

Institutional independence and sustainability: selection, status and number of EDPs and support staff

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According to Article 119 of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (EPPO Regulation), the Commission shall prepare an evaluation and shall submit an evaluation report on the implementation and impact of the EPPO Regulation, as well as on the effectiveness and efficiency of the European Public Prosecutor's Office (EPPO) and its working practices no later than five years after the start date of the operational work of the EPPO. As the EPPO started its work on 1 June 2021, the Commission's report is due on 1 June 2026. Leading up to this date, discussions are already underway as to which parts of the EPPO Regulation might or might not be subject to a revision. The overall aim of this exercise is to think about ways of strengthening the EPPO in the future. One important part of this consideration concerns institutional independence. Against this background, the present contribution reflects on the selection, status and number of European Delegated Prosecutors (EDPs) and support staff under Article 96 of the EPPO Regulation from the perspective of a Member State. It should be emphasised in this regard that these reflections can currently represent no more than initial personal¹ reflections. It cannot be ruled out that these assessments may change over the course of the discussions on the revision of the EPPO Regulation – discussions which are just beginning and to which Villa Vigoni has opened its doors.

1 The role of the EDPs within the EPPO

Article 8 of the EPPO Regulation sets out the structure and the framework of the EPPO: The EPPO is an indivisible Union body operating as one

¹ The contribution only reflects the personal view of the author and not the official opinion of the German Federal Ministry of Justice and Consumer Protection.

single office with a decentralised structure. It is organised at a central level (College, Permanent Chambers, European Chief Prosecutor, Administrative Director etc) and at a decentralised level. According to Article 8(4) and Recital 21 of the EPPO Regulation, the decentralised level of the EPPO consists of EDPs located in the Member States. According to Article 13(1) of the EPPO Regulation, the EDPs shall act on behalf of the EPPO in their respective Member State and shall have the same powers as national prosecutors in respect of investigations, prosecutions and bringing cases to judgment. Article 17(2) of the EPPO Regulation clarifies further that the EDPs shall be active members of the public prosecution service or judiciary of the respective Member State which nominated them.

The role of the EDPs as intended by the EPPO Regulation mirrors the hybrid structure of the EPPO. On the one hand, the EPPO is a supranational body connected to the European Union (EU) and is essentially governed by the EPPO Regulation. On the other hand, the EPPO is linked to the national law of the Member States and national law applies if a matter is not regulated by the EPPO Regulation. Thus, the EDPs act on behalf of the EPPO in their respective Member States while at the same time being able to use their powers as national prosecutors. This Janus-faced nature of the EDPs is also known as the ‘double hat’ of the EDPs, which will be further explained at a later stage. In terms of staff conditions, Article 96(6) of the EPPO Regulation sets out that EDPs shall be engaged as Special Advisors in accordance with Articles 5, 123 and 124 of the Conditions for Employment of other Servants (CEOS)² and the rules adopted by agreement between the institutions of the Union. The status as Special Advisors allows the EDPs to continue being active members of the public prosecution service or judiciary in their Member State.³

2 Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, as amended.

3 H-H Herrnfeld, ‘Article 96’ in H-H Herrnfeld, D Brodowski and C Burchard (eds), *European Public Prosecutor’s Office: Article-by-Article Commentary* (Nomos, 2021) mn 13; H-H Herrnfeld and M Reiser, ‘Die Europäische Staatsanwaltschaft’ in W Bohnen and L Haase (eds), *Kontrolle, Konflikt und Kooperation. Festschrift 200 Jahre Staatsanwaltschaften Koblenz und Trier (1820–2020)* (CH Beck 2020) 249, 253 f.

2 Institutional independence of the EDPs

One does not need much imagination to realise that the hybrid structure of the EPPO and its manifestation in the EDPs' work as the 'double hat' model⁴ is challenging⁵ and might be especially problematic for the independence of the EDPs. The Member States and the EPPO are continually called upon to find compromises – something that inevitably pushes independence to its limits. The question is whether these limits are justified in the light of the given concept of the EPPO or whether there is still room for improvement. In light of this question, different aspects of interactions between the EPPO and the Member States have to be examined in more detail.

2.1 The structural organisation of the EDPs

The process of setting up EDPs in the Member States begins with Article 13(2) of the EPPO Regulation. The European Chief Prosecutor (ECP) shall, after consulting and reaching an agreement with the relevant authorities of the Member States, approve the number of EDPs, as well as the functional and territorial division of competences between the EDPs within each Member State. In such consultations, due account should be taken of the organisation of the national prosecution system (Recital 44 EPPO Regulation). For Germany, it was decided to establish five offices in five different German States (*Bundesländer* – Bavaria, Berlin, Hamburg, Hesse and North Rhine-Westphalia). One further EDP is to be found at the Federal Prosecutor General level.

The settlement of the number of the EDPs by the ECP must also take place on the basis of an agreement with the Member State concerned. It goes without saying that the number of EDPs may not be determined arbitrarily but must be decided on a verifiable basis. Initially, the determination of the number of EDPs was based on the working hours that national prosecutors needed to invest in relevant cases before these started falling under the EPPO's competence. On this basis, it was initially determined that twelve EDPs were necessary for Germany.

4 See section 2.3.1.

5 For the aspect of tension see also F Meyer, '§ 3 Aufgaben der EUStA – Rolle im System europäischer Strafverfolgung' in H-H Herrnfeld and R Esser (eds), *Europäische Staatsanwaltschaft. Handbuch* (Nomos 2022) mn 88.

As the EPPO is constantly developing, the number of EDPs needed varies. According to Recital 45 of the EPPO Regulation, the total number of EDPs in a Member State may therefore be modified with the approval of the ECP, subject to the limits of the annual budget line of the EPPO. The latter is of importance as the remuneration of the EDPs – and other staff – is borne by the EPPO pursuant to Article 91(4) of the EPPO Regulation. If the caseload rises over time and the EPPO manages to get the budget for additional EDPs, the EPPO must – again – reach an agreement with Member States in line with Article 13(2) of the EPPO Regulation on the additional number of EDPs. An agreement can only be reached if the EPPO can substantiate that additional working hours (and hence more EDPs) are needed to handle the caseload assigned to the EPPO in the Member State at hand. As any action, policy or procedure under the EPPO Regulation shall be guided by the principle of sincere cooperation (Article 5(6) EPPO Regulation), it will be difficult for Member States to reject the agreement if the EPPO backs up its request with objective reasons. However, in order to reach an agreement, the Member States' interests must also be considered. The integration of (additional) EDPs into the national authorities can be challenging for Member States as they have to provide the EDPs with both human and infrastructural resources. Office space and supporting staff have to be found. In practice, there were no substantial problems in Germany when an agreement on ten additional EDPs was reached. In total, 21 EDPs are currently working in Germany.

As a first intermediate result, Article 13(2) of the EPPO Regulation enables the appropriate respect of the EDPs' independence within the hybrid structure of the EPPO. The organisation and the number of EDPs in a Member State is subject to an agreement with the respective Member State (Article 13(2) EPPO Regulation – especially in connection with Article 5(6) EPPO Regulation), which allows for a sufficient consideration of the EPPO's interest in comprehensive investigations within their competencies while at the same time leaving sufficient room for the Member States' interests as regards integrating the EDPs into the national system.

2.2 Selection procedure

Another important step is the selection of the EDPs. According to Article 17(1) of the EPPO Regulation, the College shall appoint the EDPs nominated by the Member States upon a proposal by the ECP. Again, the provision

mirrors the hybrid structure of the EPPO, being connected both to the Member States (nomination process) and to the EU (proposal and nomination of the EDP). Focusing on a Member State's perspective, the national nomination process is of interest here.

The nomination process is a challenging task for the Member States. The candidates have to be active members of the public prosecution service or judiciary of the respective Member State. Their independence shall be beyond doubt and they shall possess the necessary qualifications and relevant practical experience of their national system (Article 17(2) EPPO Regulation). In other words, the Member States must – at least temporarily – let go of their best national prosecutors and judges who furthermore are experienced in a field where good prosecutors and judges are generally hard to find. For countries like Germany – currently with 21 EDPs – this is hard to cope with; especially as Member States have to maintain each EDP's rights to social security, pension and insurance coverage while losing them as purely national prosecutors at least for a couple of years to the EPPO. It can of course be argued that the EDPs take on investigations which then no longer have to be conducted by the national prosecution offices. In this sense, the personnel transferred to the EPPO is no longer needed in the national prosecution offices. However, due to the possibilities offered by the EPPO Regulation, the EPPO's concentration on specific cases committed to the disadvantage of the EU's financial interests and the synergies created thereby, the crux of the matter is that the EPPO most likely is in a position to uncover more cases than would have been possible at the national level. While this is on the one hand encouraging and the desired goal of the EPPO, it has to be admitted that the growing caseload leads to a greater need for EDPs, which then have to be provided by the Member States.

In this regard, the main burden lies on the German *Bundesländer* which lose national prosecutors in their function of being purely national prosecutors to the extent that they provide EDPs. Without wanting to judge this, one could say that the Member States are thus paying a price for the success of the EPPO. It is not entirely inconceivable that this situation might in future reduce the willingness to agree to higher numbers of EDPs; especially as Member States will have to provide not only the EDPs but also sufficient equipment and support staff. From a Member State's perspective, a certain reluctance to an increase in EDPs is therefore understandable and it would obviously be good if this issue would also be considered by the EPPO when requesting more EDPs, support staff and equipment.

It must be said that so far, no conflicts have occurred between Germany and the EPPO in this regard. Germany is, of course, bound by the EPPO Regulation and is always open to follow justified requests of the EPPO. At the same time, there is a sense of trust that in return the aforementioned difficulties of the Member States are taken seriously.

Independently of this aspect, it is true that the nomination procedure exercised by the Member States is as such not set out in the EPPO Regulation. It has been criticised that the EPPO Regulation does therefore not guarantee that the nomination process is carried out in an efficient and transparent manner and without political interference.⁶ However, this criticism is put into perspective given that the Member States have to respect applicable Union and national law when carrying out the nomination procedure. In addition, the nomination procedure is guided by the principle of sincere cooperation (Article 5(6) EPPO Regulation) meaning that, for example, the refusal to nominate EDPs, even though there are suitable candidates in place, is unlawful. Furthermore, the college may reject a person who has been nominated if this person does not fulfil the criteria (Article 17(1) EPPO Regulation). Overall, certain control mechanisms are therefore in place to appropriately balance the effects of the hybrid structure and the necessity to take both interests (of the EPPO and of the Member States) into consideration. While it is in the interest of the EPPO to gain competent EDPs, it is in the interest of Member States to conduct the nomination processes in accordance with their national system. As a result, there does not seem to be any need to amend the selection procedure outlined in the EPPO Regulation.

2.3 The status of the EDPs

The status of the EDPs is very closely linked to the independence of the EDPs. The status provides information on the position and relationship between the office a person holds and the institution they work for. The status is determined on the one hand by the EPPO Regulation and the EU law deriving therefrom and on the other hand by national legislation which also derives from the EPPO Regulation in accordance with Article 13(1) of the EPPO Regulation.

6 D Ceccarelli, 'Status of the EPPO: an EU Judicial Actor' (2024) *eucri* 58, 61.

2.3.1 The EU framework

According to Article 13(1) of the EPPO Regulation, the EDPs act on behalf of the EPPO in their respective Member State and have the same powers as national prosecutors in respect of investigations, prosecutions and bringing cases to judgment (see also Recital 33 EPPO Regulation). At the same time, EDPs shall – from the time of their appointment as EDP until dismissal – be active members of the public prosecution service or judiciary of the respective Member States which nominated them and their independence shall be beyond doubt (Article 17(2) EPPO Regulation). Against this background, the status of the EDPs has been described as wearing a ‘double hat’, meaning that EDPs work on behalf of the EPPO (one hat) while having the same powers as national prosecutors (other hat). The expression ‘double hat’ might be useful as a catchphrase to describe the situation. It is nevertheless important to understand that EDPs always and exclusively work for the EPPO, be it on the basis of the EPPO Regulation or be it on the basis of their respective national law – the latter, however, derived from the EPPO Regulation.⁷ In fact, the EDPs wear just one European hat but have several instruments authorising them to act under this hat (EPPO Regulation and EU law or national law derived from the EPPO Regulation). The same applies if, in accordance with Article 13(3) of the EPPO Regulation, the prosecutor is partly working as an EDP and partly working as a national prosecutor. As soon as this person takes up their position as an (part-time) EDP, they are exclusively working for the EPPO under the European hat.

In the framework of Chapter IX (Financial and staff Provisions), the EPPO Regulation reflects this situation in Article 96. According to Article 96(1) of the EPPO Regulation, the Union’s Staff Regulations of Officials (EUSR) and CEOS shall apply to the ECP, the European Prosecutors (EPs) and the EDPs.⁸ Pursuant to Article 96(6) sentence 1 of the EPPO Regulation, the EDPs shall be engaged as Special Advisors in accordance with Articles 5, 123 and 124 of the CEOS. The chosen status allows the EDPs to serve the EPPO while maintaining their position as a national prosecutor who is fully integrated in the national prosecution service.⁹

7 C Burchard, ‘Article 8’ in Herrnfeld, Brodowski and Burchard (eds) (n 3) mn 21 ff.

8 Herrnfeld (n 3) mn 3.

9 H-H Herrnfeld, ‘§ 4 Aufgaben, Grundprinzipien, Struktur, interne Verfahrensregelungen’ in Herrnfeld and Esser (eds) (n 5) mn 20; Herrnfeld and Reiser (n 3) 253 f.

For Germany, this principle is reflected in § 142b *Gerichtsverfassungsgesetz* (Courts Constitution Act – GVG) which states that – within EPPO cases – the official duties of the public prosecution office shall be discharged by public prosecutors who at the same time have been appointed as EDPs for the Federal Republic of Germany. As a result, the *Strafprozedurordnung* (German Code of Criminal Procedure – StPO), the GVG and other legal provisions apply subsidiarily with regard to investigations of the EDPs in Germany.¹⁰

According to Article 5 of the CEOS, Special Advisor means a person who, by reason of their special qualifications and notwithstanding gainful employment in some other capacity, is engaged to assist one of the institutions of the Union either regularly or for a specified period and who is paid from the total appropriations for the purpose under the section of the budget relating to the institution which they serve. It follows from this and from Article 91(4) of the EPPO Regulation that the remuneration of the EDPs is paid by the EPPO. Article 123(1) sentence 1 of the CEOS specifies that the remuneration of Special Advisors shall be determined by direct agreement between the advisor concerned and the authority – i.e. the EPPO in the case at hand. The content of the contract will be determined by the EPPO Regulation and by the Decision on the rules on the conditions of employment of the EDPs adopted by the College on the proposal of the European Chief Prosecutor (Article 114 (c) EPPO Regulation). The latest College Decision is College Decision 015/2025 of 12 February 2025¹¹ (CD 15/2025). As regards the amount of remuneration, Article 96(6) sentence 3 of the EPPO Regulation contains one precondition. It shall be ensured that the total remuneration of an EDP is not lower than what it would be if that prosecutor would only have remained a national prosecutor. The details are laid down in Article 16 ff CD 15/2025. According to Article 16(1)(a) of CD 15/2025, the EDPs are entitled to a basic monthly remuneration which corresponds to the basic monthly salary of an Official function group AD, grade 9, step 1, which according to Article 66 of the EUSR is 7,185.01 €. This basic monthly remuneration shall increase by 6 % for each next level of the scale. Every three years, EDPs shall advance to the next level. They shall be engaged on a scale comprising eight levels (Article 14(1) and (2)

10 Herrnfeld and Reiser (n 3) 255.

11 Decision 015/2025 of the College of the European Public Prosecutor's Office of 12 February 2025 on the Conditions of Employment of the European Delegated Prosecutors, and Replacing and Repealing Decisions 001/2020, 013/2020, 017/2021, 013/2021, 098/2021, 007/2023 and 058/2024 of the College of the EPPO.

CD 15/2025). A top-up amount can be granted in accordance with Article 18 CD 15/2025 in case the total net remuneration of an EDP is lower than what it would be if that prosecutor would have remained a national prosecutor.

Regarding social security, pension and insurance coverage, Article 96(6) sentence 4 of the EPPO Regulation states that it shall be ensured that adequate arrangements are in place so that the rights of EDPs under the national scheme are maintained. The reason for this provision is that Special Advisors are not entitled to the Union's social security system. Title V, Chapter 2 and 3 of the EUSR does not apply to Special Advisors. The wording of Article 96(6) sentence 4 of the EPPO Regulation leaves it open whether the aforementioned financial obligation affects only the Member States or if the EPPO has to reimburse the Member States in this regard.¹² In practice, a reimbursement does not take place.

According to Article 123(1) sentences 2 and 3 of the CEOS, the contract of a Special Advisor shall be for a term not exceeding two years. It shall be renewable. This contradicts Article 17(1) sentence 3 of the EPPO Regulation which stipulates that the EDPs shall be appointed for a renewable term of five years. Article 7(4) CD 15/2025 addresses this issue. The contracts of the EDPs shall be successively extended as necessary to allow the EDPs to complete their five-year term provided for in Article 17(1) of the EPPO Regulation. This is an elegant solution, as it respects the specifications of Article 123 of the CEOS with its limitation to two years. It also has the advantage that the EDPs can rely on the regular five-year term, meaning that the successive extension must be granted as long as there is no reason for dismissal under the EPPO Regulation. For example, it would not be possible to refuse an extension up to five years on grounds of budgetary constraints.

Article 124 of the CEOS refers to several provisions of the EUSR (General Provision: Articles 1c, 1d; Rights and Obligations of Officials: Articles 1l, 1la, 12, 12a, 16(1), 17, 17a, 19, 22, 22a, 22b, 23, 25(2); Appeals: Articles 90 and 91 EUSR) which shall apply by analogy.

12 Herrnfeld (n 3) mn 20.

2.3.2 The national German framework

In Germany, the assignment of national prosecutors to the EPPO takes place on the basis of the *Verwaltungsvereinbarung über die Entsendung von Staatsanwältinnen und Staatsanwälten aus Anlass ihrer Tätigkeit als Delegierte Europäische Staatsanwälte für die Europäische Staatsanwaltschaft* (Administrative Agreement on the Assignment of Prosecutors for their Activities as Delegated European Prosecutors for the European Public Prosecutor's Office -VwVereinbEntsendEUSTa). According to § 2(4) VwVereinbEntsendEUSTa, the national prosecutor can be assigned (*zugewiesen*) to the EPPO to perform the function of an EDP in Germany. The legal basis for this assignment is to be found in § 20 *Beamtenstatusgesetz* (Civil Service Status Act – BeamtStG) which applies to the officials of the German *Bundesländer* and in § 29 *Bundesbeamtengesetz* (Federal Civil Service Act – BBG) which applies to federal officials. Germany has 21 EDPs – 20 EDPs are officials of the German *Bundesländer* and one EDP is a federal official. The choice of § 20 BeamtStG and § 29 BBG as a legal basis makes sense as this is the only national legal construction which allows for an assignment (*Zuweisung*) of national German prosecutors to international institutions such as the EU and the EPPO. A secondment (*Abordnung*) is not applicable in this context.¹³

According to § 20(3) BeamtStG and § 29(3) BBG, the legal status of the official remains unaffected. This means that the prosecutor remains a national prosecutor in line with Article 17(2) of the EPPO Regulation. They remain in a relationship of public service and loyalty (*Treueverhältnis*).¹⁴ Their rights and obligations from their national civil service status do not change.¹⁵ In consequence, the national authority must continue to take care of the national prosecutor. § 45 BeamtStG applies meaning that the national authority remains responsible for social security, pension and insurance

13 Deutscher Bundestag, 'Gesetzentwurf der Bundesregierung. Entwurf eines Gesetzes zur Regelung des Statusrechts der Beamtinnen und Beamten in den Ländern (Beamtenstatusgesetz – BeamtStG)' (21.01.2007) *BT-Drucksache 16/4027* 26 f; Deutscher Bundestag, 'Gesetzentwurf der Bundesregierung. Entwurf eines Gesetzes zur Neuordnung und Modernisierung des Bundesdienstrechts (Dienstrechtsneuordnungsgesetz – DNeuG)' (12.11.2007) *BT-Drucksache 16/7076* 108.

14 M Thomsen, '§ 20 BeamtStG' in R Brinktrine and K Schollendorf (eds), *Beamtenrecht Bund. Kommentar* (CH Beck 2021) mn 18.

15 KJ Grigoleit, '§ 29 BBG' in U Battis (ed), *Bundesbeamtengesetz. Kommentar* (CH Beck 2022) mn 4.

coverage. The national authority also remains responsible for remuneration.¹⁶ However, the EPPO Regulation takes a different approach in this regard as remuneration has to be paid by the EPPO according to Articles 91(4) and 96(6) of the EPPO Regulation in conjunction with Article 5 of the CEOS. This is in line with Article 5(3) of the EPPO Regulation stating that the EPPO Regulation prevails if a matter is governed by both national legislation and the EPPO Regulation.

Furthermore, the general working conditions are subject to the responsibility of the national authorities, as pointed out by Article 96(6) of the EPPO Regulation. Correspondingly, Article 23(2) CD 15/2025 states that the working hours shall be determined based on the regime applicable to national prosecutors in the Member State of the respective EDP. A similar provision is to be found in Article 24(1) CD 15/2025 where the EDP's rights relating to annual leave are in principle those governed by the respective national rules and regulations, unless otherwise provided in the CD 15/2025.

2.3.3 Status and independence

After having taken stock of the current status of the EDPs according to the EPPO Regulation and the German national provisions, the question arises as to what influence the interweaving of EDPs into both the European system and the national system has on their independence. A potential problem was clearly anticipated when the EPPO Regulation was negotiated. For this reason, the question of the independence of EDPs is addressed several times in the EPPO Regulation. According to Article 96(6) sentence 2 of the EPPO Regulation, the competent national authorities shall facilitate the exercise of the functions of EDPs under the EPPO Regulation and refrain from any action or policy that may adversely affect their career or status in the national prosecution system. Article 96(7) of the EPPO Regulation adds that EDPs shall not, in the exercise of their investigation and prosecution powers, receive any orders, guidelines or instructions. Article 6(1) of the EPPO Regulation repeats in its last sentence that the Member States shall respect the independence of the EPPO and shall not seek to influence it in the exercise of its tasks. And even Article 96(6) Sentence 1 of the EPPO

16 S Trautmann, '§ 6 Zusammenarbeit der nationalen Behörden' in Herrnfeld and Esser (eds) (n 5) mn 32; Thomsen (n 14) mn 22.

Regulation in conjunction with Article 124 of the CEOS in conjunction with Articles 11 and 11(a) of the EUSR emphasises the obligation that Special Agents be independent.¹⁷ According to Article 11 of the EUSR, an official shall carry out their duties and conduct themselves solely with the interests of the Union in mind. They shall neither seek nor take instructions from any government, authority, organisation or person outside their institution. Article 11(a) of the EUSR adds that officials shall not, in the performance of their duties, deal with a matter in which, directly or indirectly, they have any personal interest such as to impair their independence. Against this background, one cannot help but believe that a specific concern emerged during the negotiations, which found its expression in the outlined provisions. It can indeed be challenging to remain entirely independent while staying attached to the national authority. The position of an EDP requires, therefore, a firm personality. In the words of Article 17(2) sentence 2 of the EPPO Regulation, the independence of an EDP shall be beyond doubt. This is a good approach as real independence always has its root in the attitude of the person concerned. Nevertheless, there are several points at which the independence of an EDP might be influenced.

2.3.3.1 Obligation of loyalty (Treuepflicht)

As a starting point, the EDPs are in fact connected to the EPPO and to their respective Member State. Even though they only wear one European hat, the EPPO Regulation envisages that EDPs remain active members of the public prosecution service of their respective Member State (Article 17(2) EPPO Regulation). This hybrid structure inevitably produces links to the national authority which can be described as the inner loyalty of the EDP. This aspect should not be underestimated. EDPs are socialised in their national authority, and this shapes their identification in terms of (legal) attitude and morality in combination with a sense of belonging. Also, law-wise German EDPs continue to have an obligation of trust towards their national home authority in accordance with the applicable provisions for the assignment of national prosecutors to the EPPO. Pursuant to § 20(3) BeamStG and § 29(3) BBG, an assigned national prosecutor remains in a relationship of public service and loyalty as mentioned earlier. This

17 More negatively Ceccarelli (n 6) 61: “In particular, SRs [Staff Regulations – note from the author] cannot guarantee that the prosecutors of the EPPO enjoy institutional safeguards protecting their position from external interferences or undue influence”.

circumstance might at first glance seem contradictory to the notion of independence stemming from the EPPO Regulation since this independence mentioned in the EPPO Regulation is related to the task of the EPPO and not to the national authority.

Upon closer inspection, however, there is no such contradiction between the EPPO Regulation and national law. Article 96(6) sentence 1 of the EPPO Regulation in conjunction with Article 124 of the CEOS in conjunction with Article 11 of the EUSR clearly states that officials shall carry out their duties and conduct themselves solely with the interests of the Union – and not with the interests of the national authority – in mind. Despite the fact that § 20(3) BeamtStG and § 29(3) BBG oblige an assigned national official to remain loyal to their national authority, this loyalty due to the assignment does not differ from the loyalty Member States are obliged to show to the EPPO. According to Article 4(3) of the Treaty on European Union (TEU), the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. This principle is also reflected in Article 5(6) of the EPPO Regulation, according to which any action, policy or procedure under the EPPO Regulation shall be guided by the principle of sincere cooperation. The national obligation of loyalty therefore includes the obligation for an EDP to act independently and loyally in the interests of the EPPO and hence in the sense of the EPPO Regulation. Assignment pursuant to § 20(3) BeamtStG and § 29(3) BBG is accordingly characterised as an official task under the national civil service.¹⁸ The legal institution of assignment even makes it possible to use disciplinary law to ensure the proper fulfillment of duties in the assignment relationship.¹⁹ As a result, the EDP's independence and loyalty towards the EPPO is identical to the independence and loyalty towards the national authority as long as the national prosecutor is acting as an EDP on behalf of the EPPO. From a legal point of view, conflicts do not arise.

And even if this view is not shared and a conflict is assumed, the notion of independence and the notion of obligation to trust and loyalty as far as the latter is connected to independence would prevail over the obligation of loyalty towards a national authority as set out by § 20(3) BeamtStG and § 29(3) BBG. According to Article 5(3) of the EPPO Regulation, national law shall only apply to the extent that a matter is not regulated by the EPPO Regulation, and where a matter is governed by both national and

¹⁸ Thomsen (n 14) mn 20.

¹⁹ BT-Drs. 16/4027 (n 13) 26.

the EPPO Regulation, the latter shall prevail. The question of independence is regulated by the EPPO Regulation. To the extent that independence is inextricably linked to loyalty and fidelity, the EPPO Regulation therefore provides a preferentially applicable regulation in this respect.

2.3.3.2 Duration of service as an EDP

According to Article 17(1) sentence 3 of the EPPO Regulation, EDPs are appointed for a renewable term of five years. The EPPO Regulation does not limit the number of such renewals.²⁰ The details of the renewal are subject to Articles 8, 9 and 10 CD 15/2025. According to these provisions, the EDP has to consent to the extension of their term. In addition, the performance of the EDP has to be taken into consideration and the renewal must be in line with the agreement between the ECP and the competent national authority of the Member State according to Article 13(2) of the EPPO Regulation. For instance, a reduction of the number of EDPs of the respective Member State could lead to the denial of a further term.

From the perspective of the Member States, the question arises as to whether the prolongation of the term also depends on the consent of the Member State. The EPPO Regulation simply says that the term of an EDP is renewable without expressly stating whether the consent of the Member State is necessary or not. The question is debatable. For the sake of an EDP's independence, it could on the one hand be argued that the decision on the term's renewal falls under the exclusive competence of the EPPO.²¹ Otherwise, an EDP would have to fear being recalled by their national authority after their term of five years expired and this fear could make an EDP dependent upon their national authority. On the other hand, it could be argued that if the nomination of an EDP falls within the responsibility of a Member State under Article 17(1) of the EPPO Regulation, it is reasonable to expect that the renewal of an EDP be accompanied by a confirming act of the Member State. In addition, from the national German perspective, assignments under § 20 BeamStG and § 29 BBG are a temporary arrangement and must not be permanent. Against this background, assignments must, according to German national law, be limited in time, but *can* be

20 Ceccarelli (n 6) 61.

21 Ceccarelli (n 6) 61.

extended.²² The national decision on an extension depends on the national authority having an official interest or on Germany having a public interest.²³ Germany's public interest can easily be affirmed as Germany is obliged to assign a sufficient number of EDPs to the EPPO. It might nevertheless be in the interest of a specific national prosecution office that an EDP return to their duty as a purely national prosecutor or judge, for instance due to a lack of national personnel in a specific prosecution office or court. In such cases, however, a new national prosecutor would have to be nominated; in the end, this is probably a rather theoretical scenario.

The *VwVereinbEntsendeEUSTa* does not address the renewal of the term of EDPs. The question of consent might nevertheless come up soon as the first term of the EDPs expires in 2026. This discussion might then need to be continued in the unlikely event that problems occur in practice.

2.3.3.3 Career or status in the national prosecution system

According to Article 96(6) sentence 2 of the EPPO Regulation, the competent national authorities refrain from any action or policy that may adversely affect the career or status of EDPs in the national prosecution system. In consequence, Member States have to make sure that EDPs do not face any disadvantages when they return to their national authority.²⁴ It remains to be seen what this actually means. In any case, the position they return to cannot be lower than the one the EDP held immediately before they were assigned to the EPPO. It also means that the time the national prosecutor has served as an EDP must be taken into consideration for their national career. This period of time might for instance be considered as an additional qualification which can – depending on the case at hand – qualify for the appointment of the national prosecutor to a higher rank after their return from the EPPO.

Another question is whether Article 96(6) sentence 2 of the EPPO Regulation also grants a right for the EDP to remain integrated within the national promotion system while working as an EDP career-wise. Injustices could arise if a national colleague who stayed within the respective national authority is promoted to the next national rank while this is not the case for the EDP as they (temporarily and/or partly) left the national authority. It

²² Thomsen (n 14) mn 5.

²³ Thomsen (n 14) mn 8 ff.

²⁴ Herrnfeld (n 3) mn 17.

should not be forgotten that a national promotion is linked to a higher national remuneration as a basis for the amount of pension. As the pension is to be paid by the EDP's Member State, the question of national promotion can be relevant in this regard. To the extent that an appraisal is required for the national promotion, this will have to be obtained in the form of an assessment contribution from the EP who is supervising the investigations and prosecutions for which the EDP is responsible in accordance with Article 12(1) of the EPPO Regulation. This contribution feeds into the national appraisal and here again, an effect on the independence of the EDP cannot entirely be excluded.

2.3.3.4 EDPs as temporary agents as a possible solution

Daring to think outside the box – which was clearly the task of the working session at Villa Vigoni – one consideration could be to change the status of the EDP from “Special Advisor” to “Temporary Agent” as suggested by the EPPO during the discussions. This would mean that EDPs were provided with the same status as granted to the ECP and the EPs according to Article 96(1) of the EPPO Regulation in conjunction with Article 2(a) of the CEOS. The legal basis of the Temporary Agent is to be found in Title II Article 8 ff of the CEOS and in Articles 11 to 26a of the EUSR in conjunction with Article 11(1) of the CEOS. EDPs would among other things benefit from Chapter 5 (Remuneration and expenses) and Chapter 6 (Social security benefits), including insurance coverage and pension. As a result, the Member States would no longer be obliged to take care of these costs and Article 96(6) sentence 4 of the EPPO Regulation would be obsolete. This construction would more clearly separate the EDPs from their national authority. It would defuse the issue of appraisal and promotion within the national authority during the service as an EDP.

Furthermore, the EPPO proposed that the time of the EDP's return to the national authority does not depend on the Member State. *If* an EDP wants to return, they shall have the right to return to their national agency at the end of their service. By the time of return, the period of the EDP's absence would – according to the EPPO – have to be taken into consideration by the national authority in a manner that does not pose any career disadvantages. The EDP has the right to return to the same or a higher position than the one they occupied at the time of their appointment to the EPPO. Member States must further ensure that the period of service

at the EPPO is recognised, for the purpose of career advancements and promotions, as equivalent to seniority as a member of the national prosecution or judiciary. In addition, the EPPO suggests opening up the possibility for EDPs to be promoted on EU level according to Articles 44 and 45 of the EUSR.

Picking up on the proposal of the EPPO as described above, EDPs are doubtless more independent as they are to a larger extent detached from the national authority. For Germany, the legal basis for granting EDPs the status of Temporary Agent could – at first glance – be found in the Federal Ordinance on Special Leave (*Verordnung über den Sonderurlaub für Bundesbeamtinnen und Bundesbeamte sowie für Richterinnen und Richter des Bundes* – SUrlV) or in the respective legal framework of the *Bundesländer*. The guidelines on the granting of special leave for civil servants and judges in Hamburg (*Richtlinien über die Bewilligung von Sonderurlaub für Beamtinnen und Beamte sowie Richterinnen und Richter* – HmbSUrlR) serves as an example here. According to No. 1 HmbSUrlR, approval of special leave requires the absence of any official interest to the contrary. Special leave is in the official interest if it promotes the fulfilment of the duties of the national authority concerned (No 2(2) HmbSUrlR). Pursuant to No 11(1)(a) HmbSUrlR, special leave without pay may be granted in order to take up a position in the public service of an intergovernmental or supranational institution. The approval of special leave may be revoked if the civil servant's absence would jeopardise the proper performance of official national duties (No 16(2) HmbSUrlR).

The aim of completely detaching the EDPs from the national authority by granting them the right to return to the national authority whenever they want does not seem very balanced. From the Member State's perspective, there is either the possibility of entirely detaching the national prosecutor from the national authority with the consequence that a return is no longer possible – or at least not possible under the conditions set out by the EPPO (Option 1) or that there is the possibility of granting the right to return – for instance in accordance with the HmbSUrlR – with the consequence that they are not entirely detached (Option 2).

Option 1 might make it difficult to fulfill the requirement of Article 17(2) of the EPPO Regulation because an EDP would no longer be an active member of the national public prosecution service if they are entirely detached from their national authority. In this case, it might be difficult to grant them the same powers as national prosecutors as set out in Article 13(1) of the EPPO Regulation. It could be argued that the EDP is neverthe-

less competent to investigate in their respective Member State because their legal basis is the EPPO Regulation and the applicability of national law as derived from the EPPO Regulation. However, at least politically if not also with regard to German constitutional law, problems may occur if an EDP – no longer being an active member of the national public prosecution service – undertakes or requests investigation measures in Germany.

Also, in Option 2, the question arises as to whether an EDP with the status of a Temporary Agent can still be an active member of the national prosecution service. This does not seem to be given when the national prosecutor is on special leave. At least, Option 2 includes the possibility of the EDP returning to be a national prosecutor. However, the national understanding is that a return is not dependent on the decision of the EDP alone, because No 16(2) HmbSurlR allows for revocation – as probably do the other German national laws on special leave on the federal and *Land* level. In addition, it can hardly be expected that the national authorities can easily reintegrate the national prosecutors again. Their former post might have been replaced with a new colleague. Also, higher ranked positions to which an EDP might feel entitled might not be available. Such positions can hardly be kept open for a possible return of an EDP.

As a preliminary result, any proposal to amend the EPPO Regulation with the aim of providing EDPs with more independence should be balanced and take both interests (of the EPPO and of the Member States) into consideration as appropriate.

2.3.4 Conclusion

Due to the hybrid structure of the EPPO, EDPs are in several respects pulled in two different directions: An EDP acts on behalf of the EPPO while having the same powers as national prosecutors in their respective Member States. An EDP – while being part of the EPPO – even stays an active member of the public prosecution service of the respective Member State. Their legal basis is the EPPO Regulation and the national law derived from the EPPO Regulation. As a consequence, EDPs and their status remain interwoven with their national authority and do not completely separate from it. This combination is due to the concept of the EPPO which is in itself rooted both in the EU *and* in the Member States. It was – and still is – not wanted to establish the EPPO as a completely autonomous EU body: The EPPO does not work on the basis of autonomous EU procedural law. It does not indict before EU courts and sentences are not executed in

EU prisons. The seeds for gradually dissolving this concept in the future have been laid by the mere existence of the EPPO, but so far, no further progress has yet been made. As long as this is the case, the other side of this coin is the embedding of EDPs in their national prosecution office and the downside of this is inevitably a possible risk to independence. The EPPO Regulation tries to balance this risk in an appropriate way by providing safeguards such as in Article 96(6) sentences 2 and 6 EPPO Regulation. In summary, the current well-balanced concept follows the basic decision chosen by the Treaty of Lisbon for the EPPO. On this basis, a compelling need for a change of the status of the EDP – to alleviate the symptoms of the hybrid structure – can currently not be identified. *If*, however, changes regarding the status of the EDPs are nevertheless discussed during the revision of the EPPO Regulation, the interests of the Member States have to be taken into consideration appropriately.

2.4 The support staff

According to Article 96(6) sentences 2, 3 and 6 of the EPPO Regulation, the competent national authorities facilitate the exercise of the functions of EDPs. In particular, the competent national authorities provide the EDPs with the resources and equipment necessary to exercise their functions under the EPPO Regulation and ensure that they are fully integrated into their national prosecution services. The general working conditions and work environment of the EDPs shall fall under the responsibility of the competent national judicial authorities. Recital 113 EPPO Regulation clarifies that the costs of an EDP's office and secretarial support should be covered by the Member State. The interesting question is what does 'necessary' resources and equipment mean. The answer to this question might be different depending on who is asked – the EPPO or the Member State. One interpretation is that the Member States are simply obliged to provide EDPs with the resources and equipment they need to fulfill their task.²⁵ This is true in a sense. However, the idea behind the concept of Article 96(6) EPPO Regulation is that the Member States must bear only those costs which they would have to carry anyway if the EPPO did not exist and if they had to continue investigating those crimes for which the

25 Trautmann (n 16) mn 34.

EPPO is now responsible. It follows from this idea that the Member States do have to provide resources to the EDPs in exactly the same manner as they do for their own national prosecutors. As a result, the Member States have to provide the EDPs with suitable office space and equipment as well as administrative support personnel – comparable to the national prosecution services.²⁶ The EDP's working environment must be adjusted to the working environment of the national prosecution service to create and utilise as many synergy effects as possible. The Member States organise the EDPs like an additional national prosecution office without – of course – affecting the independence of the EDPs in a negative way.²⁷

The five EDP's offices of Germany (Munich, Berlin, Frankfurt, Hamburg, Cologne) were organised in this manner. These centers are not supposed to differ from the comparable prosecution offices in the five cities. This means for instance that if two national prosecutors are supposed to share one office room in the German *Bundesland* X where an EDP office is established, then this is also enough for the EDPs working at this office. The Member States – or more precisely the German *Bundesländer* – are not obliged to provide anything extra, be it in terms of office space, computer equipment, pencils or supporting staff for the EDPs. This might lead to the situation that the equipment of the EDPs within Germany might differ from one another as the general national equipment might differ from one German *Bundesland* to another. For instance, German *Bundesland* X might provide better and more computers to the national prosecutors than German *Bundesland* Y. This is, however, also the situation regarding the equipment of the EDPs in different Member States.²⁸

On the aforementioned basis, the German *Bundesländer* have to provide the EDPs with equipment but also with registry clerks (*Geschäftsstellenbeamten*) to the same extent as they do for their respective national prosecutors. § 153 GVG applies,²⁹ which states that a court registry staffed with the necessary number of registry clerks shall be established at each prosecution office. Furthermore, the national authorities must ensure that

26 Herrnfeld (n 3) mn 16; Trautmann (n 16) mn 35.

27 Trautmann (n 16) mn 36.

28 Herrnfeld (n 3) mn 16.

29 Deutscher Bundestag, 'Gesetzentwurf der Bundesregierung. Entwurf eines Gesetzes zur Durchführung der Verordnung (EU) 2017/1939 des Rates vom 12. Oktober 2017 zur Durchführung einer Verstärkten Zusammenarbeit zur Errichtung der Europäischen Staatsanwaltschaft und zur Änderung weiterer Vorschriften' (16.03.2020) BT-Drucksache 19/17963 42.

EDPs can benefit from judicial administration officers (*Rechtspfleger*) and experts (*Sachverständige*) in the same way as this is possible for national prosecutors. According to Article 28(1) of the EPPO Regulation, the EDP handling a case may undertake investigation measures and other measures on their own or instruct the competent authorities in their Member State. Those authorities shall, in accordance with national law, ensure that all instructions are followed and undertake the measures assigned to them. On this basis, judicial administration officers and experts should be available for EDPs.

It goes without saying that neither the national prosecutors nor the EDPs are always satisfied with their amount of equipment and supporting staff. Regardless of whether these complaints are justified or not, it should be pointed out that more staff inevitably leads to higher costs and that even if authorities are willing to and capable of spending this money, it is not always easy to find properly qualified supporting staff. But as long as EDPs are treated as equal compared to their national colleagues, the independence of the EDPs is not really at risk. Even actual shortfalls of support staff for EDPs impact the work of the EDPs less in terms of affecting their independence and more in terms of affecting their efficiency. In this regard, the Member States have of course to make sure that EDPs can at least work as efficiently as their national colleagues. Deficiencies would have to be addressed and figured out between the EPPO and the Member States as foreseen by the EPPO Regulation.

To guarantee a sufficient amount of support staff, the EPPO proposed at Villa Vigoni that staff of the EPPO should not only include the supporting personnel at the *central* level as currently stated in Article 2(4) of the EPPO Regulation but should also include personnel at the *decentralised* level with the aim of better supporting the EDPs in the day-to-day activities of performing the tasks of the EPPO. The support staff for the EDPs shall on proposal of the EPPO be recruited according to the rules and regulations applicable to officials and other servants of the European Union. That would be the EUSR and the CEOS. According to Article 1 of the CEOS, such servants are temporary staff, contract staff, local staff, Special Advisors and so on. The supporting staff of the EDPs would in this case work for the EPPO and would be paid by the EPPO. At first glance, this might be feasible for experts such as auditors which could be hired by the EPPO and work for the EDPs on a decentralised level at the cost of the EPPO. However, the question remains as to who is paying for the equipment and office space in this regard. This concept is slightly harder to imagine when

it comes to registry clerks and judicial administration officers as far as they are German officials who also have to be active members of the German national prosecution office. A less complicated approach might be that the EPPO simply reimburses the Member States for the costs of the supporting staff for the EDPs.

Indeed, the Ministers of Justice of the German *Bundesländer* decided at the Conference of Justice Ministers in Hannover on 5 and 6 June 2024 to call on the Federal Government to work towards a further development of the EPPO Regulation in a sense that would stipulate a greater contribution by the EPPO to the costs of the office and secretariat of the EDPs and that would enable the EPPO to employ its own experts and judicial administration officers at a decentralised level.³⁰ This decision seems to go in the direction of the EPPO proposal. Of course, the concrete implementation would need to be discussed in more depth, particularly with regard to the recruitment of judicial administrative officers and registry clerks by the EPPO as mentioned above.

From the perspective of the federal level of Germany, this concept produces an additional problem: To the extent that the German *Bundesländer* are exempted from paying the costs for the supporting staff, the Federal Government of Germany would be burdened with higher costs. Remunerations and other personnel costs borne by the EPPO are charged to the EU budget, approximately 24 % of which comes from the federal level of Germany. The financial burden would not only refer to the costs for the support staff provided for German EDPs but also for the EDPs of other participating Member States. This would be an enormous financial burden for the German federal budget, not to mention the fact that Germany is currently facing a general budgetary reservation.

The EPPO naturally emphasises the fact that – thanks to the EPPO – a lot of the damage caused by offenders was able to be repaid due to the freezing and confiscation of assets derived from the crimes in question. And indeed, according to the annual report of the EPPO in 2024, freezing orders

30 Number 5 of the decision under ‘TOP II.23 – Europäische Staatsanwaltschaft – Finanzierung und Kostenbeteiligung der EU sicherstellen, Frühjahrskonferenz der Justizminister und Justizministerinnen’ (Hannover, 5 and 6 June 2024), at <https://www.mj.niedersachsen.de/JuMiKo/fruehjahrskonferenz/fruehjahrskonferenz-228116.html>.

of € 2.42 billion were granted by competent authorities in EPPO cases.³¹ However, this does not automatically mean that the EPPO is gaining money which can be reinvested in the EPPO. The purpose of EPPO investigations is primarily to bring offenders to justice. Freezing and confiscation orders do not primarily serve as financial support for the investigating unit, especially as the assets derived are subject to Article 38 of the EPPO Regulation. Under this provision, assets or proceeds shall be disposed of in accordance with applicable national law. However, this disposition shall not negatively affect the rights of the Union or other victims to be compensated for damage that they have incurred.

For the time being, it is only possible to point out the actual or potential problems associated with an increase in support staff. No solution is yet available and the issue is up for discussion. In fact, neither Member States nor the EU will be easily convinced to pay for additional personnel. Interesting debates can be expected.

3 Summary

This contribution has attempted to point out where the difficulties surrounding the institutional independence of EDPs are to be seen in terms of selection, status and the number of EDPs as well as in terms of support staff; both from the perspective of a participating Member State. It showed that the provisions on the EDPs – above all Articles 13(1), 17(2) and 96(6) of the EPPO Regulation – are dedicated to the hybrid structure of the EPPO. Embedding the EDPs into the national authorities comes with the price that a complete detachment of the EDPs from their national authority is neither possible nor intended. In consequence, a certain impact on the independence of EDPs cannot be entirely ruled out. However, the EPPO Regulation sets reasonable boundaries which ensure that the independence of the EDPs is respected in a balanced manner. Ideas to further strengthen the role of the EDPs will have to be discussed on the basis of the evaluation report expected in June 2026 and on the basis of concrete proposals from the Commission following the evaluation report. At the same time, it cannot be denied that discussions are already ongoing. From a Member State

31 European Public Prosecutor's Office, 'Annual Report 2024' (Luxembourg, 2025), at https://www.eppo.europa.eu/sites/default/files/2025-03/EPPO%20Annual%20Report%202024_0.pdf, 12.

perspective, it remains important that the next steps will be taken jointly and in the interest of the EPPO as well as in the interest of Member States. As successful as the EPPO is in its work, it must not be forgotten that there are also valid interests on the side of the Member States. For the time being, the EPPO is and remains a hybrid structure *sui generis*. As long as this is the case, we will have to continue to find viable solutions together in a trusting dialogue.

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