Luxembourg, 30 March 2022
EPPO/LCK/2022/196

To the attention of
Ms Pilar Llop Cuenca
Minister of Justice of Spain

Commissioner Reynders
European Commission

Copy to
Ms Dolores Delgado García
Prosecutor General of Spain

By e-mail only

Dear Minister, dear Commissioner,

The establishment of the first transnational public prosecution office is a complex endeavour, and no one should expect it to happen overnight, or without difficulties. I have no doubt that you will agree that a frank and timely dialogue on challenges that we encounter in doing so is of crucial importance. Especially in a situation where a newly created European Public Prosecutor’s Office (EPPO) has to assert its priority competence in order to protect effectively an unprecedented EU budget by means of criminal law.

Out of scope
With a view to improving the situation by addressing some of its underlying causes, I submit to your consideration the possibility to make adjustments to the legal framework under which the EPPO has to operate in Spain (in particular, Ley Orgánica 9/2021, de 1 de julio, de aplicación del Reglamento (UE) 2017/1939 del Consejo, de 12 de octubre de 2017, por el que se establece una cooperación reforzada para la creación de la Fiscalía Europea, hereinafter “LO 9/2021”), in the following points:

1) Reporting authority: the authority competent to report to the EPPO criminal conduct on which it could exercise its competence when there is an ongoing proceeding at national level (Article 24 (2) and (3) EPPO Regulation) is identified by Article 13, paragraph 2, of the LO 9/2021 as the Fiscalía General del Estado. This is the same authority that, in accordance with Article 9 (1) of LO 9/2021, is competent to decide on conflicts between the EPPO and national prosecution authorities in accordance with Article 25 (6) EPPO Regulation. It appears clearly that the two powers are incompatible with each other, and that the power to decide which criminal conduct falls within the competence of the EPPO affects the impartiality of the General Prosecutor’s Office when deciding on conflicts of competence.
3) Conflicts of competence: Article 9 (1) of LO 9/2021 gives the General Prosecutor the power to adjudicate on conflicts of competence between the EPPO and national prosecutorial authorities in accordance with Article 25 (6) EPPO Regulation. This provision gives rise to more than one concern. The General Prosecutor is not in an impartial authority, also in consideration of her/his position of hierarchical superior to national prosecution authorities. Furthermore, the provision of Article 9 (1) LO 9/2021 gives the General Prosecutor the power to interpret and apply Union law with no possibility to introduce a judicial remedy should the interpretation of Union law be contested. It is dubious that the General Prosecutor may be regarded as “a court or tribunal” within the meaning of Article 267 TFEU, and that she/he could therefore refer questions of interpretation of Union law to the Court of Justice of the European Union. If this is so, the attribution of the power to decide on these controversies to the General Prosecutor would violate the prerogatives of the European Court of Justice, depriving it of its essential function to ensure the uniform interpretation of Union law.

Yours sincerely,

(e-signed)
Laura Kövesi
European Chief Prosecutor

Cc: Mr Andrés Ritter (Deputy European Chief Prosecutor)
Mr Danilo Ceccarelli (Deputy European Chief Prosecutor)
Ms Concepción Sabadell Carnicero (European Prosecutor)