment is forwarded to the persons against whom the accusation (and/or the request for civil liability) is directed, who can, either challenge the admissibility of taking the case to trial, or present a statement of defence against the accusations made. If the accused party challenges the admissibility of taking the case to trial, a preliminary hearing with all the parties takes place, after which the judge of guarantees decides if the case merits to be taken to trial or if, on the contrary, it should be dismissed due to the existence of one of the legally determined causes. As a hasty reaction, the existence of this 'intermediate



phase' could be seen as contradicting the provisions of the EPPO Regulation, according to which the EPPO is responsible for investigating, prosecuting, and bringing to judgment the perpetrators of, and accomplices to, criminal offences under its competence. However, it is worth noting that the EPPO Regulation does not impose a specific procedural structure, nor does it determine the phases of the penal procedure in participating Member States. The Spanish legal tradition, as many others, follows a model where, once the investigation phase ends, a judge preliminarily assesses the concurrence of the very minimum legal conditions to take the case to trial. The primary function of this phase is to control the sufficiency of the accusation and, more precisely, to prevent anyone from being accused without sufficient grounds. This is, thus, a form of 'negative control' well known in most legal traditions, which is based on the idea that the rule of law cannot allow a public trial to be held without preliminarily verifying whether the accusation is minimally founded. In other words, it is considered that the mere fact that the case comes to trial before a court constitutes a burden that the accused person should not have to bear without sufficient grounds, since the damages that such a fact entails for his fundamental rights are severe. A particular guarantee of the right of defence is thus established, as to prevent radically unfounded accusations.

The organic law has also paid attention to cross-border actions in its Art 51. This responds to the new legal reality derived from Articles 31 to 33 of the EPPO Regulation, according to which, where a measure needs to be undertaken in a Member State other than the Member State of the handling EDP, the latter EDP decide on the adoption of the necessary measure and assign it to a EDP in the Member State where the measure needs to be carried out. In addition, Law 23/2014, on mutual recognition of judicial decisions in the EU, had to be modified to equate the EDPs to the national judicial authorities for the purposes of the said law. This presents particular importance with a view to Art. 105 of the EPPO regulation, related to the cooperation with EU Member States that do not participate in enhanced cooperation on the establishment of the EPPO.

### 3.3. Administrative Issues

Beyond the complex procedural issues referred to above, the implementation of the EPPO entailed a range of measures of administrative and logistical nature. The most relevant are referenced below:

- Rules for the appointment of the EP and the EDPs were needed, to ensure the participation of qualified candidates and transparency in their selection. Thus, Royal Decree 882/2022, of 18 October, regulating the procedure for the selection and appointment of the shortlist of candidates for the post of European Prosecutor and candidates for the post of European Delegated Prosecutors in Spain, was enacted. The procedure is based on a selection committee, which is attached to the Ministry of Justice. The Secretary of State for Justice chairs the selection committee, which is composed of a representative of the General State Prosecutor's Office, appointed by that body; a representative of the General Council of the Judiciary, appointed by that body; the Director General of the Public Service of Justice; and the Director General of Integration and Coordination of General Affairs of the European Union of the Ministry of Foreign Affairs, European Union and Cooperation. When the call refers to the appointment of candidates for EDPs, the person who occupies the position of European Prosecutor designated by Spain will also be part of the selection committee. To verify, if necessary, the linguistic competence of the candidates, the selection committee may also have the participation and assistance, as advisors, of officials designated by the Language Interpretation Office of the Ministry of Foreign Affairs, European Union and Cooperation, with voice, but without vote.
- As said above, Spain had opted for the EDPs to perform their function exclusively (no 'double-hat'). The EPPO Regulation requires that EDPs continue in active service in their respective careers of origin from appointment until dismissal.<sup>26</sup> Consequently, the Organic Law on the Judiciary (which subsidiarily applies also to prosecutors) had to be amended so that the exercise of the post as EP or as EDP counts as active service in the judiciary and the prosecutor's office. This ensures that, once their mandate is over, the EP and EDPs can return to their respective previous positions.
- EDPs remuneration is entirely covered by the budget of the European Union. Therefore, the cost of covering their original

---

26 Art. 17(2) of the EPPO Regulation.

posts which become vacant in the national prosecutorial or judicial career is calculated as zero because the remuneration of judges or prosecutors who cover the vacant posts are financed by the salaries not paid to judges or prosecutors appointed as EDPs. However, although the EU covers EDPs' remuneration, Social Security cover has to be provided by Member States.<sup>27</sup> Since the Spanish State is not the employer of the EDPs, allowing the satisfaction by the State of EDPs' social contributions constituted a legal headache, although the necessary adaptations were finally made. What is still under discussion is how and who will pay the seniority supplement in the judiciary or the prosecutor's office.<sup>28</sup> On the other hand, the EDPs will have the right to reserve the position they occupied in the judiciary or the prosecutor's office at the time they were appointed EDPs, or the one they could obtain during their appointment. Their mandate as EDP will be considered for the purposes of promotion and provision of positions as if it had been effectively provided in their career of origin.<sup>29</sup>

- Article 96(2) of the EPPO Regulation provides that the competent national authorities will provide the EDPs with the resources and equipment they need to carry out their functions. Accordingly, by Order of the Minister of Justice JUS/146/2022, of 21 February, the Administrative Office of the European Prosecutor's Office in Spain was created.
- Needless to mention, it has been also necessary to find premises adapted to the needs of the EPPO, with the appropriate security measures, as well as guaranteeing adequate staff, material, computer, and office resources.

---

<sup>27</sup> According to Art. 96(6) of the EPPO regulation, it shall be ensured that adequate arrangements are in place so that the European Delegated Prosecutors' rights relating to social security, pension and insurance coverage under the national scheme are maintained. Article 15(2) of L.O. 9/2021 provides that the integration of the EDPs in the Social Security regime that corresponded to them as members of the judiciary or the prosecutor's office will be maintained.

<sup>28</sup> Article 15(2) of L.O. 9/2021 provides that the EDPs will receive their remuneration of the EPPO, without prejudice to the remuneration due to 'prosecutors' seniority'. Considering that only the EPPO may grant a top-up if required to maintain the level of salary that the EDP had as a national prosecutor, it will be necessary to clarify whether the EDPs can receive this supplementary payment from the Spanish administration.

<sup>29</sup> Article 15(3) of L.O. 9/2021.

- As concerns the working language, EDPs perform their duties within the national criminal procedure system, which is carried out in the official languages of the Spanish State. However, the European nature of the EPPO entails the need for a common working language. Art. 1(1) of EPPOs College Decision 002/2020 establishes English as the working language for the EPPO's operational and administrative activities. According to Art. 2(4) of the Internal Rules of Procedure, the EDP handling the case must ensure the translation. Although, based on Art. 3(1) of the Internal Rules of Procedure, the EPPO will seek to use electronic translation tools for speedy and high-quality translations, is expected that the regular operations of the EPPO will generate significant translation costs. In this regard, Recital 113 of the EPPO Regulation refers to the costs of operational communication between the EDPs and the central level of the EPPO, such as translations necessary for the internal functioning of the EPPO, and Article 91(5) of the EPPO Regulation provides that operational expenditure shall also include, amongst other, translations necessary for the internal functioning of the EPPO, such as translations for the Permanent Chambers.

#### **4. Conclusion**

The implementation of the EPPO constituted a particularly substantive challenge for Spain, where an investigating judge has the leading role in the pre-trial phase of criminal proceedings. In the end, the legislative option chosen was to introduce legal reforms that are so far-reaching that they in fact provide for a new and specific procedural framework for those offences where the EPPO exercises its competence.

It has not been an easy task, and further adaptations cannot be excluded in the future, as experience could demonstrate potential dysfunctions. It is a process of trial and error; it is a joint journey where the exchange of experiences between participating Member States and a constant dialogue with the EPPO will certainly help. Nevertheless, this journey is worthwhile, and we are in good company.

## Bibliography

1. Bachmaier Winter, Lorena (coord.). *La Fiscalía Europea*. Ed. Marcial Pons, 2018.
2. Revista del Ministerio Fiscal, nº 9. Fiscalía General del Estado, 2020.
3. Salvador Guerrero Palomares (dir.), Leticia Fontestad Portalés (coord.), Alejandro Hernández López (coord.), Paulo Ramón Suárez Xavier (coord.), Luis Aparicio Díaz, Coral Arangüena Fanego, María Ángeles Pérez Marín (coord.). Tratado sobre la Fiscalía Europea y el procedimiento penal especial de la L.O. 9/2021, de 1 de julio, Ed. Aranzadi, 2023.
4. Concepción Sabadell Carnicero, La competencia material de la Fiscalía Europea, Diario LA LEY nº 10298, Sección Tribuna, 1 de Junio de 2023, LA LEY.
5. Miranda Rodrigues, Anabela, Nieto Martín, Adán, Acale Sánchez, María, Costa Miguel, João (eds.). *La Fiscalía Europea ante la delincuencia económica y financiera*. Coimbra FDUC, 2023.