



How Enhanced Cooperation on the EPPO Began, and Paid Off.

Proff.ssa Ubertazzi

Jean Monnet Course Coordinator

A golden statue of Lady Justice stands on a map of Europe. She holds a scale of justice in her right hand and a sword in her left. The background is a light beige color with faint circular lines.

Article 86(1) TFEU – Legal basis for establishing EPPO

... may establish a European Public Prosecutor's Office from Eurojust. The Council shall act unanimously after obtaining the consent of the European Parliament.

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

Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft regulation concerned, they shall notify the European Parliament, the Council and the Commission accordingly.



What is 'Enhanced Cooperation'?

- Enhanced cooperation allows for a minimum of nine member states (which amounts to almost one-third at the moment) to co-operate within the structures of the EU without all member states.
- It is designed to overcome paralysis.
- Does not allow for an extension of the powers laid down in the treaties of the European Union.

Article 20 – Treaty of the European Union

Enhanced cooperation shall aim to further the objectives of the Union, protect its interests and reinforce its integration process. Such cooperation shall be open at any time to all Member States, in accordance with Article 328 of the Treaty on the Functioning of the European Union.

2. The decision authorising enhanced cooperation shall be adopted by the Council as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole, and provided that at least nine Member States participate in it. The Council shall act in accordance with the procedure laid down in Article 329 of the Treaty on the Functioning of the European Union.

TITLE III
ENHANCED COOPERATION

Article 326

(ex Articles 27a to 27e, 40 to 40b and 43 to 45 TEU and ex Articles 11 and 11a TEC)

Any enhanced cooperation shall comply with the Treaties and Union law.

Such cooperation shall not undermine the internal market or economic, social and territorial cohesion. It shall not constitute a barrier to or discrimination in trade between Member States, nor shall it distort competition between them.

Article 327

(ex Articles 27a to 27e, 40 to 40b and 43 to 45 TEU and ex Articles 11 and 11a TEC)

Any enhanced cooperation shall respect the competences, rights and obligations of those Member States which do not participate in it. Those Member States shall not impede its implementation by the participating Member States.

Article 328

(ex Articles 27a to 27e, 40 to 40b and 43 to 45 TEU and ex Articles 11 and 11a TEC)


1. When enhanced cooperation is being established, it shall be open to all Member States, subject to compliance with any conditions of participation laid down by the authorising decision. It shall also be open to them at any other time, subject to compliance with the acts already adopted within that framework, in addition to those conditions.

The Commission and the Member States participating in enhanced cooperation shall ensure that they promote participation by as many Member States as possible.

2. The Commission and, where appropriate, the High Representative of the Union for Foreign Affairs and Security Policy shall keep the European Parliament and the Council regularly informed regarding developments in enhanced cooperation.

Enhanced Cooperation is also laid down in Articles 326 – 334 of the Treaty on the Functioning of the European Union

- 2013 – European Commission submits its proposal to establish a European Public Prosecutor's Office.
- After three years of negotiations, the Council of the European Union failed to reach unanimous agreement.
- Absence of unanimity registered by the Council in February 2017.
- Enhanced Cooperation was undertaken in April 2017.
- In October 2017, the Council adopted the EPPO regulation, which entered into force 20 November 2017.

A person is seated at a desk in a formal setting, likely a conference room or a meeting. A large European Union flag is visible in the background. The person is wearing a dark jacket over a light-colored shirt. The scene is slightly blurred, suggesting a focus on the text overlay.

How does
Enhanced
Cooperation apply
to EPPO?



Brussels, 17.7.2013
COM(2013) 534 final

2013/0255 (APP)

Proposal for a

COUNCIL REGULATION

on the establishment of the European Public Prosecutor's Office

{SWD(2013) 274 final}

{SWD(2013) 275 final}

2013 – European Commission submits its proposal

- Proposal for a Council Regulation on the establishment of EPPO.
- European Commission submits its proposal on the legal basis of Article 86 TFEU.
- *(7) The mandate of the European Public Prosecutor's Office should be to investigate, prosecute and bring to judgment the perpetrators of offences against the Union's financial interests. This requires autonomous powers of investigation and prosecution, including the ability to carry out investigations in cross-border or complex cases. - Remember, this is envisaged by the TFEU Article 86(1).*



Negotiations in
the Council last
for three years...

- As established by Article 86(1) TFEU, unanimity is required for the passage of a Council Regulation establishing EPPO.
- No unanimous agreement could be reached on the legislative proposal submitted by the Commission for the Regulation establishing EPPO.
- So then, **now what?**



Absence of unanimity registered by the Council in February 2017.

- At its meeting of 7 February 2017, the Council registered the absence of unanimity on the draft Regulation.
- In accordance with the second subparagraph of Article 86(1) TFEU, a group of seventeen Member States requested, by a letter of 14 February 2017, that the draft Regulation be referred to the European Council.
- On 9 March 2017, the European Council discussed the draft Regulation and noted that there was disagreement within the meaning of the third subparagraph of Article 86(1) TFEU.

An aerial photograph of a city, likely Brussels, showing a dense urban area with various buildings and green spaces. A large blue rectangular box is overlaid on the left side of the image, containing white text. The background is slightly blurred, and there are decorative curved lines in the top-left and bottom-right corners.

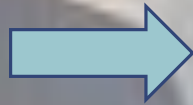
**Enhanced Cooperation
was undertaken in April
2017.**

On 3 April 2017, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Greece, Lithuania, Luxembourg, Portugal, Romania, Slovakia, Slovenia and Spain notified the European Parliament, the Council and the Commission that they wished to establish enhanced cooperation on the establishment of the EPPO.

Connecting the legal bases for the establishment of EPPO with Enhanced Cooperation

EPPO:

86(1) TFEU – ‘in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft regulation concerned, they shall notify the European Parliament, the Council and the Commission accordingly’.



Enhanced Cooperation:

Article 20(2) TEU – ‘The decision authorising enhanced cooperation shall be adopted by the Council as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole, and provided that at least nine Member States participate in it’





Member States participating in the Enhanced Cooperation


- In accordance with Article 328(1) TFEU, when enhanced cooperation is being established it is to be open to all Member States of the European Union. It is also to be open to them at any other time, including with regard to an enhanced cooperation in progress subject to compliance with the acts already adopted within that framework.
- by letters of 19 April 2017, 1 June 2017, 9 June 2017 and 22 June 2017, Latvia, Estonia, Austria and Italy indicated their wish to participate in the establishment of the enhanced cooperation.

**From the first
session:
Council
Regulation
2017/1939 – 12
October 2017**

WHAT IS THE AIM OF THIS REGULATION?

It establishes an independent and decentralised prosecution office of the European Union with the competence to investigate, prosecute and bring to judgment crimes against the Union's financial interests.

It establishes a system of shared competences between the EPPO and national authorities in tackling such cases.



Does Establishing EPPO
through Enhanced
Cooperation Undermine
EPPO's effectiveness?

Recall EPPO's objective:

Article 86(1) TFEU – *'In order to combat crimes affecting the financial interests of the **Union..**'*

Risks

A serious risk resulting from establishment of the EPPO through enhanced cooperation is that non-participating Member States unable or unwilling to cooperate with the EPPO's requests for judicial cooperation could become a "safe haven" for the perpetrators of the offences falling within the competence of the EPPO. This could occur in the following situations:

- a) when offences falling within the EPPO's mandate
 - i) are committed on the territory of non-participating Member States or
 - ii) have a cross-border dimension and therefore have effect on the territory of both participating and non-participating Member States; or
- b) when ancillary offences "inextricably linked" to criminal conduct falling within the material scope of competence of the EPPO are committed on the territory of a non-participating Member States.

What does the 2017 Council Regulation say?

Article 105

Relations with Member States of the European Union which do not participate in enhanced cooperation on the establishment of the EPPO

1. The working arrangements referred to in Article 99(3) with the authorities of Member States of the European Union which do not participate in enhanced cooperation on the establishment of the EPPO may in particular, concern the exchange of strategic information and the secondment of liaison officers to the EPPO.
2. The EPPO may designate, in agreement with the competent authorities concerned, contact points in the Member States of the European Union which do not participate in enhanced cooperation on the establishment of the EPPO in order to facilitate cooperation in line with the EPPO's needs.
3. In the absence of a legal instrument relating to cooperation in criminal matters and surrender between the EPPO and the competent authorities of the Member States of the European Union which do not participate in enhanced cooperation on the establishment of the EPPO, the Member States shall notify the EPPO as a competent authority for the purpose of implementation of the applicable Union acts on judicial cooperation in criminal matters in respect of cases falling within the competence of the EPPO, in their relations with Member States of the European Union which do not participate in enhanced cooperation on the establishment of the EPPO.



What does this mean for EPPO's effectiveness?

The relationship between the EPPO and the non-participating Member States will be characterised by fragmentation, as it will rely on working agreements concluded between the EPPO and the non-participating Member States, of which there may be as many different ones as there are non-participating Member States.

Members

Currently, 22 EU Member States participate in the enhanced cooperation. So far, Hungary, Poland and Sweden have decided not to join the EPPO. Denmark and Ireland have an opt-out from the area of freedom, security and justice (AFSJ). Working arrangements with these five non-participating Member States are being established to define how the EPPO will cooperate with them.

But...

Working arrangements are underway with non-participating Member States.

The pay off for European Union integration

- Enhanced Cooperation worked to overcome three years of paralysis in the Council on the establishment of EPPO.
- Works within the limits of the European Union treaties, particularly Article 86(1) TFEU and Article 20 TEU.
- EPPO recognizes the legal limits of its establishment via Enhanced Cooperation under the treaties, and is working to design arrangements with non-participating Member States.
- This pathway respects the original purpose of establishing EPPO while addressing fragmentation of national laws in this area.