



EUROPEAN PUBLIC PROSECUTOR'S OFFICE — RELATIONS WITH POLAND AS A STATE NOT PARTICIPATING IN ENHANCED COOPERATION

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Abstract

This article deals with a new European institution: the European Public Prosecutor's Office (the EPPO). The author discusses the origins of the EPPO, the issue of cooperation between the EPPO and non-participating states, Poland's position on non-participation in enhanced cooperation, as well as the proposed solution for mutual cooperation between Poland and the EPPO. The position adopted by Poland includes the necessity to amend the provisions of the Polish Code of Criminal Procedure, because in the current legal framework the EPPO is not an entity authorised to operate in cross-border legal actions with Poland. To establish mutual cooperation, the next step should be to conclude a working agreement. In the final conclusions, the author indicates that even if Poland, due to the voluntary status of participation in enhanced cooperation, was entitled to refuse to participate, it is nevertheless still obliged to cooperate with the EPPO. It is therefore necessary for Poland to immediately adopt solutions that will make this cooperation possible. Failure to introduce these solutions can be regarded as a breach of Treaty obligations (Article 258 of the TFEU). An alternative solution to the current situation is for the Commission to use its power to propose legislative measures to ensure effective mutual cooperation between Poland and the EPPO.

Keywords

European Public Prosecutor's Office (the EPPO), non-participating Member State

INTRODUCTION

The European Public Prosecutor's Office (the EPPO) – the new independent public prosecution office of the EU, established for investigating, prosecuting, and bringing to judgement crimes against the financial interests of the EU – commenced its operations on 1 June 2021. The expectations of the EPPO are enormous. Although the first months of the EPPO's operation show that it is a body that carries out its tasks actively and consistently, it is still far too early to assess the legitimacy of the establishment of this institution and the effectiveness of its activities. This study aims to present the current situation of Poland as a non-participating Member State (hereinafter the NPMS), in particular to answer the questions of whether Poland has an obligation to cooperate with the EPPO and what legal possibilities exist to establish a legal framework for this cooperation.

1. THE JOURNEY FROM THE *CORPUS JURIS* TO COUNCIL REGULATION (EU) 2017/1939

The idea of a European Public Prosecutor's Office was first included in the *Corpus Juris* project (1997).¹ The concept of establishing this body aroused considerable interest and became the subject of lively scientific and political discourse. The deliberations concerned all issues related to the EPPO: the purposefulness of its establishment, its competences, structure, principles of functioning, and rules of cooperation with Member States and EU institutions. Another important stage in the discussion on the creation of the European Public Prosecutor's Office was the publication by the European Commission of the Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor (2001).² However, of great importance for the establishment of the EPPO was the adoption of the Treaty of Lisbon, which provided the legal basis for the creation of this body. Pursuant to Article 86 (1) of the TFEU:

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.

- 1 Barbara Namysłowska (ed), *Corpus Iuris zawierający przepisy karne mające na celu ochronę interesów finansowych Unii Europejskiej. Wydanie dwujęzyczne angielsko-polskie, Bilingual edition English-Polish* (C.H. Beck 1999). See also 'Florence version': Mireille Delmas-Marty, John A.E. Vervaele, *The Implementation of the Corpus Juris in the Member States* (Intersentia 2000) (4 Vol.).
- 2 Commission of the European Communities, Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, Brussels, 11 December 2001, COM (2001) 715 final.

A further part of this provision sets out the procedure for establishing the EPPO, also providing for the option of using enhanced cooperation in this area, and indicates in a very general way the competences of the new body. On 17 July 2013, the Commission published a proposed regulation regarding the establishment of the EPPO.³ On one hand, it was already the culmination of many years of discussion on this issue, and on the other hand, it reignited the intense debate about the subject.⁴ The Commission's proposal did not meet with unanimous approval. The parliaments of the Member States sent opinions (the so-called 'yellow card procedure') raising a whole range of objections to the proposal.⁵ Despite this, the Commission considered that there was no need to withdraw or amend the proposal and maintained it unchanged. By ignoring the concerns raised, the Commission has shown its determination in pursuing the establishment of the EPPO.⁶ Legislative work on the proposal continued over the ensuing years, with many changes made to the draft.⁷ Despite the changes introduced and the many discussions held between academics, practitioners, representatives of EU institutions and politicians, the idea of creating a European Public Prosecutor's Office was not accepted by all Member States. It therefore became clear that the establishment of the EPPO was only possible through enhanced cooperation.⁸ And ultimately, that is what

3 European Commission, Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, Brussels, 17 July 2013, COM(2013) 534 final.

4 See more Lorena Bachmaier Winter, 'The potential contribution of European Public Prosecutor in light of the proposal for regulation of 17 July 2013' (2015) 23 *European Journal of Crime, Criminal Law and Criminal Justice* 121-144; Katalin Ligeti, 'The European Public Prosecutor's Office: How should the rules applicable to its procedure be determined?' (2011) 123 *European Criminal Law Review* 123-148; Katalin Ligeti, Michele Simonato, 'The European Public Prosecutor's Office: Towards a Truly European Prosecution Service?' (2013) 4 *New Journal of European Criminal Law* 7-21; Michiel Luchtman, John A.E. Vervaele, 'European Agencies for Criminal Justice and Shared Enforcement (Eurojust and the European Public Prosecutor's Office)' (2014) 10 *Utrecht Law Review* 132-150; Grażyna Stronikowska, *Prokuratura Europejska jako instrument ochrony interesów finansowych Unii Europejskiej* (C.H. Beck 2020) 127-129 and the literature referred to therein; John A.E. Vervaele, 'The European Public Prosecutor's Office (EPPO): Introductory Remarks' in Willem Geelhoed, Leendert H. Erkelens, Arjen W.H. Meij (eds), *Shifting Perspectives on the European Public Prosecutor's Office* (Springer 2018) 11-19.

5 See more Marek Tomczyk, *Prokuratura Europejska. Geneza, ewolucja koncepcji oraz kluczowe kontrowersje w perspektywie funkcjonowania organu* (Instytut Wydawniczy EuroPrawo 2018) 186-188.

6 Ibid, 188.

7 Tomasz Ostropolski, 'Współpraca wymiarów sprawiedliwości w sprawach karnych' in Jan Barcz (ed), *System Prawa Unii Europejskiej. Współpraca sądowa w sprawach cywilnych, karnych i współpraca policyjna.*, Vol. 8 (C.H. Beck 2021) <<https://sip.legalis.pl/document-full.seam?documentId=mjxw62zogi3damzygm4tkmy>> accessed 7 June 2022.

8 On the implications of the establishment of the EPPO through enhanced cooperation see Szymon Pawelec, 'Implications on Enhanced Cooperation for the EPPO Model and Its Functioning' in Leendert H. Erkelens, Arjen W.H. Meij, Marta Pawlik (eds), *The European Public Prosecutor's Office. An Extended Arm or a Two – Headed Dragon?* (Springer 2015) 209-227; Julian J.E. Schutte, 'Establishing Enhanced Cooperation Under Article 86 TFEU' in Leendert H. Erkelens, Arjen W.H. Meij, Marta Pawlik (eds), *ibid* 195 – 208; Sławomir Steinborn, 'Komentarz do Artykułu 86 TFUE' in Dawid Miąsik, Nina Półtorak and Andrzej Wróbel (eds), *Traktat o funkcjonowaniu Unii*

happened. On 3 April 2017, sixteen Member States gave notice of their intention to engage in enhanced cooperation to establish the EPPO.⁹ Shortly after, on 12 October 2017, the Council adopted Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (hereinafter Regulation 2017/1939).¹⁰ By that time, four more countries had joined enhanced cooperation (Austria, Estonia, Italy and Latvia) with two more (the Netherlands and Malta) joining after the adoption of the regulation. Thus, currently the EPPO is made up of 22 Member States. The following states remain outside the EPPO: Poland, Hungary, Sweden, Denmark and Ireland.¹¹

Pursuant to Article 328 of the TFEU, enhanced cooperation is open to all Member States, so non-participating countries can join at any time if they fulfil the conditions set out in the regulation establishing the EPPO and respect the legal acts already adopted under this cooperation. It is also worth emphasising that participation in enhanced cooperation is voluntary and should remain so. Any other solution would contradict the essence of this mechanism, which serves to promote deeper integration within a narrower group of those Member States that are prepared to do so and are willing to cooperate.¹² Enhanced cooperation can provide the impetus for other countries to take the same steps, but it should not be used as an instrument to put pressure on non-participating states.¹³

2. WHY IS POLAND NOT PARTICIPATING IN ENHANCED COOPERATION?

Poland, despite active participation in many years of work on the final shape of the EPPO, decided not to join enhanced cooperation.¹⁴ The reasons justifying Poland's refusal to

Europejskiej. Komentarz, Vol. I (Wolters Kluwer 2012) <<https://sip.lex.pl/#/commentary/587327160/124600?pit=2022-03-13&keyword=Traktat%20o%20funkcjonowaniu%20Unii%20Europejskiej&tocHit=1&cm=SREST>> accessed 12 March 2022.

- 9 Belgium, Bulgaria, the Czech Republic, Croatia, Cyprus, Germany, Greece, Finland, France, Lithuania, Luxembourg, Portugal, Romania, Slovakia, Slovenia and Spain.
- 10 Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') [2017] OJ L 283/1.
- 11 Denmark and Ireland benefit from an opt-out clause in the area of EU freedom, security and justice. And in April 2019, the Prime Minister of Sweden announced his intention to join the EPPO.
- 12 Justyna Maliszewska – Nienartowicz, 'Zasada wzmocnionej współpracy w prawie Wspólnoty Europejskiej – od Traktatu Amsterdamskiego po projekt Traktatu Konstytucyjnego' [2007] (1) *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 33, 35.
- 13 On the origins and perils of enhanced cooperation see more Sławomir Dudzik, 'Mechanizm wzmocnionej współpracy na tle konstytucyjnych zasad porządku prawnego Unii Europejskiej' [2003] (1) *Kwartalnik Prawa Publicznego* 7-39 <https://bazhum.muzhp.pl/media/files/Kwartalnik_Prawa_Publicznego/Kwartalnik_Prawa_Publicznego-r2003-t3-n1/Kwartalnik_Prawa_Publicznego-r2003-t3-n1-s7-39/Kwartalnik_Prawa_Publicznego-r2003-t3-n1-s7-39.pdf> accessed 12 March 2022; Monika Szwarc, *Zróżnicowana integracja i wzmocniona współpraca w prawie Unii Europejskiej* (Prawo i Praktyka Gospodarcza 2005) 176-285 and the literature referred to therein.
- 14 At this point, one should also emphasise the very extensive Polish academic output on the subject of

co-create the EPPO were indicated, *inter alia*, in the official response to a parliamentary inquiry, No 6373, concerning this issue.¹⁵ It turns out that the key argument against joining enhanced cooperation by Poland was reservations about the scope of competences of this EU body. This response indicates that the Polish side, during negotiations regarding the proposed regulation on the establishment of the EPPO and directive on the fight against fraud to the Union's financial interests by means of criminal law (the 'PIF directive'¹⁶), had consistently opposed the proposal excluding the investigation of VAT offences from the exclusive competence of the Member States. It was argued that in such cases it is difficult to speak of any harm to the EU's financial interests, since VAT revenues are primarily national budgetary revenues. In addition, Poland questioned the jurisdiction of the EPPO over offences involving the use of EU funds if the harm to the EU budget would be minimal compared to the harm to the national budget. Poland's reservations were also provoked by the EPPO's powers to prosecute offences described as 'inseparable' from offences detrimental to the EU's financial interests. It was argued that such a broad and, at the same time, vaguely defined scope of competences was related to the potential extension of the jurisdiction beyond the limits set out in Article 86 of the TFEU and the risk of interference by an external entity (the EPPO) in the powers of the Member States. Another argument raised by the Polish side was related to the lack of control over the activities of the EPPO by the Court of Justice of the EU (the CJEU). It was argued that due to the European nature of the EPPO and the cross-border dimension of its jurisdiction, control of its activities should also lie with a supranational court. It was proposed that the CJEU be guaranteed the right to hear appeals against the EPPO decisions that would have cross-border effects. Concerns were also raised about the case management system, which allows the EPPO to have extremely wide access to information and data held by national authorities with powers to conduct preparatory proceedings, while requiring the development of costly IT systems. There were also concerns about the complex structure of the EPPO, the complicated and lengthy decisionmaking processes, and the large amount of bureaucratic obligations imposed on national authorities.¹⁷

It is worth adding that the abovementioned reservations from the Polish side were also raised by other countries in the course of work on establishing the EPPO. Although the controversy over the EPPO has not gone away, and many issues still remain problematic, in the end only five countries decided not to participate in enhanced cooperation, with Sweden declaring its willingness to join in 2022. In conclusion, Poland has the right

the EPPO, in particular: regular scientific conferences organised by Towarzystwo Badawcze Prawa Europejskiego (Cracow 1999, Warsaw 2003–2018).

15 Sejm Rzeczypospolitej Polskiej, VIII kadencja, Archiwum, Response from the Undersecretary of State in the Ministry of Justice of 25 January 2018 to parliamentary inquiry No 6373 on the European Public Prosecutor's Office <<https://www.sejm.gov.pl/sejm8.nsf/InterpelacjaTresc.xsp?key=565CA1EC&view=null>> accessed 31 January 2022.

16 Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law [2017] OJ L 198/29.

17 Response (n 15).

to refuse to participate in enhanced cooperation establishing the EPPO¹⁸, however, at any time, it may change its mind and join enhanced cooperation. It is hard to disagree with Krisztina Karsai's opinion that 'participation in the EPPO primarily appears as a political rather than a professional issue in Member States'.¹⁹ Therefore, without a change in the approach towards cooperation with the EU, it is difficult to expect Poland to join the EPPO in the near future. The lack of participation of all EU Member States in the EPPO raises concerns about the effectiveness of the EPPO's actions.²⁰ It has been pointed out that if 'states like Poland and Hungary do not participate in the future, the EPPO cannot fulfil its fundamental role of protecting the EU and its financial solidarity interests in an efficient and comparable way within the EU territory'.²¹ The above concerns seem legitimate, however, it should be noted that it is reasonable to raise this point against all non-participating Member States (the NPMS), not just Poland and Hungary.

3. JUDICIAL COOPERATION BETWEEN THE EPPO AND NON-PARTICIPATING MEMBER STATES

Non-participating Member States²² are also not bound by the provisions of Regulation 2017/1939.²³ However, this does not mean that they can ignore the existence of the

18 It should be stressed that the opinion that Poland is a country 'in which corruption and EU fraud-related problems are widespread and apparently not effectively prosecuted' (Fabio Giuffrida, 'Now or Never: the European Public Prosecutor's Office and Enhanced Cooperation', Societal Security Network <<http://observatory.societalsecurity.net/blog/now-or-never-european-public-prosecutor%E2%80%99s-office-and-enhanced-cooperation>> quoted after: Constanza Di Francesco Maesa, 'Repercussions of the Establishment of the EPPO via Enhanced Cooperation. EPPO's Added Value and the Possibility to Extend its Competence' [2017] (3) EUCRIM 156, 157 is false and the clearest rebuttal calls for directly quoting the statement of the Vice-President of the European Commission, Vera Juorova: 'I do not understand why Poland has not joined the European Public Prosecutor's Office, because, incidentally, it does not have aboveaverage problems with abuse in this area. On the contrary, Poland has always been regarded as one of the countries that spend European funds very well', Deutsche Welle, Statement by Vera Juorova <<https://www.dw.com/pl/jourov%C3%A1-polacy-czy-w%C4%99grzy-nie-chc%C4%85-wr%C3%B3ci%C4%87-do-re%C5%BCim%C3%B3w-authoritarian/a-57310910>> accessed 31 January 2022.

19 Krisztina Karsai, 'The European Public Prosecutor's Office and Hungary. Challenge or Missed Opportunity?' (Transparency International Hungary 2020), 7 <https://transparency.hu/wp-content/uploads/2021/02/europai_ugyeszseg_eng_VEGSO.pdf> accessed 31 January 2022. See more about political aspects of the establishment of the EPPO Celina Nowak, 'Prokuratura Europejska – idea się urzeczywistnia' [2013] (11) Prokuratura i Prawo 19, 41-42.

20 Szymon Pawelec, 'Uwagi na temat zakresu kompetencji przyszłej Prokuratury Europejskiej' [2014] (5-6) Palestra 25, 38.

21 Lothar Kuhl, 'The European Public Prosecutor's Office – More Effective, Equivalent, and Independent Criminal Prosecution against Fraud?' [2017] (3) EUCRIM 135, 140.

22 Regulation 2017/1939 refers to non-participating Member States and third countries, but these are not synonymous expressions, as the latter are not EU countries.

23 Hans-Holger Herrnfeld, Judith Herrnfeld, 'The European Public Prosecutor's Office – where do

EPPO and refuse to cooperate with it. On the contrary, as EU Member States, they have a duty of sincere cooperation, which flows from Article 4 of the Treaty on European Union (the TEU). It is worth quoting *in extenso* Recital 110 of the preamble to Regulation 2017/1939, which states:

Member States of the European Union which do not participate in enhanced cooperation on the establishment of the EPPO are not bound by this Regulation. The Commission should, if appropriate, submit proposals in order to ensure effective judicial cooperation in criminal matters between the EPPO and Member States of the European Union which do not participate in enhanced cooperation on the establishment of the EPPO. This should in particular concern the rules relating to judicial cooperation in criminal matters and surrender, fully respecting the Union acquis in this field as well as the duty of sincere cooperation in accordance with Article 4 (3) TEU.

What is more, Article 325 of the TFEU stipulates that both the EU and its Member States are obliged to counter all activities affecting the financial interests of the Union, and that the Member States are obliged to take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests.

In this regard, the question arises of how the NPMS should fulfil their obligation to cooperate with the EPPO. The answer to this question is not simple, especially since the provisions of Regulation 2017/1939 concerning the EPPO's relationship with the NPMS are unclear or even slightly contradictory.²⁴

The rules governing the relationship of the EPPO with the NPMS are set out in the cited Recital 110 of the Preamble as well as in Articles 99 and 105 of Regulation 2017/1939.²⁵ Pursuant to Article 99 (1) of Regulation 2017/1939, the EPPO, to the extent necessary for the performance of its tasks, may establish and maintain cooperation with the authorities of the NPMS. The EPPO may also exchange any information with them if it is relevant for the performance of its tasks, and Regulation 2017/1939 does not

we stand?' (2021) 22 ERA Forum 655,668 <<https://doi.org/10.1007/s12027-021-00688-0>>.

24 Nicholas Franssen, 'The future judicial cooperation between the EPPO and non-participating Member States' (2018) 9 New Journal of European Criminal Law 291, 297.

25 It is worth mentioning that in the proposal of the regulation on the establishment of the EPPO, published on 17 July 2013, there were no provisions that would regulate the cooperation of the EPPO with the NPMS. This omission was surprising, as it was already known that at least three Member States – Denmark, the United Kingdom and Ireland – would not participate in the establishment of the EPPO (Recitals 47 and 48 of the Preamble). It was only during the Slovak Presidency (July – December 2016) that the issue of the EPPO's relations with the NPMS was considered. These efforts resulted in the addition of a new provision, Article 59a, to the proposal (later Article 105 of the Regulation). See European Commission, Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, Brussels, 17 July 2013, COM(2013) 534 final.

provide otherwise (Article 99 (2)). Article 99 (3) of Regulation 2017/1939 provides for the possibility of concluding working arrangements between the EPPO and the NPMS. These arrangements shall be of a technical or operational nature and serve in particular to facilitate cooperation and information exchange between the parties. However, they may not constitute the basis for an exchange of personal data, nor may they have legally binding effects on the Union or its Member States. Article 99 of Regulation 2017/1939 contains the common provisions and applies to the EPPO's relations with its partners (not only countries not participating in enhanced cooperation, but also with institutions and bodies or EU administrative entities).

In contrast, Article 105 of Regulation 2017/1939 is more specific and applies only to the cooperation of the EPPO with the NPMS. In the first paragraph of this Article, the working arrangements referred to in Article 99 (3) are clarified by indicating that they may in particular relate to the exchange of strategic information and the secondment of liaison officers to the EPPO. In accordance with Article 105 (2), the EPPO may designate, in agreement with the competent authorities, contact points in the Member States that do not participate in enhanced cooperation in order to facilitate cooperation in accordance with the EPPO's needs. The issues regulated in paragraphs 1 and 2 of Article 105 do not raise major doubts, contrary to paragraph 3 of this Article.²⁶ It suggests that a specific legal instrument should be the preferred and overarching basis for cooperation between the EPPO and the NPMS.²⁷ It is only in the absence of this legal instrument that Member States shall designate the EPPO as the competent authority for cooperation on matters within the scope of the EPPO's cognisance in its relations with the NPMS. However, such a solution is very ambiguous and raises many doubts.²⁸ As non-participating Member States are not bound by the provisions of Regulation 2017/1939, it is possible that they would not consider it sufficient for participating states to designate the EPPO as the competent authority for the purposes of cooperation. This is the position of Poland, which is reflected in the proposed amendments to the Code of Criminal Procedure (hereinafter the CCP).²⁹

26 Article 105 (3) states: 'In the absence of a legal instrument relating to cooperation in criminal matters and surrender between the EPPO and the competent authorities of the Member States of the European Union which do not participate in enhanced cooperation on the establishment of the EPPO, the Member States shall notify the EPPO as a competent authority for the purpose of implementation of the applicable Union acts on judicial cooperation in criminal matters in respect of cases falling within the competence of the EPPO, in their relations with Member States of the European Union which do not participate in enhanced cooperation on the establishment of the EPPO.'

27 The literature indicates ambiguity as to the legal basis on which it should be based: Dominik Brodowski, 'Commentary to the article 105' in Hans – Holger Herrnfeld, Dominik Brodowski and Christoph Burchard (eds), *European Public Prosecutor's Office. Article-by-Article Commentary* (C.H. Beck, Hart, Nomos 2021) 638.

28 Ibid; Franssen (n 24); Karsai (n 19).

29 Kodeks postępowania karnego (1997) [Code of Criminal Procedure], Dz.U. (1997), No 89, item 555 with subsequent amendments.

4. JUDICIAL COOPERATION BETWEEN THE EPPO AND POLAND

Although Poland does not participate in enhanced cooperation and is not bound by the provisions of Regulation 2017/1939 (Recital 110), as already mentioned, as a Member State it is nonetheless obliged to sincerely cooperate with the Union, as required by Article 4 of the TEU. To date, however, no solutions have been adopted that would allow for cooperation between the Polish judicial authorities and the EPPO. Although in August 2021 a draft act, amending the CCP, which related to the matter in question (hereinafter the draft act)³⁰ was published on the website of the Government Legislation Centre [Rządowe Centrum Legislacji, RCL], it was removed after a dozen or so days. After that, there was no other proposal made for the legislation necessary to enable Poland to cooperate with the EPPO.

The aforementioned draft act provided for the introduction of a new provision to the CCP – Article 615 a. According to the initially designed solutions, the relations between the Polish bodies responsible for criminal proceedings and the EPPO were to be regulated within:

- Chapter 62 of the CCP ('Legal aid and service in criminal cases'); in the explanatory memorandum to the draft, it was specified that it refers in particular to the provisions concerning the establishment of an investigative team,
- Chapter 62c of the CCP ('Requesting a Member State of the European Union to take investigative measures on the basis of a European Investigation Order'),
- Chapter 62d of the CCP ('Request by a Member State of the European Union to take investigative measures on the basis of a European Investigation Order'),
- Chapter 63 of the CCP ('Takeover and transfer of criminal prosecution'); in the explanatory memorandum, it was specified that it refers in particular to the regulations relating to jurisdictional conflicts,
- Chapter 65b of the CCP ('Request of a European Union Member State to surrender the prosecuted person on the basis of a European arrest warrant'),
- Chapter 65d of the CCP ('Request of a European Union Member State to enforce a judgement issued in order to ensure the proper course of the proceedings'),
- Chapter 67 of the CCP ('Final Provisions'),
- Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders.³¹

The indicated legal framework does not include Chapters 62a and 62b of the CCP, on freezing of evidence and assets in the EU, which have been omitted as they apply only

30 Draft act of 24 August 2021 amending the Act – Code of Criminal Procedure (No UD 244). See also Krzysztof Sobczak, 'Polska będzie współpracować z Prokuraturą Europejską' <<https://www.prawo.pl/prawnicy-sady/prokuratura-europejska-polska-bedzie-wspolpracowac-jest-projek,510222.html>> accessed 31 January 2022.

31 Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders [2018] OJ L 303/1.

in relations with Denmark and Ireland, while cooperation in this respect with other EU Member States takes place (since 19/12/2020) on the basis of the directly applicable provisions of the abovementioned Regulation 2018/1805.

The authors of the draft act emphasised that an amendment to the provisions of the CCP is necessary because in the current legal circumstances the EPPO is not an entity authorised to operate in crossborder procedural activities with Poland. Therefore, it is not possible for Polish courts and prosecutors to provide legal assistance to the EPPO, nor is it possible for Polish courts and prosecutors to submit requests for legal assistance to the EPPO. The reason for this is that the EPPO is a body of the EU and not a body of those Member States participating in enhanced cooperation. And *de lege lata*, the provisions of the CCP provide a basis for the application of EU legal instruments only in relations with EU Member States and their competent authorities, and not in relations with EU authorities. At the same time, it was emphasised that this problem cannot be solved only through notifications submitted pursuant to Article 105 (3) of Regulation 2017/1939 by the participating Member States, designating the EPPO as an entity authorised to act in legal transactions in criminal matters, including to enforce judgements issued by the competent authorities of the Member States not participating in enhanced cooperation.

In other words, the Polish side assumed that since the EPPO, given the current wording of the CCP, is not an entity authorised to operate in cross border legal transactions, this state of affairs can only be changed by amending this Code. This modification will create a legal framework for mutual cooperation that will be equivalent to an act of the legislature, and the principles of this cooperation will be specified in an agreement subsequently concluded between the State Prosecutor's Office of the Republic of Poland and the EPPO.³²

The proposed solution deserves approval and therefore it is difficult to find any rational justification for abandoning further work on the draft act regulating this issue, especially considering that without adopting the proposed changes, cooperation between Poland and the EPPO is impossible. In the context of the tense relations between Poland and the EU, the reasons for desisting may therefore be political rather than substantive.

De lege lata, there are no legal instruments that would allow Poland to cooperate with the EPPO. This situation should be changed as soon as possible, because Poland, as an EU Member State, cannot ignore the establishment of the EPPO. Maintaining a different position could be seen as a breach of Treaty obligations (Article 258 of TFEU).

On 16 February 2022, the European Chief Prosecutor sent a letter to the European Commission, indicating that Poland refused to cooperate with the EPPO.³³

32 It should be noted that Hungary signed a working arrangement on cooperation with the EPPO, which entered into force on 6 April 2021. European Public Prosecutor's Office, 'EPPO signs working arrangement with the Office of the Prosecutor General of Hungary' <<https://www.eppo.europa.eu/en/news/eppo-signs-working-arrangement-office-prosecutor-general-hungary>> accessed 13 March 2022.

33 European Public Prosecutor's Office, 'Letter sent to European Commission regarding Poland's refusal

Therefore, it seems that the issue of creating legal possibilities for mutual cooperation should immediately become the subject of legislative work.

CONCLUSIONS

The issue of cooperation between the EPPO and the countries not participating in enhanced cooperation has not been regulated in a clear and transparent manner. As a consequence, interpretations have diverged, which has led to the adoption of different models of cooperation between the EPPO and the NPMS.

Referring to the question posed in the introduction, it should be recognised that the Member States have always had the right to decide to join enhanced cooperation for the EPPO, or to remain outside. However, if they decide not to join, there is still an obligation imposed on them to cooperate with the EPPO. In such cases it is necessary to take immediate action to introduce the legal possibility of mutual cooperation. The absence of relevant provisions can be viewed as a failure to fulfil Treaty obligations (Article 258 of TFEU). With regard to such cooperation, it is worth mentioning that according to Recital 110 to the Preamble of Regulation 2017/1939, the Commission should, if appropriate, submit proposals in order to ensure effective judicial cooperation in criminal matters between the EPPO and EU Member States which do not participate in enhanced cooperation on the establishment of the EPPO. Consequently, it should be emphasised that the Commission has the competence to take action to establish a cooperation mechanism. Tapping into this competence is perhaps a way out of the current stalemate.

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