EPPO's competences and the exercise of its competences – conflicts, clarifications, and extensions?

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Competences of the EPPO: Is it time for an expansion?

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There are few superlatives that have not been used in connection with the creation of the European Public Prosecutor's Office (EPPO). The term 'milestone'[1] was used time and again. Expectations were clearly high. It is therefore not surprising that even before the EPPO began its work, a proposal was made to extend its powers. So far, this has not happened, but after about four years of work, it is worth considering the future of the EPPO and its potential for a European Area of Freedom, Security and Justice (AFSJ) by answering the question: Is it time to extend the EPPO's competences? To answer this question, this paper focuses on the material scope of competence of the EPPO, set out in Article 22 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), and its possible extension, leaving aside the territorial and personal competence of the EPPO (Article 23 EPPO Regulation).

1 The Competences of the EPPO

Before assessing the possible extension of competences, it is first necessary to examine the status quo. To this end, I will provide a brief overview of the status quo regarding the existing material scope of the EPPO's competences and of the legal basis for an extension.

1 D Brodowski, 'Strafverfolgung im Namen Europas. Die Europäische Staatsanwaltschaft als Meilenstein supranationaler Kriminalpolitik' (2022) *Goltdammer's Archiv für Strafrecht* 421, 424; E Schramm, 'Auf dem Weg zur Europäischen Staatsanwaltschaft' (2014) 69 *JuristenZeitung* 749, 757; MA Zöller and S Bock, '§ 22 Europäische Staatsanwaltschaft' in M Böse (ed), *Enzyklopädie Europarecht, Bd. 11 – Europäisches Strafrecht* (2nd edn, Nomos 2021) mn 51.

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1.1 Material scope of competence

The material scope of competence of the EPPO is currently limited to the protection of the European Union's (EU) financial interests. This follows not only from Article 22 of the EPPO Regulation but is already anchored in its primary law, finding its legal basis in Article 86(1) of the Treaty on the Functioning of the European Union (TFEU). What the 'protection of the EU`s financial interests' covers is set out in detail in Article 22 of the EPPO Regulation.[2] Without going into further detail, in principle, in addition to the offences provided for in 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 (so-called PIF Directive, see Article 22(1) EPPO Regulation in conjunction with Article 3, Article 4(2) and (3) PIF Directive), certain offences in the context of criminal organisations whose focus is the commission of offences affecting the financial interests of the EU and 'inextricably linked' offences are covered. This signifies that the EPPO was conceived from the outset as a financial protection agency[3] prosecuting in the interests of the EU. The financial interests of the EU are a self-interest of the EU. Thus, a genuine European legal interest or '*Rechtsgut*' is being protected.[4]

1.2 The legal basis for expansion

Given the hopes placed in the way that the EPPO would provide 'added value' within the EU architecture and serve as the first truly supranational

2 For an in-depth analysis see D Brodowski, 'Article 22' in H-H Herrnfeld, D Brodowski and C Burchard (eds), *European Public Prosecutor's Office: Article-by-Article Commentary* (Nomos 2021) mn 1 ff; H-H Herrnfeld and D Brodowski, '§ 5 Zuständigkeiten der EuStA' in H-H Herrnfeld and R Esser (eds), *Europäische Staatsanwaltschaft. Handbuch* (Nomos 2022); G Grasso, R Sicurella and F Giuffrida, 'EPPO Material Competence: Analysis of the PIF Directive and Regulation' in K Ligeti, MJ Antunes and F Giuffrida (eds), *The European Public Prosecutor's Office at Launch. Adapting National Systems, Transforming EU Criminal Law* (CEDAM 2020) 23, esp. 32 ff; T Gut, 'EPPO's material competence and its exercise: a critical appraisal of the EPPO Regulation after the first year of operations' (2023) 23 *ERA Forum* 283, 284 ff.

3 Zöller and Bock (n 1) mn 3 ff; S Pohlmann, 'Perspektiven einer Kompetenzerweiterung der Europäischen Staatsanwaltschaft: Wird die Europäische Staatsanwaltschaft bald für Sanktionsverstöße zuständig sein?' (2023) *Kriminalpolitische Zeitschrift* 396, 400.

4 Brodowski (n 1) 423.

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law enforcement agency, it is not surprising that there were early proposals and discussions about a possible extension of its material competence;[5] especially since the mothers and fathers of the Lisbon Treaty, who created the competence for the establishment of the EPPO, already foresaw the possible need or desire for an extension and provided a legal basis for it.

The legal basis for such an extension is Article 86(4) TFEU. An extension to serious cross-border crime ('to include serious crime having a cross-border dimension') is explicitly provided for, referring implicitly to the areas of crime listed in Article 83(1) TFEU. These areas of crime include terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.[6] Other crimes may be included if, in addition to the cross-border dimension, the seriousness of the crime requirement is met.[7]

However, the competence of the EPPO can only be extended beyond Article 86(1) and (2) TFEU by means of a simplified Treaty amendment.[8] This requires the unanimous adoption of a decision by the European

5 See for example European Commission, 'Communication from the Commission to the European Parliament and the European Council. A Europe that protects: an initiative to extend the competences of the European Public Prosecutor's Office to cross-border terrorist crimes', COM(2018) 641 final; É Dupond-Moretti and M Buschmann, 'Verstöße gegen EU-Sanktionen im Russlandkontext. Europäische Staatsanwaltschaft muss Strafverfolgung übernehmen' (LTO, 28 November 2022) at https://www.lto.de/recht/hintergruende/h/justizminister-deutschland-frankreich-eu-staatsanwaltschaft-russland-ukraine-sanktionen/.

6 This list has now been expanded by Council Decision (EU) 2022/2332 of 28 November 2022 on identifying the violation of Union restrictive measures as an area of crime that meets the criteria specified in Article 83(1) of the Treaty on the Functioning of the European Union to include 'violations of restrictive measures', see below 2.4.1.

7 Zöller and Bock (n 1) mn 27. Such an extension was done by Council Decision (EU) 2022/2332, that qualified the violation of restrictive measures of the Union as a criminal area within the meaning of Art 83(1) TFEU.

8 See also Grasso, Sicurella and Giuffrida (n 2) 33. Interestingly, an indirect extension could occur if European Commission, Proposal for a Directive of the European Parliament and of the Council on combating corruption, replacing Council Framework Decision 2003/568/JHA and the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union and amending Directive (EU) 2017/1371 of the European Parliament and of the Council, COM(2023) 234 final, were to enter into force. The planned amendments to Directive (EU) 2017/1371, which include an extension of criminal liability for bribery offences, etc., would affect and extend the EPPO's jurisdiction by virtue of the dynamic reference in Art 22(1) of the EPPO Regulation. However, this raises the question of competence for such an indirect extension.

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Council pursuant to Article 86(4) TFEU, which means that all Member States (including those not [yet] participating in the EPPO) have to agree. Additionally, a corresponding regulation pursuant to Article 86(1) TFEU, which makes use of the extension of competences provided by EU primary law, will have to be adopted.

So far, this extension has not been used and there seems to be a certain scepticism not only among legal scholars but also, and in particular, among the Member States involved.[9] Nevertheless, in the following sections, this potential of the EPPO will be examined by evaluating the case for expansion.

2 The case for expansion

In order to assess the potential of the EPPO in terms of expansion, first, the advantages of and obstacles to an expansion of the EPPO's powers are examined; second, the requirements an area of expansion would have to meet are outlined; before, finally, examining two possible areas of expansion – Russia sanctions and terrorist offences – as examples.

2.1 Advantages of extending the EPPO's competences

The general benefits of extending the EPPO's powers are inextricably linked to the benefits of a (well-functioning) EPPO itself, which aims to effectively prosecute crimes against the EU's financial interests.[10] In its work to date, the EPPO has already achieved some significant successes,[11] though, of course, there also remain structural difficulties.[12] It is a pan-

9 F Meyer, '§ 3 Aufgaben der EUStA – Rolle im System europäischer Strafverfolgung' in Herrnfeld and Esser (eds) (n 2) mn 22.

10 This idea was already the basis of the original concept in the Green Paper, see H Radtke, 'Die Europäische Staatsanwaltschaft. Ein Modell für Strafverfolgung in Europa mit Zukunft?' (2004) *Goltdammer's Archiv für Strafrecht* 1, 9.

11 European Public Prosecutor`s Office, 'Annual Report 2024' (Luxembourg, 2025), at https://www.eppo.europa.eu/assets/annual-report-2024/index.html; Pohlmann (n 3) 397.

12 Particularly with regard to the EPPO`s competences R Sicurella, 'The EPPO's material scope of competence and non-conformity of national implementations' (2023) 14 *New Journal of European Criminal Law* 18.

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European law enforcement agency, established as an independent body[13] with strong internal legal control.[14] It benefits from its decentralised, hybrid and transnational structure of European cooperation[15] and provides effective enforcement, especially in a previously under-investigated and under-prosecuted area. It can therefore compensate for enforcement deficits at Member State level, inter alia, through the pooling of knowledge in the EPPO and its more effective cross-border prosecution possibilities.

It ensures effective action at different levels:

2.1.1 Detection

Through regulated reporting mechanisms, partly based on obligations where national and other European actors are concerned, a broad and efficient detection is ensured. Of course, there is still room for improvement, but the EPPO figures show that the mechanisms put in place are already working quite well.[16] Moreover, as the EPPO becomes better known and more visible in the Member States, it can be expected that not only the national authorities but also the public will contribute even more to the detection of these crimes.[17] As these mechanisms are already in place, an area of expansion would benefit from them.

2.1.2 Investigation and prosecution

The EPPO aims to redress the structural imbalance between crime and crime control in a Europe of free borders.[18] While criminals benefit from free movement between Member States, national law enforcement authori-

13 Unlike, for example, German prosecutors; see Art 6(1) 1 EPPO Regulation.

14 See Arts 12 and 13 EPPO Regulation; however, on the still existing weaknesses see MJ Antunes and N Brandão, 'EPPO Independence and Accountability' in Ligeti, Antunes and Giuffrida (eds) (n 2) *The European Public Prosecutor's Office at Launch. Adapting National Systems, Transforming EU Criminal Law* (CEDAM 2020) 17.

15 Brodowski (n 1) 426 ff.

16 European Public Prosecutor`s Office (n 11).

17 Interestingly, according to the EPPO's Annual Report 2024 (n 11), 70 % of the cases came from private parties, p. 5, which might indicate a high level of public acceptance of the EPPO's activities.

18 See L Strauch, 'Die Europäische Staatsanwaltschaft – Rechtliche Einordnung der ersten supranationalen Strafverfolgungsbehörde' (2021) *Zeitschrift für Europarechtliche Studien* 683, 689.

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ties are limited to their national competences within their own territory. The EPPO architecture aims to remedy this situation by providing effective tools, in particular for cross-border investigations. To take just one key example: The EPPO was created to overcome the limitations and obstacles of traditional mutual legal assistance.[19] In practice, Article 31 of the EPPO Regulation provides the basis for achieving (more) speed and efficiency.[20] In a recent judgement, the European Court of Justice (ECJ), in response to a reference for a preliminary ruling from the Oberlandesgericht Wien (Higher Regional Court, Vienna),[21] confirmed an interpretation of Article 31 of the EPPO Regulation which ensures that Article 31 of the EPPO Regulation continues to provide the basis for a fast and efficient system of cooperation between the participating Member States.[22] In principle, the powers of the EPPO are geared towards effective cross-border investigations and prosecutions, as set out, inter alia, in Article 37(1) of the EPPO Regulation, which makes it clear that the admission of evidence in a criminal proceeding in one Member State cannot be refused on the sole ground that the evidence was gathered in another Member State. To be clear, although there certainly is room for improvement, the EPPO provides real added value in the prosecution of transnational crime, as demonstrated by its work to date. Furthermore, in terms of efficiency, it should be stressed that the EPPO's work helps to prevent parallel and unconnected investigations at national

19 Strauch (n 18) 689.

20 A Ritter, 'Grenzüberschreitende Strafverfahren der EuStA – Erste Einblicke in die Praxis' in T Niedernhuber (ed), *Die neue Europäische Staatsanwaltschaft. Bedeutung, Herausforderungen und erste Erfahrungen* (Nomos 2023) 15, 17.

21 ECJ, Case C-281/22 *G.K. and Others (Parquet européen),* ECLI:EU:C:2023:1018. For an in-depth analysis see H-H Herrnfeld, 'Efficiency contra legem? Remarks on the Advocate General's Opinion Delivered on 22 June 2023 in Case C-281/22 G.K. and Others (Parquet européen)' (2023) *eucrim* 229.

22 ECJ, Case C-281/22 *G.K. and Others (Parquet européen),* ECLI:EU:C:2023:1018. In its decision, the ECJ clarified that the substantive reasons for justifying and adopting the investigative measure must be assessed solely in accordance with the law of the Member State of the executing EDP, while judicial review by a court in the Member State of the assisting EDP must be limited to the elements relating to the execution of that measure; see also N Franssen, 'The judgment in G.K. e.a. (parquet européen) brought the EPPO a pre-Christmas tiding of comfort and joy but will that feeling last?' (European Law Blog, 15 January 2024), at https://www.europeanlawblog.eu/pub/the-judgment-in-g-k-e-a-parquet-europeen-brought-the-eppo-a-pre-christmas-tiding-of-comfort-and-joy-but-will-that-feeling-last/release/1.

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level, thanks to the regulated reporting obligations and the rules governing the exercise of its powers.[23]

2.1.3 Cooperation

The EPPO's work is also based on clear rules on reporting and cooperation obligations. The EPPO therefore provides for a tried and tested system of cooperation with Member States' authorities, non-participating Member States and other third parties, as underlined by the many working arrangements already concluded.[24] Any additional area of competence would also benefit from these structures.

2.1.4 Structure of the EPPO

Two structural aspects of the EPPO are also beneficial: its independence and its standard-setting function. The importance of the EPPO's independence is underlined by the prominent placement of Article 6 at the beginning of the EPPO Regulation. The structure allows for complete independence, which is a clear advantage over national prosecutors who may be subject to various forms of legal or political pressure that might compromise their independence. The EPPO may also facilitate the uniform application of European law and has (at least potential) standard-setting power,[25] which would benefit any other incorporated area.

In conclusion, although it is still early to give a definitive and complete answer to the question of the EPPO's added value, and although there certainly is room for improvement, the EPPO has already proved its worth. It must also be recognised that some things can indeed be better dealt with at a European level. An extension of the EPPO's powers could therefore help to overcome Member States' inertia or reluctance to prosecute certain crimes[26] and the limitations of a national law enforcement response to the problems posed by modern, transnational crime by overcoming the obstacles to cooperation posed by national borders (e.g. mutual legal

23 Ritter (n 20) 16; on structural deficits see Grasso, Sicurella and Giuffrida (n 2).
24 See European Public Prosecutor's Office, 'International Cooperation' at https://www.eppo.europa.eu/en/about/international-cooperation.
25 Meyer (n 9) mn 21.
26 Strauch (n 17) 690.

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assistance[27]), and it can help to approximate the level of prosecution and sanctions in the different Member States. Provided that sufficient resources are made available, all this would also have a beneficial effect in each new area.

2.2 Obstacles

However, it must be recognised that there are also some obstacles to such an extension:

2.2.1 Feasibility

First of all, there is the question of feasibility: The 24 Member States participating in enhanced cooperation cannot extend the EPPO`s competences on their own, because the simplified Treaty amendment procedure requires unanimity (Article 86(4) TFEU). Although in theory such a unanimous decision could be achieved by convincing the non-participating Member States[28] to vote in favour, in practice this is unlikely to happen any time soon because of the existing scepticism of (at least some of) these Member States, which is manifested in their reluctance to participate.[29] This raises the question of whether the first immediate objective should not be to get all or as many members as possible to join.[30] The case of Poland, which immediately joined the EPPO after a general election and subsequent change of government, shows that this can be an appropriate and viable way forward.[31]

27 Strauch (n 17) 689.

28 Denmark, Ireland and Hungary would have to agree without being part of it; while with regard to Denmark and Ireland, their special role has to be taken into account, as they have opted out of the AFSJ (in the case of Ireland, with the possibility of opting in on certain initiatives if it so wishes). This leaves Hungary (at least under the current government) as the most likely candidate not only to refrain from joining the EPPO but also to prevent further expansion.

29 Whether the principle of sincere cooperation (Art 4(3) Treaty on European Union [TEU]) would require such a support in case all participating members would agree is, due to the nature of treaty amendment, more than questionable.

30 See further below, 3.1. Both Poland and Sweden have recently joined, demonstrating the potential for persuading other members to join.

31 Its participation in the EPPO was confirmed on 29 February 2024 by the Commission, see European Commission, 'Commission Decision (EU) 2024/807 of 29 Febru-

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2.2.2 Structural barriers

There exist three further structural obstacles. The EPPO runs the risk of being overwhelmed by an extension of its powers due to limited resources. This would not only jeopardise its effectiveness in prosecuting cases but would also call into question its legitimacy.[32] In this context, it should not be forgotten that added value is also a fundamental condition for the exercise of the Union's non-exclusive powers.[33] While this obstacle could be overcome by providing sufficient resources, the political reality is that (financial) resources are finite.

Moreover, the EPPO is still conceived and structured as a 'special body for financial offences'[34], which requires special knowledge and expertise. Consequently, many provisions of the EPPO Regulation are tailored to the prosecution of PIF-offences.[35] This focus cannot easily be transferred to all other areas of cross-border crime; hence, their prosecution would require restructuring the EPPO.

Finally, the question of whether this structural change towards a supranational law enforcement agency has been adequately reflected on the 'defence side' and whether the rights of the accused have been sufficiently taken into account has been raised and often negated.[36] There are various proposals to institutionalise the defence (e.g. Eurodefensor, Ombudsperson).[37] Though the extent to which institutionalisation is desirable or re-

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ary 2024 confirming the participation of Poland in the enhanced cooperation on the establishment of the European Public Prosecutor's Office', C(2024) 1444 final.

32 This also concerns the capacity of the Union in general and is thus linked to the claim to legitimacy vis-à-vis the citizens of the Union, Meyer (n 9) mn 2.

33 As required by the principle of subsidiarity, Art 5(3) TEU.

34 Meyer (n. 9) mn 13; Pohlmann (n 3) 398.

35 H-H Herrnfeld, '§ 2 Entstehungsgeschichte – Rechtsgrundlage – Errichtung der EuStA' in Herrnfeld and Esser (eds) (n 2) mn 13.

36 R Esser, 'Transnationalität der Strafverfolgung durch die EUStA als Herausforderung für die Strafverteidigung' in Niedernhuber (ed) (n 20) 89; B Schünemann, 'Grundzüge eines Alternativ-Entwurfs zur europäischen Strafverfolgung' (2004) 116 *Zeitschrift für die gesamte Strafrechtswissenschaft* 376; T Wahl, 'The European Public Prosecutor's Office and the Fragmentation of Defence Rights' in Ligeti, Antunes and Giuffrida (eds) (n 2) 85, 95 ff.

37 P Asp, E Bacigalupo Zapater, N Bitzilekis, Á Farkas, D Frände, H Fuchs, R Hefendehl, A von Hirsch, M Kaiafa-Gbandi, V Militello, C Nestler, H Satzger, B Schünemann, E Symeonidou-Kastanidou and A Szwarc, 'Proposal for the Regulation of Transnational Criminal Proceedings in the European Union' in B Schünemann (ed), *Ein Gesamtkonzept für eine Europäische Strafrechtspflege. A Programme for European Criminal Justice* (Heymanns 2006) 255, 301 ff; Schünemann (n. 36) 388 ff; M Kaiafa-Gbani,

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quired is disputed,[38] within the current legal framework, there clearly exist some structural deficits due to the inherent fragmentation of the defence's rights[39]. Any extension of competence therefore, threatens to (further) undermine the rights of the accused.[40] There has not been enough time to see whether the EPPO will find its role as 'guarantor of the rule of law in criminal proceedings'[41] to counter this threat.

2.3 Preconditions

Given that there certainly are advantages as well as obstacles to expansion, and that expansion clearly cannot take place in an unstructured and capricious manner with respect to every possible crime, there are, in my view, some basic preconditions that need to be met for expansion. Some of these are inherent in the structure of the Union itself, and some are simply sensible in terms of maintaining an effective law enforcement agency at European level. *Brodowski* has already proposed three such preconditions,[42] on which the following model is based and which will be developed in more detail here.

2.3.1 A European interest

First, a new area must concern a European interest. This can be inferred from Article 86 TFEU, which only allows for an extension to 'serious crime with a cross-border dimension', which refers to crimes whose cross-border

'The Establishment of an EPPO and the Rights of Suspects and Defendants: Reflections upon the Commission`s 2013 Proposal and the Council`s Amendments' in P Asp (ed), *The European public prosecutor's office. Legal and criminal policy perspectives* (Stiftelsen Skrifter utgivna av Juridiska fakulteten vid Stockholms universitet 2015) 234, 252; F Meyer and S van der Stroom, 'Die Europäische Staatsanwaltschaft. Funktionsweise und Perspektive' (2018) *Zeitschrift für Europarecht* 40, 64.

38 Even defence attornies themselves seem to be critical, J Arnold, *Grenzüberschreitende Strafverteidigung in Europa. Praktische Erfahrungen und theoretische Überlegungen anhand von Interviews mit Strafverteidigerinnen und Strafverteidigern* (Berliner Wissenschafts-Verlag 2015) 187 ff; see also Wahl (n 36) 112.

39 Wahl (n 36) 95 ff; F Falletti, 'The European Public Prosecutor's Office and the Principle of Equality' (2017) *eucrim* 25, 26.

40 On the practical difficulties the defence is faced with in EPPO-proceedings Esser (n 36) 93 ff.

41 Brodowski (n 1) 426.

42 Brodowski (n 1) 430: a pan-European interest, added value, coherence is maintained.

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dimension – as can be seen in conjunction with Article 83(1) TFEU – results from their nature or effects or from a particular need to combat them on a common basis. They therefore concern the Union as a whole.

This European interest can be based on different criteria. First, it can be based on a genuinely European, and therefore supranational, legal interest or, in the German terminology, '*Rechtsgut*'. This includes the protection of interests that affect the Union in a particular way, such as the Union's financial interests.[43] A genuinely European nature of the legal interest[44] is required, so that protection by a European institution is already indicated by the factual connection. An example would be a comprehensive and genuine criminal liability of European officials,[45] going beyond the already existing mandate on corruption in Article 22 TFEU in conjunction with Article 4(2) of the PIF Directive.[46]

However, a European interest justifying the extension of the powers of the EPPO is not limited to genuine European legal interests but can also be derived from the Union's need for uniform criminal prosecution in a specific area.[47] This need may be based on several factors, such as disparities in the national application of laws or in national sanctions. Since these two justifications differ in the degree to which the Union's interests are affected, depending on the nature of the interest at stake, a distinction must be made as to the form of the extension.[48]

2.3.2 An added benefit

Secondly, derived from the principle of subsidiarity (Article 5(3) TEU), the EPPO must, in any case, provide added value through its activities in the specified area. This presupposes that only the EPPO as a supranational body can effectively and efficiently combat the relevant offences in terms of their nature and extent. The following circumstances may indicate such a need, as they represent conditions that compensate for the frictional losses that inevitably occur due to the involvement of another level and the interaction of the EPPO with the national level: An enforcement deficit at the national level, (political) pressure on national law enforcement actors

43 Pohlmann (n 3) 398.
44 Meyer (n 9) mn 2.
45 On the significance and necessity Schünemann (n 36) 379.
46 Brodowski (n 2), mn 67 ff.
47 Meyer (n 9) mn 22.
48 See further below, 3.2.

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due to the national state's own political interests that can be prevented or alleviated by a transfer to the supranational level, the necessity and effectiveness of an external view and/or an effectively functioning supranational law enforcement agency, that is, due to its competences and functioning, able to compensate for structural deficits at the national level, such as those concerning the cross-border collection and use of evidence.

2.3.3 Structural requirements

Thirdly, there are some structural requirements to be met. First, there must be a structural basis for such an extension, which requires at least a suitable degree of harmonisation of the specific area. This can be based on a regulation (if and when the Union's competences allow for such criminalisation) or – as in the case of the protection of the EU's financial interests – on a directive setting out minimum requirements for criminalisation in the Member States, to which a – reformed – EPPO Regulation could refer.

In addition, such an extension must fit into the overall structure of the Union, which requires, inter alia, that the coherence of the interwoven criminal prosecution systems at Union and national level be maintained.[49] The structural suitability of the EPPO to become active in this area must be required and ensured.

2.4 Areas for possible expansion

Once these necessary conditions have been established, they can be used to examine specific areas. In the following sections, the focus is laid on two areas that have already been proposed by various actors: first, the extension to Russia sanctions, and second, to terrorism offences. The second was proposed by the European Commission in 2018[50], the first, more recently, by the French and German justice ministers at the end of 2022[51].

49 See Brodowski (n 1) 431.
50 Communication COM(2018) 641 final (n 5).
51 Dupond-Moretti and Buschmann (n 5).

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2.4.1 Russia sanctions

In response to Russia's invasion of Ukraine, the European Union imposed a series of sanctions, including in Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine[52], which has been continuously adapted to date, covering various areas such as travel bans and asset freezes. It was also agreed that, in order to ensure effective enforcement, violations should be punished as criminal offences throughout the EU territory. Against this background, the German and French justice ministers proposed in 2022 that sanctions violations should not only be jointly sanctioned, but also jointly prosecuted – through the EPPO.[53]

The term 'sanctions violations' refers to violations of restrictive measures that the EU can impose based on Articles 21(1), 23, 28(1) TEU in conjunction with Article 215 TFEU to enforce fundamental values such as democracy, the rule of law, human rights and fundamental freedoms at the international level. By Council Decision (EU) 2022/2332, the violation of restrictive measures of the Union was qualified as a criminal area within the meaning of Article 83(1) TFEU. A Directive on the definition of criminal offences and sanctions for the violation of restrictive measures of the Union has entered into force in May 2024.[54]

The argument in favour of such an extension in this particular case is that it meets the conditions set out above. There is a genuine European legal interest in protecting the enforcement of European restrictive measures. An additional benefit is to be expected, as it stands to reason that the involvement of the EPPO can contribute to improved prosecution of violations and thus to better enforcement of these sanctions. As noted in the Draft Directive, there have been inconsistencies in national enforcement

52 That imposes restrictive measures against natural and legal persons as well as groups and non-state entities in connection with the Russian war of aggression on Ukraine.

53 Dupond-Moretti and Buschmann (n 5).

54 Directive (EU) 2024/1226 of the European Parliament and of the Council of 24 April 2024 on the definition of criminal offences and penalties for the violation of Union restrictive measures and amending Directive (EU) 2018/1673 was published in the Official Journal on 29 April 2024 and enters into effect on 19 May 2024; it had to be transposed by May 20th 2025.

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or a general lack thereof.[55] In addition, this is an area where the EPPO's expertise in financial crime[56] can be put to good use. Furthermore, the EPPO has an advantage over traditional mutual legal assistance, particularly in the case of complex financial flows and structures or entities consisting of companies operating in several EU Member States.[57] These circumstances consequently point to a clear added value in the prosecution of violations of restrictive measures. Finally, the structural requirements will be met once the basis has been established through the transposition of the Directive (EU) 2024/1226. Nor are there likely to be any problems of coherence.

What speaks against such an expansion are general considerations. It would mean a redesign and alteration of the EPPO's basic structures with possible detrimental effects on its work and the obstacles described above, so that the question would have to be answered politically whether such a change of role is desirable.

2.4.2 Terrorism

An extension to terrorism offences has already been proposed by the Commission and has been supported by the European Parliament,[58] which clearly saw the advantage of such an extension. So far, however, the Council has not taken up the idea. What cannot be denied is that it would make the Union a new and stronger security actor. However, if one takes the developed criteria as a basis for extending the EPPO`s powers, one comes to the conclusion that there is cause for doubt.[59]

The first criterion is the common European interest in the subject of the extended competence. Although, unlike in the case of the Russia sanctions, no genuine European legal interest is affected, there is indeed a European interest at stake, since terrorist acts affect all of us as Europeans[60] and

55 European Commission, 'Proposal for a Directive of the European Parliament and of the Council on the definition of criminal offences and penalties for the violation of Union restrictive measures', COM(2022) 684 final, 1 f.

56 Pohlmann (n 3) 399.

57 Pohlmann (n 3) 399.

58 European Parliamentary Research Service, 'Briefing – Understanding EU counter-terrorism policy' (10 March 2023), at https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/739395/EPRS_BRI(2023)739395_EN.pdf 10.

59 It is viewed predominantly critically in principle, see Meyer (n 9) mn 22; Herrnfeld (n 35) mn 12; Brodowski (n 1) 430 f.

60 Brodowski (n 1) 430.

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terrorist activities today often have a transnational character. Moreover, such an interest could be based on the Union's need for (more) uniform prosecution, since this is an area that is very much shaped by national structures and is still governed by national peculiarities of the legal systems, which have led to major differences in implementation and, in particular, in the penalties provided for by national laws and imposed by national courts.[61]

The second criterion, being the added value, has been highlighted and presented in the Commission's initiative, which underlines that although criminal investigations and prosecutions in this area are generally considered a high priority by Member States, the authorities often take a national perspective due to the link with national security aspects.[62] It also complained that the complexity and/or cross-border nature of such cases is not always properly taken into account in national investigations.[63] Challenges also remain regarding the timely exchange of information[64] and the exchange of sensitive information.[65] The Commission, therefore, clearly expects less inefficiency from the involvement of the EPPO.[66]

However, this assessment can be questioned. It should be borne in mind that terrorist attacks are often highly dynamic events that can develop in unpredictable patterns. This makes frictional losses, which are likely to be caused by a transfer to the European level, highly problematic.[67] Moreover, this is also an area where national law enforcement agencies are highly motivated, so there is definitely no enforcement deficit to be expected. There are also high-ranking competing national interests. Where there are national victims affected, it will be very difficult for a Member State and its agencies to accept that they are not allowed to prosecute those responsible.

61 A Petzsche, *Strafrecht und Terrorismusbekämpfung. Eine vergleichende Untersuchung der Bekämpfung terroristischer Vorbereitungshandlungen in Deutschland, Großbritannien und Spanien* (Nomos 2013) 425 ff; M Cancio Meliá, *Los delitos de terrorismo: Estructura típica e injusto* (Editorial Reus 2010) 151 ff; A Cornford and A Petzsche, 'Terrorism Offences' in K Ambos, A Duff, J Roberts and T Weigend (eds), *Core concepts in criminal law and criminal justice. Volume I* (Cambridge University Press 2020) 172, 175 ff; A Petzsche and C Coenen, 'Terrorismus und Recht' in L Rothenberger, J Krause, J Jost and K Frankenthal (eds), in *Terrorismusforschung. Interdisziplinäres Handbuch für Wissenschaft und Praxis* (Nomos 2022) 461, 463 ff.

62 Communication COM(2018) 641 final (n 5) 5.

63 Communication COM(2018) 641 final (n 5) 5.

64 Communication COM(2018) 641 final (n 5) 5.

65 Communication COM(2018) 641 final (n 5) 6.

66 As indicated in Communication COM(2018) 641 final (n 5) 8.

67 Brodowski (n 1) 431.

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Finally, there are other European agencies, namely Europol and Eurojust, which can assist in cross-border investigations of terrorist activities. The Commission's assessment of the added value of expansion in this area is therefore less positive.

And, crucially in my view, there are many structural problems that would erode the promise of the added value: First, although this is a partially harmonised area, European law does not contain an adequate definition of terrorism that can be used as a basis for criminal prosecution, since the definition contained in the Directive is subjective in nature.[68] Secondly, the close link with crime prevention and the avoidance of imminent dangers raises the question of coherence. In the case of terrorism, the real objective of national actors (legislation, law enforcement, police, national security agencies, etc.) is prevention – to prevent a terrorist attack from taking place –, and if it occurs nonetheless, to limit its harm. This area is clearly the domain of the Member States. All this argues against an extension for the time being.

To sum up, while the prosecution of breaches of the Union's restrictive measures, such as the sanctions against Russia, is a viable avenue for expansion once the Directive (EU) 2024/1226 is transposed, the extension to cross-border terrorism offences seems to be more problematic. There are certainly areas that are more obviously suited to such an extension, and which meet the conditions described above. Economic crime and, in particular, environmental crime[69] come to mind. These are examples of areas that should be looked at first when considering expansion. This leaves open the question of whether and how such an extension should take place.

3 Ensuring effective expansion

Bearing in mind the significant challenges and chances of an expansion, my view is that the EPPO will stand or fall depending on whether it effectively fulfils the tasks allocated to it, and whether it succeeds in not disappointing the hopes placed in it. In this respect, it is essential to ensure the effectiveness of the EPPO in the event of an extension of its competences. For its success also affects the performance of the European Union as a whole

68 Herrnfeld (n 35) mn 12.
69 Brodowski (n 1) 431; Meyer (n 9) mn 23.

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and is therefore linked to its claim to legitimacy before the citizens of the Union.[70]

3.1 Time for consolidation

The risk of expansion that is brought too early and too far must be recognized. Premature expansion would jeopardise the achievements of the EPPO, so it is crucial to ensure effective expansion. We can distinguish between expansion in general and expansion now or in the near future. Most of the risks and disadvantages can be mitigated over time and, on the other hand, the EPPO itself can actually strengthen the case for expansion by working effectively.

To ensure effective expansion, consolidation should come first. It should not be forgotten that the work of the EPPO started only about four and a half years ago (on June 1st, 2021), which translates into only about four and a half years of experience. So, it makes sense to first consolidate what has been achieved. Consolidation is needed both internally, for example by strengthening and developing further cooperation with national authorities[71] and seeking necessary reforms of the EPPO Regulation[72] and the EPPO´s rules of procedure, and externally, by expanding cooperation with non-participating Member States and other relevant third parties.

To give some examples of this needed consolidation: There are a number of challenges[73] that need to be addressed and resolved, such as the flow of information, equivalent investigative powers in the national legal order,

70 Meyer (n 9) mn 2.

71 Ritter (n 20) 15–20; F Zimmermann, 'Die Zuständigkeit der EUStA im Ermittlungsverfahren und der Grundsatz "ne bis in idem"' in Niedernhuber (ed) (n 20) 21, 24 ff; on problems with regard to Art 30 see A Schneider, 'Die Zusammenarbeit der Europäischen Staatsanwaltschaft mit nationalen Ermittlungsbehörden' in Niedernhuber (ed) (n 20) 39, 44 ff; I Zerbes, 'Beweiserhebung und Beweisverwertung in EUStA-Verfahren – Dogmatische Probleme des Beweismitteltransfers' in Niedernhuber (ed) (n 20) 69, 82 ff.

72 On problems regarding Art 25 see Ritter (n 20) 18–19; Gut (n 2). An opportunity to address them is the forthcoming review and reform of the EPPO Regulation, as provided for in Art 119 of the EPPO Regulation.

73 J Vervaele, 'Outlook on the European Public Prosecutor's Office: A Giant with National Clay Feet?' in M Luchtman, K Ligeti, J Vervaele (eds), *EU Enforcement Authorities. Punitive Law Enforcement in a Composite Legal Order* (Hart Publishing 2023) 322, 323–326.

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transnational investigations, etc. To focus on just one of these areas: The work of the EPPO relies heavily on the flow of information from and the willingness of national enforcement authorities to inform and cooperate.[74] This needs to be (further) established and secured. The importance of this can be illustrated by an example: The conclusion of a working arrangement with the Italian Antimafia and Counterterrorism Directorate (DNA)[75] was necessary because the Italian implementing legislation for the EPPO Regulation[76] did not include the EPPO (and its EDPs) within the scope of Article 371-bis of the Italian Code of Criminal Procedure, which governs the relationship between the Italian Antimafia prosecutors and other enforcement authorities.[77] The working arrangement now in place remedies this by providing for proper consultation, coordination and mutual support.[78] It is to be expected that more such problems will arise, but that they too can be resolved through working arrangements.

Time would also allow the EPPO to further demonstrate its value and legitimacy,[79] and would allow countries with a more disrupted system[80] to find a workable way of integrating the EPPO.[81] This will also allow more time to encourage non-participating Member States to join.[82]

74 Vervaele (n 73) 323.

75 European Public Prosecutor's Office, 'Working arrangement between the European Public Prosecutor's Office (EPPO) and the National Antimafia and Counter Terrorism Directorate (DNA)' (Rome, 24 May 2021), at https://www.eppo.europa.eu/sites/default/files/2021-12/WA%20%28EN%29%20EPPO%20-%20The%20National%20Antimafia%20and%20Counter%20Terrorism%20Directorate%20%28DNA%29.pdf.

76 Decreto Legislativo 2 febbraio 2021, n. 9. Disposizioni per l'adeguamento della normativa nazionale alle disposizioni del regolamento (UE) 2017/1939 del Consiglio, del 12 ottobre 2017, relativo all'attuazione di una cooperazione rafforzata sull'istituzione della Procura europea «EPPO». (21G00012), GU n.30 del 5–2–2021.

77 Vervaele (n 73) 319.

78 This problem exists due to the referral in the Regulation because it follows that the myriad of national enforcement authorities that are labelled in the Regulation as competent national authorities for information exchange and for cooperation with the EDPs concerning certain operations are defined by national law.

79 That is already questioned by some, Vervaele Office (n 73) 328.

80 Such as France with the normal centrality of the investigating judge, see on the ensuing problems M Slimani, 'The influence of the European Public Prosecutor's Office on French criminal law' (2023) 14 *New Journal of European Criminal Law* 294, 298 ff.

81 On the changes in French Criminal Law Slimani (n 80) 296 ff.

82 As has happened in the case of Poland after a change in government, see European Public Prosecutor's Office, 'Polish delegation visits the EPPO in Luxembourg' (31

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On the one hand, given the short time that EPPO has been operational, it still makes sense to focus on consolidation, especially considering that the political level is decisive, since expansion is only possible with unanimity. On the other hand, in view of the forthcoming evaluation and possible reform based on Article 119 of the EPPO Regulation, there is an opportunity for expansion. It may therefore be time to make a (political) push for an extension to include violations of restrictive measures. At the same time, the work of and on the EPPO must continue to support this political push. It makes sense to build on the EPPO's own achievements. The time until a (possible) reform of the Regulation must be used to assess which (further) problems may arise and which may already be solvable. It should also be used for further research into the matter and perhaps new ideas on how and in which areas expansion would be best.

3.2 A possible way into the future

Given the complex political background of the European Union and the national interests that have to be taken into account, one way forward when considering further expansion is to differentiate. For this, the European interest behind the area of expansion is decisive. Where there is a genuine European interest, such as the financial interest of the EU or the violation of European restrictive measures, expansion can be prioritized and comprehensive. Although competing national interests may be affected, in such cases, the European interest prevails. The subsidiarity principle and the sovereignty interest of the Member States therefore do not argue against or for only limited expansion in these cases.

However, if the European interest is justified in other ways, as in the case of terrorism offences, for example, a more sparing approach is indicated. Due to the very pronounced domestic interests in individual cases, an extension is more problematic here. One avenue would be to simply extend the possibility for Member States to consent to an investigation and prosecution by the EPPO, as already provided for in Article 25(4) of the EPPO Regulation. However, leaving an extended competence to the mere discretion of the Member States may not be sufficient to provide for any real added value.

January 2024), at https://www.eppo.europa.eu/en/news/polish-delegation-visits-eppo-luxembourg.

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Another possibility for a conservative approach that balances national and European interests offers the application of the complementarity principle[83] familiar from international criminal law, in particular Articles 1 and 17 of the Rome Statute.[84] According to this principle, the EPPO would be responsible for other specific areas that do not concern a genuine European legal interest only if the respective national states concerned were unwilling or unable to ensure effective criminal prosecution on their own.[85] This would safeguard the sovereign right of the Member States to deal with such cases through their national prosecuting authorities rather than through the EPPO.[86] It would also clearly reflect the principles of subsidiarity and proportionality, which are particularly important at the European level,[87] as well as the aspiration to respect the sovereignty of EU Member States and national sensitivities.[88] An additional advantage is that it not only allows Member States to have a decisive influence, since it is in their hands to ensure effective prosecution, but also creates an incentive for them to do so, in order to avoid intervention from the European level.[89]

The difficulties of assessing the willingness or ability of Member States at the early investigative stage of proceedings may be more challenging than the situation faced by the International Criminal Court in determining its

83 On the complexities of the principle MM El Zeidy, *The Principle of Complementarity in International Criminal Law. Origin, Development, and Practice* (Brill 2008) 157 ff; G Werle and F Jeßberger, *Principles of international criminal law* (4th edn, Oxford University Press 2020); see also F Razesberger, *The International Criminal Court. The Principle of Complementarity* (Peter Lang 2006).

84 H Satzger, 'Die potentielle Errichtung einer Europäischen Staatsanwaltschaft – Plädoyer für ein Komplementaritätsmodell' (2013) *Neue Zeitschrift für Strafrecht* 206 already argued in 2013 in favour of introducing the principle as the general basis for the EPPO, which had not yet been created at the time; also favouring such a solution K Ambos, *Internationales Strafrecht. Strafanwendungsrecht, Völkerstrafrecht, Europäisches Strafrecht, Rechtshilfe* (5th edn, CH Beck 2018) § 13 mn 26.

85 The application of this principle would of course produce some challenges that would need to be resolved in the reformation process.

86 Satzger (n 84) 210–211.

87 See further P de Hert and I Wieczorek, 'Testing the Principle of Subsidiarity in EU Criminal Policy: The Omitted Exercise in the Recent EU Documents on Principles for Substantive European Criminal Law' (2012) 3 *New Journal of European Criminal Law* 394; H Kaptein, 'Toward marginalisation of European Criminal Law: Proportionality, Subsidiarity and Principled Public Policy Priorities in Protecting Human Life and Rights' in JB Banach-Gutierrez and C Harding (eds), *EU Criminal Law and Policy. Values, Principles and Methods* (Routledge 2017) 70.

88 Satzger (n 84) 210.

89 See Satzger (n 85) 211 on further arguments for a general principle of subsidiarity.

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jurisdiction under Article 17 of the Rome Statute. However, it is not impossible to assess, even at an early stage, whether the national investigation for a particular case does not meet the criteria of willingness and ability. For example, if it appears that the national authorities are shielding a person from criminal proceedings or are not pursuing them seriously, the EPPO could and should take up the case on the basis of this 'unwillingness'. Or if the national legislator has failed to provide an adequate legal basis for prosecuting a particular case or is unable to prosecute effectively for procedural reasons, e.g., because of a lack of effective mutual legal assistance instruments, this would constitute 'inability'.

For this to work, however, it would be necessary to decide which legal remedies could be used to resolve a jurisdictional dispute. It is questionable whether the current model of a decision by national authorities, as provided for in Article 25(6) of the EPPO Regulation, would work here. Rather, a competence of the ECJ seems to be indicated.[90] However, this would mean that the Court would have to be expanded in order to be able to deal adequately with the additional burdens associated with an extension of its competences. In addition, because of the (then to be expected) growing workload, the EPPO would also need structural reforms to ensure continued effective functioning and accountability. Such an expansion would thus imply a restructuring of several institutions at the European level (including the EPPO), which may be possible in the future, but not at this stage.

Therefore, to ensure an effective expansion in the future, it makes sense to first concentrate on the areas that deal with genuine European legal interests as a basis for expansion, since expansion here would mean that the same basic framework already in use could be applied. For a possible further expansion based on the principle of complementarity, the structures of the EPPO and other European institutions would have to be adapted in order to allow for a distribution mechanism that can resolve the question of whether a particular Member State is unwilling or unable to prosecute a particular case.

4 Conclusion

The EPPO has great potential as a European and truly supranational criminal justice actor, but it should not be overburdened by asking for too much

90 Similar Satzger (n 84) 212.

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too soon. To answer the question posed above: Is it time to extend the EPPO's competences? The answer given in this chapter is not clear-cut due to the unique political background of the EU. While it is still necessary to focus on the consolidation of the EPPO's work and its firmer establishment, the forthcoming evaluation and possible reform based on Article 119 of the EPPO Regulation could provide a window of opportunity for a (political) push towards expansion. Expansion should, however, only be considered for areas that meet the above-mentioned conditions to ensure an effective expansion. The inclusion of violations of restrictive measures could be a logical first step, as it fulfils the criteria developed above and also fits into the current structure of the EPPO as a financial protection agency. At the same time, given the political uncertainties of an actual expansion, future expansion should be prepared for by optimising the current work, by seeking support and by conducting research into the preconditions and possible areas of expansion.

If we consider further expansion in the future, we should focus on areas that meet the preconditions developed above and are suitable for such an expansion. Again, with regard to the examples examined here, only the Union's restrictive measures, but not terrorism offences, seem suitable. However, a distinction also needs to be made between areas that concern genuine European legal interests, where an expansion can build upon the current framework, and other areas, where a more sparing approach is needed – one that could be based on the principle of complementarity known from international criminal law.

Finally, it should not be forgotten that any further extension would change the nature of the EPPO towards a comprehensively responsible supranational law enforcement agency. There is still a long way to go to arrive at a truly European law enforcement agency to protect the area of freedom, security and justice – a way that should not be rushed.

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