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**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**

*A contribution from the European Commission to the Leader's meeting in
Salzburg on 19-20 September 2018.*

"The European Union must also be stronger in fighting terrorism. In the past three years, we have made real progress. But we still lack the means to act quickly in case of cross-border terrorist threats. (...) I also see a strong case for tasking the new European Public Prosecutor with prosecuting cross-border terrorist crimes.

Jean-Claude Juncker, State of the Union Address, 13 September 2017

1. Introduction

Terrorism remains one of the most significant challenges facing our societies. Acts of terrorism constitute one of the gravest types of crime and violate the very values upon which the European Union is founded.

A stronger Europe must protect its citizens and ensure that terrorists are brought quickly to justice. In his State of the Union Address in September 2017, President Juncker set out a number of actions with a perspective towards a stronger, more united and more democratic Union by 2025. As a follow up, the Commission presents this initiative to extend the competence of the European Public Prosecutor's Office (EPPO)¹ to investigate and prosecute terrorism.

Over the past years, the terrorist threat in the European Union has remained high and has continued to evolve. In addition to the emergence of new forms of terrorist attacks, online propaganda and networking via social media have become powerful tools for terrorists to reach out in the EU for recruitment, radicalisation and fundraising.² The threat of terrorism is present and a long-term challenge, which requires a comprehensive and structural Union response, including the investigation and prosecution of terrorist offences across the EU.

¹ Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office.

² Europol Te-Sat Report (European Union Terrorism Situation and Trend Report) 2018.

The European Union, while respecting the limits of the Treaty³, has taken decisive action in addressing terrorism threats, in particular under the 2015 European Agenda on Security⁴ and in the work towards an effective and genuine Security Union⁵. It undertook measures to deny terrorists the space and means to carry out attacks, to criminalise terrorist offences across the Union, to improve the sharing of law enforcement information between Member States, to counter radicalisation, and to reinforce the management of the Union's external borders. The Union Agencies, in particular Eurojust and Europol, have been strengthened in their role in facilitating judicial and police cooperation in the EU, including coordination and exchange of information in terrorist cases upon the request of the national authorities. A proposal for a Regulation to prevent the dissemination of terrorist content on-line is adopted together with this Communication⁶.

Although significant progress has been made and there have been successful cases of cross-border cooperation, the Union lacks a European level prosecution in this area encompassing all steps starting from investigating, prosecuting and ending with bringing to judgement cross-border terrorist crimes. While not all Member States have been equally exposed to terrorist threats in the past years⁷, within the area of the freedom, security and justice, gaps in investigations and prosecutions in one Member State may lead to casualties or risks in another one or in the Union as a whole.

The recently established EPPO is responsible for investigating, prosecuting and bringing to judgement crimes affecting the financial interests of the Union⁸. The EPPO's founding act, Regulation (EU) 2017/1939, entered into force on 20 November 2017⁹ with twenty Member States¹⁰ participating. Since then, two more Member States joined the enhanced cooperation.¹¹

³ Article 4(2) Treaty on European Union (TEU).

⁴ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee, and the Committee of the Regions – the European Agenda on Security, COM(2015) 185 final of 28.4.2015.

⁵ Communication from the Commission to the European Parliament, the European Council and the Council delivering on the European Agenda on Security to fight against terrorism and pave the way towards an effective and genuine Security Union, COM(2016) 230 final of 20 April 2016. See the latest Security Union progress report (COM(2018) 470 final of 13.6.2018) as well as previous reports for an overview of the progress made to address terrorism and other security threats in the European Union.

⁶ Proposal for a Regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online, COM (2018) 640, 11 September 2018

⁷ Cf. the Europol Te-Sat Reports for 2015, p.13, 2016, p. 15, 2017, p. 11, and 2018, p. 10.

⁸ See for the definitions of the criminal offences falling within the material competence of the EPPO Directive (EU) 2017/1371 of the European Parliament and the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, OJ L 198, 28.7.2017, p. 29–41.

⁹ Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office. Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Portugal, Romania, Slovakia, Slovenia, and Spain.

¹¹ On 1 August 2018, the Commission confirmed the participation of the Netherlands in the enhanced cooperation on the establishment of the European Public Prosecutor's Office (OJ L 196 of 2 August 2018). On 7 August 2018, the Commission confirmed the participation of Malta in the enhanced cooperation on the establishment of the European Public Prosecutor's Office (OJ L 201 of 8 August 2018).

Work is on-going to ensure that the EPPO becomes fully operational by the end of 2020. This initiative will not affect the setting up of the EPPO under the existing Regulation (EU) 2017/1939.

2. The Commission's initiative

The Commission presents this initiative, which would entail a change to the Treaty, to extend the competences of the EPPO to terrorist crimes affecting more than one Member State as part of the comprehensive and strengthened European response to terrorist threats.

This Communication is accompanied by an Annex with a Commission initiative for the possible adoption of a European Council decision amending Article 86, paragraphs (1) and (2), of the Treaty on the Functioning of the European Union (TFEU) with a view to extending the EPPO's competence to terrorist offences affecting more than one Member State.

Article 86(4) TFEU provides for the possibility of extending the EPPO's competences. Pursuant to Article 86(4) TFEU the European Council is empowered to adopt a decision amending Article 86 TFEU to extend the powers of the EPPO to include serious crime affecting more than one Member State. The European Council shall act unanimously after obtaining the consent of the European Parliament and after consulting the Commission.

The term "unanimity" in Article 86(4) TFEU refers not only to the Member States that participate in the EPPO¹², but includes also the others. While this simplified Treaty amending procedure does not foresee that the European Council acts on a proposal from the Commission, this does not prevent the Commission from presenting an initiative.

The European Council may amend Article 86(1) and (2) TFEU to extend the material competence of the EPPO to all, some or only one of the "serious crimes having a cross-border dimension". This notion includes the particularly serious crimes with a cross-border dimension referred to in Article 83(1) TFEU. As an additional requirement, the EPPO's competence may be extended only in relation to "serious crimes affecting more than one Member State".

After a European Council decision amending Article 86 TFEU, the Commission would put forward a legislative proposal to amend Regulation (EU) 2017/1939 so as to grant the competence to the EPPO and introduce any possible adjustment that might be required for the

¹² The EPPO was established under enhanced cooperation with to date 22 Member States participating, see Footnotes 9, 10, and 11.

EPPO's effective activities in investigating and prosecuting terrorism. When amending the Regulation, it would not be possible to have a variable geometry within the EPPO in a way that Member States would participate in different parts of its competence. In the same way, non-participating Member States that might later join the EPPO would have to participate in it as a whole.

3. Gaps in the investigation and prosecution of cross-border terrorist crimes

Even though significant progress is being made to address terrorism and other security threats in the European Union, in particular in the context of the European Agenda on Security and the work towards an effective and genuine Security Union, a number of gaps in the current legal, institutional and operational framework remain. In particular, there is no common Union approach to the investigation, prosecution and bringing to judgment of cross-border terrorist crimes.

3.1. Fragmentation of terrorist crime investigations

Currently, national law enforcement and judicial authorities are exclusively responsible for investigating, prosecuting and bringing to judgment terrorist crimes. However, their powers stop at national borders, while terrorist crimes have very frequently a cross-border dimension.¹³ This often leads to different national approaches in investigating and prosecuting, as well as gaps in information exchange, co-ordination and co-operation between the different authorities involved across the borders.

Over the years, the Union has introduced a series of measures to improve cross-border cooperation concerning terrorist offences. In particular, Eurojust and Europol already now facilitate multilateral judicial and law enforcement cooperation respectively, as well as coordination and exchange of information in cases involving serious cross-border crime upon the request of the national authorities. The role of Eurojust will be further enhanced by its new legal framework due to become applicable in 2019.¹⁴

The caseload of Eurojust in the area of fighting terrorist crimes more than doubled over the period between 2015 and 2017¹⁵, while the number of Joint Investigation Teams (JITs)

¹³ Cf. above and Article 83(1) TFEU.

¹⁴ On 19 June 2018 the European Parliament and the Council reached an agreement on the reform of Eurojust and Regulation (EU) 2018/... of the European Parliament and the Council of ... on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA is about to be formally adopted and enter into force.

¹⁵ Forty-one cases in 2015, 67 cases in 2016 and 87 cases in 2017.

quadrupled¹⁶. The cases dealt with by Eurojust clearly demonstrate the growing need for a common and coordinated approach between national judicial authorities. Member States seek the assistance of Eurojust, for example, in the exchange of information and evidence, in accelerating the execution of Mutual Legal Assistance and extradition requests, European Arrest Warrants and European Investigation Orders, and in the setting up of Joint Investigation Teams.

Experience from Eurojust also suggests that even if criminal investigations and prosecutions in this area are generally considered a high priority by the Member States, the authorities often take a national perspective given the links with national security aspects. The sensitive nature of terrorism-related investigations may create additional hurdles for authorities to share information and open investigations beyond what is strictly necessary in a national case.

Consequently, terrorism cases are investigated and prosecuted in parallel and in isolation in several Member States. As a result, their complexity and/or cross-border nature is not always properly regarded. The boundaries of national jurisdiction can thus be an impediment for understanding and countering the activities of cross-border terrorists and terrorist cells or networks.

While both Eurojust and Europol consistently provide strong support to the national authorities in their endeavours to combat terrorist crimes, they can only act on the basis of requests for support from national authorities. Furthermore, since neither of them is equipped with the powers needed to carry out pro-actively coordinated, effective and proportionate prosecution at the level of the Union, they cannot address the fragmentation in the prosecution of terrorist offences.

3.2. Gaps in timely exchange of information on terrorist cases between the national authorities and EU agencies

While the Union has taken action to enhance the structural exchange of information, notably with the work towards stronger and smarter information systems for security, border and migration management¹⁷, significant challenges persist when it comes to timely sharing of information in specific cases of criminal investigations or prosecutions.

¹⁶ In 2017, 12 Joint investigation teams (JITs) were set up for the purpose of tackling terrorism compared to 4 JITs in 2016 and 3 JITs in 2015.

¹⁷ See the Fourteenth progress report towards an effective and genuine Security Union (COM(2018) 211 final of 17.4.2018) for an overview.

With respect to information exchange on terrorist cases, Eurojust has indicated in its recent Foreign Terrorist Fighters report¹⁸ that there is no harmonised approach as to the information shared. Differences continue to exist in the volume, type and scope of the information shared with Eurojust by each Member State. This is one of the reasons why the importance of cross-checking judicial information for the purpose of prosecuting terrorist crimes was stressed again in the context of a counter-terrorism meeting organised by Eurojust in June 2018.¹⁹ Due to this sub-optimal information exchange, Eurojust's ability to identify existing links with ongoing investigations and prosecutions, including links with other Member States, remains hampered.

In addition, investigating and prosecuting terrorist offences in concrete cross-border cases requires swift and concerted action by all law enforcement and judicial authorities to ensure that no evidence gets lost and to prevent further, possibly related, terrorist offences. However, this proves to be quite challenging when it comes to cross-border cases investigated by different authorities in several Member States. This is mitigated partially by the support of Europol and Eurojust. Also, neither Europol nor Eurojust have the power to oblige national authorities to provide specific information or perform investigative measures, meaning that information is not always available in time, whereas the time aspect is crucial for the success in pursuing terrorist crimes, as well as to ensure that further, possibly related, terrorist attacks can be prevented.

3.3. Collecting, sharing and using sensitive types of evidence

Ensuring that the information collected is admissible as evidence is key to the successful prosecution of any crime. This is particularly true for terrorism cases, where prosecution is also based on circumstantial evidence (surveillance, witness statements, intercepts). Eurojust's Terrorism Conviction Monitor reports²⁰ indicate that there are also issues around the collection, sharing and use of certain types of information to be used in evidence when prosecuting terrorism cases. In particular, in terrorism cases, the collection of information is often dependent on the use of special investigative techniques, or involves the work of specialised competent authorities of the Member States. Such information is often not shared to protect the sources of information, to ensure that informants remain anonymous, or to ensure that the methods through which the information was gathered remain protected.

¹⁸ Council document 15515/17, 2 July 2018.

¹⁹ Cf. Eurojust Press Release of 21 June 2018 with further references: <http://www.eurojust.europa.eu/press/PressReleases/Pages/2018/2018-06-21.aspx>. In this Joint Statement a number of Member States call for the creation of a European Judicial Counter-Terrorism Register to be kept at Eurojust.

²⁰ Cf. the Terrorism Convictions Monitor reports of Eurojust, issue 28 of May 2018, p. 16-18, 38, issue 27 of March 2017, p. 32, issue 25 of June 2016, p. 29-31.

3.4. Disconnect between the investigation and prosecution phase

Especially in cases involving terrorism, closely coordinated action between law enforcement and prosecution authorities is essential. Arrest warrants or house searches must be executed simultaneously, and judicial authorisations obtained on time. It is therefore crucial that cooperation between investigating and prosecuting authorities works seamlessly. Even with cooperation between national authorities, Europol and Eurojust, it may be that different national priorities or sensitivities, or simply the (lack of) availability of resources, influence the final outcome. There is no central authority at Union level which can direct both the investigation and prosecution aspects of cross-border terrorist cases, thus ensuring truly seamless cooperation between all authorities involved both at the national and at the Union level, within strict deadlines and limits of confidentiality.

3.5. Inefficient parallel investigations and prosecutions

Terrorist offences often affect several countries. They also often involve suspects or affect victims of different nationalities. Conflicts of jurisdiction may occur, for instance, in cases where victims of crime come from different Member States, resulting in all affected Member States wanting to exercise jurisdiction in relation to the same terrorist offence. For example, in several recent terrorist cases two or more Member States claimed, in parallel, jurisdiction for prosecuting the same offence on different grounds, such as the victim's nationality or territorial competence. Such parallel prosecutions could give rise to situations of *ne bis in idem*.

There is currently no adequate Union mechanism to address such situations. In cases affecting more than one Member State, investigative or prosecutorial action by the authorities of one Member State may have consequences for investigations or prosecutions taking place in other Member States. Especially in cases involving terrorist cells where the members are active in different Member States, coordinated action is crucial to avoid the disappearance of evidence or suspects. Whilst Eurojust can play a crucial role in the coordination of investigations, under its current legal framework it cannot decide on conflicts of jurisdiction, and force the authorities of the Member States to refrain from exercising their jurisdiction.

The above-mentioned gaps are illustrated in the box below:

<p style="text-align: center;">Hypothetical Case</p> <p>A jihadist terrorist cell employs agents in several EU Member States, who are not allowed to communicate with or even do not know about each other and only receive instructions through encrypted messages. They all have different tasks, such as renting cars, purchasing chemical materials, collecting information on potential targets, obtaining fake identification documents, etc., whereas the leader of the operations acts from a third country.</p> <p>Thanks to information obtained by law enforcement activities in Member State A, the</p>
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competent authorities discover that fake documents were fabricated for fictitious persons and arrest the suspect. They are unaware that these documents are destined for a larger terrorist cell and its terrorist crimes and prosecute the person for forgery of documents.

Law enforcement activities in Member State B enable the competent authorities to identify the person, who purchased large amounts of pesticides, allegedly for producing a bomb, then arrest and charge that person as a “lone-wolf” terrorist only, being unaware of the terrorist cell or other members of the cell.

The leader of the terrorist group in the third country becomes aware of the law enforcement and judicial activities in Member States A and B and the terrorist cell adapts their terrorist plans.

The uncoordinated actions in Member States A and B lead to prosecutions and individual convictions, but the wider network and its activities remain undetected, while the remaining parts of the terrorist network may adapt their plans and continue with their terrorist activities.

4. The EPPO can address the existing gaps

As discussed above, while the added-value of Eurojust and Europol in supporting national authorities and facilitating judicial cooperation on the basis of existing mutual assistance and mutual recognition instruments is crucial, there is no common European approach to investigating, and prosecuting terrorist crimes and bringing the perpetrators to judgment. Europol and Eurojust cannot fully address the existing shortcomings in the investigation and prosecution of cross-border terrorist crimes, as they do not have and cannot be given the necessary powers under the Treaty, which, by contrast, the Treaty allows for the EPPO.

In the light of the gaps identified above, a stronger European dimension is needed to ensure a uniform, effective and efficient judicial follow up to these crimes across the entire European area of freedom, security and justice. Terrorist crimes affect all Member States and the Union as a whole, which is why a solution at European level must be considered. In this context, there is a strong case that the EPPO would bring added value to combating terrorist crimes and address the identified gaps.

The functioning of the EPPO

The EPPO is an independent, European prosecution office acting at Union level mandated to investigate, prosecute and bring to judgement crimes against the financial interest of the Union as a whole. The EPPO’s integrated structure comprises the European Chief Prosecutor and European Prosecutors, forming the EPPO College, organised in Permanent Chambers, who will work at the EPPO’s central office in Luxembourg. The central office will direct and

supervise the European Delegated Prosecutors located in the participating Member States, who are an integral part of the EPPO and will investigate, prosecute and bring the EPPO's cases to judgment before the competent national courts.

The central office monitors, directs and supervises the investigations and prosecutions undertaken by European Delegated Prosecutors, thereby ensuring a consistent investigation and prosecution policy across Europe, allowing for an effective and targeted follow-up. The European Delegated Prosecutors will direct the work of the national law enforcement authorities, in particular police, customs and financial investigating authorities.

There will be direct and immediate information exchange within the EPPO as well as between the EPPO and national law enforcement authorities and EU bodies, including Eurojust, Europol and OLAF.

The EPPO will operate as a single office across all participating Member States, which means that, in principle, there will be no need for *ad hoc* Joint Investigation Teams or Mutual Legal Assistance requests, as it is the case today. Throughout its operations, the EPPO will also be able to use a comprehensive set of investigation measures to gather inculpatory as well as exculpatory evidence for consistent and efficient prosecutions in courts.

4.1. A comprehensive European response through investigation and prosecution of cross-border terrorist crimes

The EPPO would deliver a European dimension to the current efforts to tackle terrorist crimes and address the current shortcomings, by bridging the gaps between national efforts in the investigation and prosecution of these offences. Compared to the current approach, the EPPO would create a direct relationship with the different Member States authorities and Union actors when dealing with terrorist cases. This could be a decisive qualitative improvement making investigation and prosecution of terrorist crimes across the Union more effective.

The EPPO would be in a strong position to prosecute terrorist offences across the Union, with the European Delegated Prosecutors embedded in the national systems and working hand in hand with national law enforcement authorities, and with a EPPO's College developing a coherent Union-level prosecution to fighting terrorist crimes and thus enabling efficient and effective investigations and prosecutions. In particular, it would be able to order investigations, ensure the timely collection of further evidence, connect and prosecute jointly related cases, and settle any issues of jurisdiction before bringing a case to court. It would also closely cooperate with other Union actors, such as Eurojust and Europol, and thus be strategically placed to enforce the Union's approach to investigating and prosecuting terrorist crimes.

4.2. Timely and sufficient exchange of information on terrorist offences

The EPPO could overcome the current difficulties with the timely sharing of information. It would not only be able to obtain information on terrorist offences from Member States, but also to instruct the national authorities to collect more information in a pro-active and targeted manner. The same applies to sharing information with Eurojust and Europol.

The EPPO's involvement would be equally beneficial with respect to the collection, sharing and use of certain types of evidence. Given the fact that the EPPO's College will consist of European Prosecutors originating from all participating Member States, the EPPO will be well placed to deal with sensitive and confidential information. For example, the EPPO would ensure that through the European Delegated Prosecutors and the supervising European Prosecutors, the ways of gathering information remain confidential, and clear handling codes for the information used by the EPPO are agreed. It would also be easier for the EPPO to cooperate with third countries or international organisations, as *the* European prosecution office, than it would be for individual Member States. In this regard, the EPPO would benefit from the provisions in Regulation (EU) 2017/1939 related to international cooperation and the legal framework that will be created.

With its integrated approach, the EPPO will create new information channels at the level of the European Delegated Prosecutors and the Member States authorities, as well as at central level, with Union bodies, third countries and international organisations. The flow of information across the entire Union, would be facilitated. This would allow for quick reactions to new terrorist trends and *modi operandi*.

4.3. A connected investigation and prosecution phase

The EPPO will be competent to both investigate and prosecute offences affecting the Union's budget and will have the advantage of having the power to coordinate police investigations, allowing for example for the fast freezing and seizure of assets and the ordering of arrests across the EU. This would also tackle the existing deficiencies created by parallel and fragmented investigation and prosecution in terrorist cases.

The EPPO will make possible a much better connected and coordinated investigation and prosecution approach. Investigations directed by the EPPO will ensure that at all times all authorities involved can have access to the information they need in a timely manner. In addition, there will be a clear decision-making structure focused on achieving the optimal result for all concerned Member States. Investigations into crimes coming under the EPPO's new mandate would benefit from this central steering role of the EPPO. These investigations could therefore proceed in a well-coordinated manner, with all aspects of the investigation being taken into consideration, irrespective of where the crimes occurred. A coordinated approach for investigation and prosecution would also ensure that investigating authorities could rely on the powers of the EPPO to ensure that investigative actions are taken at the time

and place where this is most efficient, irrespective of where in the Union these actions must take place.

4.4. Efficiency and coherence of investigations and prosecutions

The EPPO would be able to ensure coherent and effective prosecution for terrorist crimes, which would take account of the interests of all Member States involved and of the Union as a whole. European Prosecutors with knowledge of national legal systems will be sitting in the College of the EPPO and this would help to ensure the best possible response to cross-border terrorism cases. The EPPO would be well placed to address jurisdiction issues due to its nature as the only Union-level actor, which would decide – based on objective criteria – where to bring the case to court. Such decision on the best jurisdiction to prosecute a case would prevent possible conflicts and avoid unnecessary litigation. The extension of the EPPO’s competences to terrorist offences affecting more than one Member State could thus reduce the potential for conflicts of jurisdiction in this area and provide an effective mechanism for their resolution, where they persist.

Hypothetical future case

In Member State A, an investigation is on-going into terrorist financing crime. While the authorities of that Member State have clear indications that the persons concerned are financing terrorism, it is unclear to them where the money is ultimately intended to be used. At the same time, in Member State B, an investigation is on-going into acts which are considered to be preparatory acts for a terrorist attack, including purchasing materials for creating a so-called “dirty bomb”. In Member State C, meanwhile, an investigation is focused on a particular website which contains terrorist propaganda. The authorities in Member State C suspect that some closed-off parts of the site are also used for communication between members of a terrorist group.

None of the Member States concerned has yet sought the support of Europol or Eurojust, since they consider these investigations to be primarily national. It is only when the case is brought to the attention of the EPPO through one of the European Delegated Prosecutors involved in the investigation in Member State A that the link between these cases is discovered: the financing investigated in Member State A is actually directed towards the activities of the group preparing the “dirty bomb” in Member State B, and it is discovered that these groups are actually in contact with each other through the website under investigation in Member State C.

The EPPO can ensure that the investigative measures needed to obtain access to the logs of the website in Member State C take place at the same time when the financing group in Member State A and the preparatory Group in Member State B are arrested, so that they have no chance to tamper with the evidence.

All terrorist suspects involved can be apprehended at the same time, and further investigative measures can be coordinated and implemented from one Office, which would also ensure that no jurisdictional conflicts arise and that the evidence collected is admissible.

5. Impact of the extension of the EPPO's competences to terrorist crimes affecting more than one Member State

5.1. Impact on the EPPO

The EPPO, with its integrated institutional structure and decision-making processes offers significant advantages in the fight against cross-border terrorist crimes. This structure brings together the knowledge of national legal systems, allows for a unique overview over cross-border criminal activity in the Union, provides for quick decision-making through Permanent Chambers, within which the European Prosecutors operate, and ensures an effective follow up at national level through European Delegated Prosecutors. A case management system will ensure quick communication flows between all EPPO prosecutors located at central and local levels across the Union. The institutional structure and decision-making processes of the EPPO should be maintained when extending the EPPO's competence to terrorist crimes affecting more than one Member State.

The extension would, however, require a number of changes to be made to Regulation (EU) 2017/1939 establishing the EPPO in order to take account of the broader mandate and in view of the EPPO's current focus on financial crimes against the Union budget. These changes concern particularly the EPPO's material competence but would also require a number of other adjustments. Moreover, an extension of the EPPO's competence to terrorist crimes affecting more than one Member State would have also an impact on the EPPO's budget and staffing.

Following the decision of the European Council to amend Article 86 TFEU (see above), the Commission would put forward a legislative proposal to amend Regulation (EU) 2017/1939 to extend the EPPO's competence to terrorist crimes affecting more than one Member State, including the necessary adjustments.

Material competence

The EPPO's material competence currently covers crimes affecting the financial interests of the Union, as defined in Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law.²¹

²¹ See Footnote 8 above.

The EPPO's material competence may, in the same manner, be extended to terrorist crimes affecting more than one Member State through a reference to Directive (EU) 2017/541 on combatting terrorism²². Article 86(4) TFEU provides the possibility to extend the EPPO's material competence to a range of serious crimes having a cross-border dimension and by this initiative the Commission seeks an extension targeted to terrorist crimes affecting more than one Member State.

Following such targeted extension, Article 22 of Regulation (EU) 2017/1939 would be amended accordingly by way of including a new paragraph stating that the EPPO shall be competent in respect of criminal offences as provided in Articles 3 to 12 and 14 of Directive (EU) 2017/541, as implemented by national law, where these offences affect more than one Member State.²³

The criminal offences referred to in Directive (EU) 2017/541 comprise "terrorist offences", "offences relating to a terrorist group", as well as "offences related to terrorist activities", such as public provocation to commit a terrorist offence, recruitment, providing and receiving training for terrorism, travelling for the purpose of terrorism, organising or facilitating that travelling, and terrorist financing. Not only the commission of these offences is included, but also the aiding, abetting, inciting and attempting.

Article 2 of Regulation (EU) 2017/1939 ("Definitions") would reflect the inclusion of these offences in EPPO's competence and provide further clarifying language with regard to the requirement that the criminal offences in question need to affect more than one Member State.

Other adjustments to Regulation (EU) 2017/1939

As the EPPO's current framework is designed for the purpose of investigating, prosecuting and bringing to judgement crimes against the Union budget, the extension of its competence to terrorist crimes affecting more than one Member State will require other consequential adjustments to be made to Regulation (EU) 2017/1939 in order to make it fit for such extended competence.

The issues that would need to be looked into in the Regulation include, for example, defining territorial and personal competence of the EPPO, the possible need to adapt the conditions of

²² Directive (EU) 2017/541 of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA. In accordance with Article 28(1) of Directive (EU) 2017/541 Member States are to transpose Directive (EU) 2017/541 by 8 September 2018.

²³ Article 86(4) TFEU stipulates that the extension may concern crimes that affect more than one Member State. This does not exclude that third countries are also affected by these crimes.

the exercise of the EPPO's competence (which in some instances are linked to aspects particularly relevant to crimes against the budget, such as the level of damage or of financing by the Union budget), its investigation powers or principles of jurisdiction. In addition, the current framework contains a number of provisions focused on financial crimes, with references to financial thresholds²⁴, requirements of specific expertise in the area of financial investigations as a selection criterion for the appointment of the EPPO prosecutors²⁵, these will need to be adjusted accordingly, so as to take account of the specific needs in the investigation and prosecution of terrorist crimes.

Budgetary and staffing considerations

The extension of the EPPO's mandate would also have implications for the EPPO's budget and staffing, in view of the increased workload, requiring additional prosecutors and other staff particularly experienced in investigating and prosecuting terrorist crimes. Moreover, the necessary security requirements of the Office would need to be adapted accordingly. Those implications will be further assessed on the basis of more detailed information to be submitted in the Legislative Financial Statement accompanying a future legislative proposal.

5.2. Impact on EU Agencies and national authorities

An extension of the EPPO's competence to terrorist crimes affecting more than one Member State would have an impact on the current tasks and roles of Europol and Eurojust, as well as on the national authorities. For example, the capacity to conduct criminal analysis at EU level should be further developed, given that this form of analysis is one of the most powerful advantages of sharing information at this level. The EPPO could be empowered to instruct²⁶ Europol to perform crime analysis work for it. Likewise, the EPPO would closely coordinate its work with Eurojust, in order to ensure complementarity of prosecutions conducted by the EPPO and those undertaken by national authorities and supported by Eurojust. This complementarity would enhance Eurojust's role as an essential link for coordinated prosecutions in the area of cross-border crimes connected with terrorism, such as cybercrime. At the same time, Eurojust would be able to devote its resources to supporting cross-border investigations into other crimes, such as organised crime, drug trafficking and trafficking in human beings.

²⁴ Such as in the context of the exercise of EPPO's competence (Articles 24 and 25 of Regulation (EU) 2017/1939), EPPO's right of evocation (Article 28 of Regulation (EU) 2017/1939) or referrals and transfers of proceeding to the national authorities (Article 34 of Regulation (EU) 2017/1939).

²⁵ Articles 14 and 16 of Regulation (EU) 2017/1939.

²⁶ Article 102 of Regulation 2017/1939 already provides that the EPPO « may ask Europol to provide analytical support to a specific investigation conducted» by it, but the instruction power envisaged here would require amending the Europol Regulation as well.

Establishing a close relationship between the EPPO, Eurojust and Europol could generate synergies beneficial to all involved in fighting terrorist crimes and ensure that there is no duplication of work. In this way, scarce resources would be used in the most efficient way.

The extension of the EPPO's competence to terrorist crimes would also impact on its work with other Union or national authorities and the way and framework under which the EPPO will cooperate with them. These include, for example, Financial Intelligence Units (FIUs) which are in charge, *inter alia*, of dealing with suspicious transactions involving the financing of terrorism.

6. Conclusion

The threat of terrorism remains high and continues to evolve, necessitating an even stronger response from the European Union. Enhancing the capacity at Union level to investigate and prosecute terrorist crimes and bring the perpetrators to judgement is part of the comprehensive European response to terrorist threats.

Being the only Union body with the power to conduct criminal investigations and prosecute criminal offences before the competent national courts and bring the perpetrators to justice, the EPPO holds great potential to substantially enhance the current efforts in the fight against terrorist crimes in the European Union.

Through this Communication, the Commission invites the European Council, with a view to the Summit in Sibiu on 9 May 2019, to take this initiative forward together with the European Parliament and to decide on the extension of the competences of the EPPO to terrorist offences affecting more than one Member State.