https://doi.org/10.55194/GI.2023.5-6.3

Cooperation of the European Public Prosecutor's Office with third countries, in particular the Swiss Confederation

Balázs Márton
PhD student (University of Public Service, Hungary)

Abstract

The 1959 European Convention on Mutual Assistance in Criminal Matters under the auspices of the Council of Europe is a treaty which has a significant impact on the cooperation in criminal matters of the European states. Judicial authorities are the most important channels of such a cooperation. However, it is legally uncertain whether the European Public Prosecutor's Office as an independent body of the European Union may enter into a direct cooperation with third countries under the 1959 Convention. According to the legal interpretation by the Swiss Confederation, the recognition of the European Public Prosecutor's Office as a judicial authority, therefore its direct participation in the inter-state relations aiming criminal cooperation is unacceptable due to the fact that the contracting parties of the 1959 Convention are states, neither the European Union nor the European Public Prosecutor's Office are contracting parties. This confirms the hypothesis that the re-opening of those agreements concluded on the basis of public international law may be unavoidable when third countries intend to establish a direct cooperation with the European Public Prosecutor's Office in criminal matters.

Keywords: European Public Prosecutor's Office, international criminal cooperation, Swiss Confederation, judicial authority

Az Európai Ügyészség együttműködése harmadik országokkal, különösen a Svájci Államszövetséggel

Absztrakt

Az Európa Tanács égisze alatt született kölcsönös bűnügyi jogsegélyről szóló 1959. évi egyezménynek alapvető jelentősége van az európai államok nemzetközi bűnügyi együttműködésére irányuló kapcsolataiban, amelyek legfontosabb

csatornái az államok igazságügyi hatóságai. Jogi szempontból bizonytalan, hogy az Európai Unió független szerve, az Európai Ügyészség az 1959. évi egyezmény alapján harmadik országokkal közvetlen együttműködésre léphet-e. A Svájci Államszövetség jogértelmezése szerint nem fogadható el az Európai Ügyészség igazságügyi hatóságként történő elismerése és ilyen módon közvetlen részvétele a bűnügyi jogsegélyre irányuló államközi kapcsolatokban, tekintve, hogy az 1959. évi egyezmény államok között jött létre és annak sem az Európai Unió, sem pedig az Európai Ügyészség nem részes fele. Ez bizonyítja azt a feltevést, hogy a nemzetközi közjog alapján kötött egyezmények újbóli megnyitására lehet szükség abban az esetben, ha harmadik országok az Európai Ügyészséggel közvetlen bűnügyi együttműködésre irányuló kapcsolatot szándékoznak kialakítani.

Kulcsszavak: Európai Ügyészség, nemzetközi bűnügyi együttműködés, Svájci Államszövetség, igazságügyi hatóság

1. Introduction: the platforms for international criminal cooperation in Europe

By European integration we generally mean the European Union (hereafter: the Union or EU), forgetting those states that, although not EU Member States, belong to Europe geographically, economically, politically and culturally. There can be no doubt that the depth of cooperation between states in different policy areas is mostly outstanding in the results achieved within the framework of the Union, although other integration organisations outside the Union should not be neglected. This is also true in the field of international cooperation in criminal matters, where the Council of Europe, established in 1949, has produced some decisive documents. In 1953, the decision-making body of the Council of Europe, the Committee of Ministers, called on the Secretary-General of the Council of Europe to convene a committee of government experts to examine the possibility of laying down certain principles of extradition within the framework of a European Convention. The panel of experts eventually proposed a broader multilateral agreement on international mutual legal assistance in criminal matters, the like of which was then unprecedented in the world.[1] Thus the European Convention on Mutual Assistance in Criminal Matters[2] and its Additional Protocols (together

1 Council of Europe: *Explanatory Report to the European Convention on Mutual Assistance in Criminal Matters*, European Treaty Series, No. 30. Strasbourg, 20 April 1959.

2 European Convention on Mutual Assistance in Criminal Matters signed at Strasbourg on 20 April 1959 and its Additional Protocols.

referred to as the 1959 Convention), which was opened for signature by the States of the Council of Europe on 20 April 1959, was created. The 1959 Convention is only one of many, given that the Council of Europe has built up a whole system of international conventions governing the various aspects of criminal cooperation between its States since the 1950s.[3] Many of these are still in force today and regulate cooperation outside the EU. In addition, the conventions drawn up under the auspices of the Council of Europe also play an important role in the field of criminal cooperation between the Member States of the Union, providing the legal basis for EU cooperation.[4]

Bilateral agreements between states play the main role in international criminal cooperation. The number of frameworks established by the various multilateral conventions is much lower, but they still play an important complementary role. The multilateral agreements concluded in the framework of the Council of Europe, which regulate various aspects of international cooperation in criminal matters (extradition, international recognition of criminal convictions, etc.) have a pioneering role. Among the multilateral agreements, the 1959 Convention stands out as a comprehensive, horizontal framework for criminal cooperation between the Council of Europe's Member States, and it is no coincidence that it has been applied for more than 60 years, and is even considered by some experts to be the 'mother convention' of the 2000 EU Convention on Mutual Assistance in Criminal Matters.[5] The Contracting Parties to the 1959 Convention are the Council of Europe States, represented by their governments at the time of signature.[6]

2. The concept and importance of judicial authority in international criminal cooperation

The States Parties to the 1959 Convention, as Contracting Parties, have undertaken to afford each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance,

3 Villányi, József: Az EU kölcsönös bűnügyi jogsegélyéről szóló egyezményhez kapcsolódó jogalkotási feladatok, *Acta Universitatis Szegediensis*, 2003, 1–13, 209–252, 210.

4 Villányi op. cit. 211.

5 Convention established by the Council in accordance with Article 34 of the Treaty on European Union on Mutual Assistance in Criminal Matters between the Member States of the European Union, 12 July 2000, Official Journal 197.; Villányi op. cit. 217.

6 Convention of 1959, Preamble.

falls within the jurisdiction of the judicial authorities of the requesting Party.[7] What constitutes a judicial authority in the requesting Party is a matter for the Contracting Parties themselves to determine. The 1959 Convention provides that "*A Contracting Party may, when signing the Convention or depositing its instrument of ratification or accession, by a declaration addressed to the Secretary-General of the Council of Europe, define what authorities it will, for the purposes of the Convention, deem judicial authorities.*"[8] A further practical relevance of the designation of judicial authorities is that the channels of cooperation under the 1959 Convention pass through them, i.e. for example, in the context of mutual legal assistance, a request may be addressed to the requested State by the judicial authority of the requesting State, etc.

The notion of judicial authority is not unique, it is a common terminology in international and therefore European criminal cooperation. The Explanatory Memorandum to the 1959 Convention deals with judicial authorities in more detail. It notes that, given that the 1959 Convention does not apply to proceedings of an administrative nature, several experts have already pointed out that the status of prosecutors in some States is close to that of administrative authorities, and that the drafters of the 1959 Convention therefore thought it better simply to leave it to the States Parties to decide which of their authorities they would classify as judicial authorities. As a result, Article 24 was drafted in its current form.

Although not directly related to the 1959 Convention, the case-law of the Court of Justice of the European Union on the interpretation of the judicial authority issuing the European arrest warrant cannot be ignored. The major innovation of the Council Framework Decision on the European arrest warrant and the surrender procedures between Member States[9] (hereafter: Framework Decision 2002/584/JHA) was the abolition of extradition between EU Member States and its replacement by a much simpler system of surrender between judicial authorities.[10] Article 6 of Framework Decision 2002/584/JHA provides for the determination of the competent judicial authority. It provides that the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State, while the executing judicial authority is the judicial authority of the executing Member

7 Convention of 1959, Article 1.

8 Convention of 1959, Article 24.

9 Council (EU) Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States, 13 June 2002, OJ L 190, 2002, 1–20.

10 Framework Decision 2002/584/JHA, 5.

State which is competent to execute the European arrest warrant by virtue of the law of that State.[11] The Court of Justice of the European Union has dealt with the interpretation of the concept of a national judicial authority in several cases. First, it has held that the meaning and scope of the concept cannot be left to the assessment of each Member State, since the Union requires a uniform interpretation. It also stated that the term "judicial authority" should be understood to mean bodies traditionally falling outside the executive branch of government, distinct from administrative authorities, and involved in the administration of criminal justice.[12] In the relevant cases so far, the Court of Justice of the European Union has mainly examined whether the judicial authority is involved in the administration of justice and whether the guarantees of fundamental rights are respected when issuing European arrest warrant decisions. It also looked at the guarantees of independence for two national prosecutors' offices, in Germany and Lithuania.[13]

It should be stressed that Framework Decision 2002/584/JHA is part of the *sui generis* EU legal system, which is independent and supersedes the laws of the Member States, and is subject to a uniform interpretation by the Court of Justice of the European Union.[14] The 1959 Convention, on the other hand, falls within the scope of public international law, and its interpretation is therefore subject to much more complex methods and must necessarily reflect the "will" of the States parties.[15] On the whole, therefore, compared with EU law, the 1959 Convention allows States considerably greater freedom – within the limits it lays down, of course – to determine for themselves which body they recognise as a judicial authority.

3. The European Public Prosecutor's Office in the European area's relations for criminal cooperation

The European Public Prosecutor's Office has been operational as an autonomous body of the European Union from 1 June 2021. The European Public Prosecutor's Office is a supranational prosecuting body that is not part of the constitutional structure of a federal state or an international judicial mechanism. The main

11 Framework Decision 2002/584/JHA, Article 6.

12 Angyal, Zoltán: Az igazságügyi hatóság fogalma az Európai Bíróság legújabb ítélkezési gyakorlatában. *Miskolci Jogi Szemle*, 2019, 14(2/1 special issue), 11–20.

13 Ibid.

14 Treaty on the Functioning of the European Union (TFEU), Article 267.

15 Nagy Károly: A nemzetközi szerződések hiteles értelmezése. *Acta Universitatis Szegediensis*, 1963, 10, 4, 1–33.

purpose of the European Public Prosecutor's Office is to provide effective protection by criminal law against fraud affecting the financial interests of the Union and certain related offences, in particular those of a cross-border nature and those affecting the whole of integration. The original idea, as previously laid down in the Treaty on the Functioning of the European Union, was that the Council of the European Union, composed of the representatives of the Member States, could decide unanimously, with the consent of the European Parliament, to transform Eurojust, the EU's agency for criminal judicial cooperation, into a European Public Prosecutor's Office.[16] Due to several blocking Member States, the unanimous decision failed, leaving the use of the institution of enhanced cooperation in the field of justice and home affairs, which is available if at least nine Member States agree.[17] The area thus created, often referred to as the European Prosecutor's Office zone ("EPPO zone"), currently consists of 22 EU Member States, with five EU Member States maintaining their decision not to join enhanced cooperation.

The European Public Prosecutor's Office is a body with decentralised structure.[18] The centralised, supranational part of the structure is made up of the European Prosecutors based in Luxembourg (one per Member State, 22 European Prosecutors in total) and the European Chief Prosecutor. At the decentralised level, there are a varying number of European Delegated Prosecutors per Member State, who have the same powers as prosecutors in their own Member State and carry out their duties from their Member State of origin.[19]

The EU Regulation implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office[20] (hereinafter: EU Regulation 2017/1939), which is the basic regulation governing the European Public Prosecutor's Office, provides in a separate article for the relationship of the European Public Prosecutor's Office with the Member States of the Union that do not participate in enhanced cooperation.[21] With these Member States, working arrangements may be concluded, which may focus on the exchange of strategic information, the secondment of liaison officers and the designation

16 Article 86 (1), TFEU.
17 Ibid.
18 Regulation 2017/1939 (EU), Article 8.
19 Regulation 2017/1939 (EU), Article 13.
20 Council Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office, 12 October 2017, Official Journal L 283.
21 Regulation 2017/1939 (EU), Article 105.

of contact points.[22] Criminal justice cooperation with EU Member States not participating in enhanced cooperation is not examined here.

Due to the cross-border nature of the criminal offences falling within the jurisdiction of the European Public Prosecutor's Office, it cannot be excluded that third countries that are not EU Member States are also involved in the European Public Prosecutor's Office's investigations. The European Public Prosecutor's Office may establish and maintain cooperative relations with the authorities of third countries.[23] This relationship may also be based on a working arrangement.[24]

EU Regulation 2017/1939 provides for three main types of cooperation relationship.

Firstly, the European Public Prosecutor's Office is bound by international agreements which the Union, as a legal person, has concluded or acceded to with one or more third countries in the fields within the European Public Prosecutor's Office's jurisdiction, in accordance with Article 218 of the Treaty on the Functioning of the European Union. In practice, these are bilateral or, in most cases, multilateral international agreements governing specific aspects of cooperation in criminal matters to which the Union or the European Public Prosecutor's Office itself is a party.[25]

Secondly, if there is no agreement of which the Union or the European Public Prosecutor's Office is a party, but another multilateral international agreement permits and the third country concerned accepts it, Member States may recognise and notify the European Public Prosecutor's Office as the competent authority[26] for the implementation of multilateral international agreements on mutual assistance in criminal matters to which they are parties.[27] In addition, Member States may also notify the European Public Prosecutor's Office as the competent authority for the implementation of other international agreements on mutual assistance in criminal matters which they have concluded.[28] In the latter two cases, the agreements in question must be amended accordingly.

22 Regulation 2017/1939 (EU), Article 105, 1–2.
23 Regulation 2017/1939 (EU), Recital 108.
24 Regulation 2017/1939 (EU), Article 104.
25 Regulation 2017/1939 (EU), Article 104, 3.
26 In our view, the terminology of Regulation (EU) 2017/1939 is misleading, as the legislator uses the concept of competent authority, which overlaps with the concept of judicial authority, as regards the totality of the regulation and subject to a systematic interpretation of the law.
27 Regulation 2017/1939 (EU), Article 104, 4.
28 Ibid.

Thirdly, in the absence of the agreement mentioned in the first and the recognition referred to in the second place, the European Delegated Prosecutor conducting the procedure may approach the national prosecutor in his/her Member State to request criminal assistance from the authorities of a third country, the legal basis for which is thus an international agreement concluded by the Member State concerned or the applicable national law. The third solution is therefore a kind of bypass whereby the European Public Prosecutor's Office essentially seeks to use the national authorities to provide assistance. It is true that, in order to ensure transparency, the third way solution requires the European Delegated Prosecutor to inform the authorities of the third country and, where appropriate, to seek their consent to the use by the European Public Prosecutor's Office of evidence gathered in the framework of mutual assistance. The Regulation 2017/1939 requires that in all cases the third country must be duly informed that the European Public Prosecutor's Office is the final recipient of the reply to the request.[29] The role of the national prosecutor, who must intervene to issue a request for legal assistance, is of particular interest in the third case, especially in light of the fact that the European Delegated Prosecutor constituting the decentralised level of the European Public Prosecutor's Office, remains a member of his national authority throughout, thus occupying a double-hat position as a national prosecutor.[30] Nevertheless, since he is dealing with the same case and is acting in connection with the investigation of the European Public Prosecutor's Office (in his capacity as a European Delegated Prosecutor), he cannot himself submit a request for legal assistance in his capacity as a national prosecutor.

Finally, as a fourth solution, EU Regulation 2017/1939 also allows the European Public Prosecutor's Office to request criminal assistance from the authorities of a third country within the limits of its jurisdiction and the case in question, in the absence of the three previous options, by complying with the conditions that the authorities of the third country may impose on the use of the information they provide.[31] In this case, however, the requested third country is under no obligation to provide the assistance and has the discretion to comply with the request.

29 Regulation 2017/1939 (EU), Article 104, 5.

30 Study of European Parliament, Directorate General for Internal Policies of the Union: *The European Public Prosecutor's Office: strategies for coping with complexity*, PE 621.806, 2019.

31 Regulation 2017/1939 (EU), Article 104, 5.

The scope of EU Regulation 2017/1939 cannot, by definition, extend to third countries, and the EU legislator cannot regulate whether a third country recognises the European Public Prosecutor's Office as a judicial authority for the implementation of an international treaty to which it is a party. A total of 43 States have acceded to the 1959 Convention, including the 22 EU Member States which are parties to the enhanced cooperation to establish the European Public Prosecutor's Office.[32] In relations on criminal cooperation between the EU and third countries, the 1959 Convention is applied for the most part, in addition to the eventual bilateral agreements concluded. As has already been pointed out, it is a sovereign decision for the States to determine what they accept as a judicial authority under the 1959 Convention, although the Convention does not *de iure* exclude the possibility of recognising the European Public Prosecutor's Office as such. In contrast, EU law requires more. In the preamble to EU Regulation 2017/1939, the legislator lays down a general obligation, derived from the principle of loyal cooperation between Member States,[33] to facilitate the performance of the European Public Prosecutor's Office's tasks. It is an obligation for Member States to recognise and notify the European Public Prosecutor's Office as a competent authority, if the relevant multilateral agreement so allows and if the third country concerned agrees to it. The Member States may also notify the EPPO as a competent authority for the purpose of the implementation of other international agreements on legal assistance in criminal matters concluded by them, including by way of an amendment to those agreements. The legislator also foresees here additional rights to be granted to the European Public Prosecutor's Office, namely that the European Public Prosecutor's Office should also be able to rely on reciprocity or international comity vis à-vis the authorities of third countries.[34]

Of the 22 Member States participating in the enhanced cooperation to establish the European Public Prosecutor's Office, 16 have already recognised the European Public Prosecutor's Office as a judicial authority, issuing a declaration stating that the European Public Prosecutor's Office is considered a judicial authority for the purposes of implementing the 1959 Convention. The declarations made by the 16 Member States are identical in form and substance. The practical consequence of the declarations of recognition

32 https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treaty-num=030. (6 December 2022)

33 Treaty on the Functioning of the European Union (TFEU) Article 4, 3.

34 Regulation 2017/1939 (EU), Recital 109.

is that the Member State which has made the recognition, accepts the European Public Prosecutor's Office as a body which is entitled *suo iure* to issue a request to the State party to the 1959 Convention (the requested State).[35] This in itself would be insufficient, which is why, in fact, the Member States have undertaken to do more, for which we will examine a specific declaration. Romania has made a declaration of recognition on 1 April 2021,[36] in which, among other things, it establishes an irrebuttable presumption ("*shall be deemed*...") that the European Public Prosecutor's Office is a judicial authority both in respect of requests for criminal assistance that may be issued under the 1959 Convention and in respect of information to be provided in response to a request from another Contracting Party to the 1959 Convention. It is clear that a state can only make such recognition for itself, although the fact that a state includes the European Public Prosecutor's Office among its judicial authorities does not guarantee that it will accept it as a requesting party. Therefore, as it is clear from Romania's declaration, the State is making a bilateral recognition, i.e., it is not only declaring that it recognises the European Public Prosecutor's Office as the authority issuing (requesting) legal assistance, but also that it directly entitles the European Public Prosecutor's Office to respond to a request for legal assistance from another State. Romania also adds a further explanation to its declaration, detailing the legal effects of the above-mentioned acknowledgements, namely that where the 1959 Convention refers to a requesting or requested party and such a request is made by or addressed to the European Public Prosecutor's Office, it should be understood as referring to the Member State of the European Delegated Prosecutor whose jurisdiction has been established on the basis of EU Regulation 2017/1939.[37]

The European Public Prosecutor's Office is an autonomous legal person and, as an independent body of the EU, is not subject to the recognition of any State in its operation, so it can also apply to a State party to the 1959 Convention which has not made a similar declaration of recognition, even in its own right, which the legislator expressly allows it to do in EU Regulation 2017/1939 (see above). However, it can only do so without reference to the 1959 Convention

35 Lew, Darryl: *The Framework for Cooperation between the European Public Prosecutor's Office and Non-EU Third Countries*. https://www.whitecase.com/insight-alert/framework-cooperation-between-european-public-prosecutors-office-and-non-eu-third. (6 December 2022)

36 https://www.coe.int/en/web/conventions/full-list?module=declarations-by-treaty&numSte=030&codeNature=0. (6 December 2022)

37 Ibid.

as a legal basis, which entails the risk that no legal norm guarantees that the requested State must comply with the request for legal assistance.[38]

In the following section, we will look specifically at criminal cooperation with the European Public Prosecutor's Office in relation to the Swiss Confederation (hereinafter Switzerland). In addition to the bilateral agreements, from the international law aspect, the starting point in matters requiring mutual assistance in criminal matters between Switzerland and the Member States of the Union is the 1959 Convention.

4. The relationship between the European Public Prosecutor's Office and Switzerland in terms of criminal cooperation

The conclusions of a leader of the Swiss Federal Department of Justice (*Office fédéral de la justice*) presented on 5 May 2021 at the Council of Europe conference on strengthening international cooperation in criminal matters have been widely resonated in professional circles. In essence, the leader's argument is that Switzerland limits the provision of mutual legal assistance in criminal matters to cooperation with States and that, since the Union is not a State, it is not possible to provide assistance to the European Public Prosecutor's Office. In order to cooperate with the European Public Prosecutor's Office, Switzerland would be open to assisting the Council of Europe in the development of a new legal instrument, which could be based on the 1959 Convention.[39] Switzerland's position is discussed in more detail in this section.

Switzerland has been a member of the Council of Europe since 1963,[40] and acceded to the 1959 Convention in 1965, and following its ratification, it has been in force in the country since 1967.[41]

In December 1985, and subsequently in a declaration issued in 2002, Switzerland defined which bodies it considers to be judicial authorities for the purposes of the 1959 Convention. Switzerland has declared as judicial authorities (1) the tribunals, their courts, chambers and departments; (2) the organisation of the Swiss Attorney General (*Ministère public de la Confédération*); (3) the Federal Department of Justice; and (4) the authorities

38 Lew, Darryl et al.

39 Sager, Christian: The Swiss Perspective at an online conference, https://rm.coe.int/presentation-c-sager-switzerland-eppo-conference-on-mla/1680a29a94 (7 December 2022)

40 https://www.coe.int/en/web/portal/switzerland (6 December 2022)

41 Chart of signatures op. cit.

empowered under cantonal or federal law to investigate criminal matters, to issue arrest warrants or summonses and to take decisions in affairs related to criminal proceedings.[42]

We agree with Switzerland's legal assessment, expressed at the above-mentioned conference, that in the public international law sense, the Union is a legal entity separate from its Member States, on the basis of the express recognition in Article 47 of the Treaty on European Union, which makes the Union an independent legal entity in its own right,[43] just like the European Public Prosecutor's Office, which, as an organ of the Union, is also separate from the Member States.[44] Switzerland maintains a bilateral relationship with the Union based on public international law, which is also true in the area of international criminal cooperation, in which it considers the Union to be equivalent to any other sovereign state.[45]

The expert will then meticulously go through the solutions offered by EU Regulation 2017/1939 for the cooperation of the European Public Prosecutor's Office with third countries (see above).

In the first case, i.e., where cooperation is based on an international agreement to which the EU is a party, the expert states that there is currently no such agreement between Switzerland and the EU. Switzerland participates in criminal cooperation primarily within the framework of the Council of Europe and secondarily on the basis of bilateral agreements with certain Member States. In addition, for example the Schengen Association Agreement[46] also contains relevant provisions, but this neither creates any legal obligation between Switzerland and the Union, as the Schengen Agreement was at the time of its conclusion part of the third, intergovernmental pillar of the Union's pillar structure established by the Maastricht Treaty and was therefore not concluded with the Union as an entity of its own right.[47]

In the second case – namely where the existing multilateral international agreement allows, and the third country concerned agrees that Member States recognise the European Public Prosecutor's Office as the competent authority for the implementation of the international agreement – the expert

42 Reservations and Declarations op. cit.
43 Article 47, TUE.
44 Sager op. cit. 2.
45 Sager op. cit. 4.
46 Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis, OJ L 53, 27 February 2008, 52.
47 Sager op. cit. 4.

examined two possibilities. The first is the direct recognition of the European Public Prosecutor's Office as a judicial authority. In this context, he concludes that the European Public Prosecutor's Office could only be recognised as a judicial authority under Article 24 of the 1959 Convention if the Union itself were a party to the Convention. It is argued that it cannot be inferred from the relevant provision of EU Regulation 2017/1939 that any party to a given international treaty (in this case, the 1959 Convention) could, by a unilateral act, recognise the prosecuting body of another legal entity as a judicial authority. In a previous interpretation of the law, the Directorate of Legal Advice and Public International Law of the Council of Europe concluded that the Union is to be regarded as the successor in title to the Member States, thus the rights and obligations of the Member States under the 1959 Convention also apply to the bodies of the Union. Switzerland rejects this interpretation and considers that if a Council of Europe State recognises the European Public Prosecutor's Office as a judicial authority under Article 24 of the 1959 Convention, this is in fact an act of recognition of the public prosecutor's office of a non-Contracting Party to the 1959 Convention, which is not legally possible under the Convention, given that the European Public Prosecutor's Office is an organ of the Union and not of the Member States of the Union, and therefore not accepted by Switzerland.[48] Another option examined in the second case is to supplement the 1959 Convention so as to explicitly allow for the recognition of the European Public Prosecutor's Office as a judicial authority, or to create a completely new legal instrument within the Council of Europe, which would specifically open the way for cooperation between the parties to the 1959 Convention and the European Public Prosecutor's Office. In their view, it is risky to supplement the 1959 Convention in such a way as to grant rights to the European Public Prosecutor's Office without the Union itself acceding to it, but they see the creation of a new legal instrument as a potential solution and would strongly support the latter. Of course, accession to such a new legal instrument would be a sovereign decision for each prospective State Party, as would the negotiation of the precise content of the new instrument.[49]

Concerning the third option, where the European Delegated Prosecutor makes use of another national prosecutor of his Member State when requesting legal assistance, Switzerland opposes the concept of dual status of the European Delegated Prosecutor in the context of the application of

48 Ibid.

49 Sager op. cit. 5.

international mutual legal assistance in criminal matters. In its view, the beneficiary of mutual legal assistance cannot be an actor who is not a party to the legal instrument which constitutes the legal basis for the issuance of the assistance. Although the European Delegated Prosecutor may enjoy different rights under the procedural laws of the Member States, this should not have an external effect on the relationship between the European Public Prosecutor's Office and a third country, especially since from the third country's perspective the European Delegated Prosecutor remains a prosecutor of the EU. This argument goes back to what was said above, i.e. that the EU is not the same as its Member States. In addition, further, more technical criticisms are made, in particular with regard to the normative clarity of the relevant provisions of EU Regulation 2017/1939. They would be concerned about the situation where, after the European Delegated Prosecutor has to inform the third country that he is in fact behind the request for mutual legal assistance through the national prosecutor of his Member State, the third country is aware that the requesting Member State is in fact forwarding the requested information or evidence to another legal entity and nevertheless complies with the mutual legal assistance, which is simply incompatible with most national rules on international criminal cooperation.[50]

5. Conclusions

In addition to emphasising the role of the Council of Europe in international cooperation in criminal matters and presenting the elements of mutual legal assistance relevant to our study, we have also dealt in detail with the relationship between the European Public Prosecutor's Office and the 1959 Convention, the latter based on an assessment of Switzerland. Switzerland's legal argument is one-sided and could even be the subject of a deeper professional debate as to its correctness. Nevertheless, this does not alter the fact that it is ultimately up to the sovereign decision of the States Parties to the 1959 Convention, which is based on public international law, to determine the judicial authority and thus to decide with whom they will cooperate in the execution of legal assistance. It is a well-known fact that Switzerland is one of the world's financial centres, home to many financial services providers and companies. The offences falling within the remit of the European Public Prosecutor's Office fall within the category of economic crime. As things stand at present, direct criminal cooperation between the European Public

50 Sager op. cit. 6.

Prosecutor's Office and Switzerland cannot be established for conceptual reasons. In particular, EU Regulation 2017/1939 failed to take due account of the realities of international criminal cooperation when regulating the European Public Prosecutor's Office's relations with third countries. Although the EU legislation (seemingly consistent, but after a detailed analysis affected by several deficiencies) is inadequate to clearly regulate the relationship of criminal cooperation with third countries, an urgent amendment of the Regulation is justified, but not sufficient in itself.

The legal situation examined above demonstrates that international conventions based on public international law may need to be reopened if the Union, as a separate legal entity, wishes to have third countries establish a direct criminal cooperation relationship with the European Public Prosecutor's Office. This is a problem not only in the area of mutual legal assistance in criminal matters, but also in the much riskier area of human rights. Some authors have analysed the possibility that Member States being parties to the European Convention on Human Rights,[51] which have no real influence on the functioning of the European Public Prosecutor's Office, may nevertheless be held liable for violations of fundamental rights which do not formally apply to the European Public Prosecutor's Office itself, since the Union itself is not a party to the European Convention on Human Rights.[52] However, an analysis of this last point should be the subject for a separate study.

Following the finalisation of the manuscript of this study, on 21 December 2022, the Federal Council of Switzerland (Bundesrat) announced the extension of the current intergovernmental cooperation in criminal matters to the European Public Prosecutor's Office by decree, which will enter into force on 15 February 2023. This is provided for in the law on criminal cooperation, which allows the Federal Council to extend cooperation to international judicial fora and police organisations, provided certain conditions are met.[53]

51 Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 and its eight additional protocols.

52 Callewaert, Johan: No Case to Answer for the European Public Prosecutor Under the European Convention on Human Rights? Considerations on Convention Liability for Actions of the European Public Prosecutor's Office, *Europe des Droits & Libertés*, 2021, 1 (3), 20–35.

53 https://www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.msg-id-92319.html (5 January 2023)