Legal Studies in International, European and Comparative Criminal Law 1

Lorena Bachmaier Winter
*Editor*

# The European Public Prosecutor's Office

## The Challenges Ahead

# Legal Studies in International, European and Comparative Criminal Law

Volume 1

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Lorena Bachmaier Winter
Editor

# The European Public Prosecutor's Office

## The Challenges Ahead

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This book has been written within the framework of the Research Project of the Spanish Ministerio de Economía y Competitividad "Investigación y prueba en los procesos penales en Europa. La creación de una Fiscalía Europea (DER 2013-44888-P).

ISSN 2524-8049 ISSN 2524-8057 (electronic)
Legal Studies in International, European and Comparative Criminal Law
ISBN 978-3-319-93915-5 ISBN 978-3-319-93916-2 (eBook)
https://doi.org/10.1007/978-3-319-93916-2

Library of Congress Control Number: 2018955737

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Cover illustration: Maria Isabel Ruggeri

This Springer imprint is published by the registered company Springer Nature Switzerland AG
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

# Introduction: The EPPO and the Challenges Ahead

Many years have passed since the first project for a European Public Prosecutor's Office was presented by a group of prestigious academics under the name of *Corpus Iuris*[1]—a name that already intended to show the far-reaching aspirations to establish a unified legal system in the European Union—and the Council Regulation of 12 October 2017 on the establishment of the European Public Prosecutor's Office (the "EPPO") was finally adopted. The long road to a majority of Member States agreeing on the establishment of the European Public Prosecutor's Office, through the mechanism of enhanced cooperation, has not been easy. Those involved in the negotiations have gone through enthusiasm and frustration, being sometimes completely overwhelmed by the difficulties and sometimes encouraged by advancements and small areas of agreement. There is no doubt that behind this Regulation, there are years of continuous efforts and struggle, which can only be imagined by an outside observer. For academics, this project has provided much food for discussions and debates, inspired studies and made us all rethink the known structures and models of criminal justice and investigation.

Addressing the study of the European Public Prosecutor's Office within this project presented as many difficulties as attractions, among them the changing object of our study and the uncertainty of its evolution, just to mention two. In fact, we were dealing with a legal institution that had been under discussion for almost 20 years and where only a preliminary consensus was reached in 2013 when the European Commission presented a Proposal for a Regulation. In such a scenario, the possibility that there might finally be a political agreement in the European Union was unclear. The almost visceral opposition of some countries to establishing a supranational body for criminal prosecution, fearing to yield sovereign powers in such a sensitive area as criminal justice, existed alongside with the lack of interest

[1] The project of the *Corpus Iuris* can be read in M. Delmas-Marty (ed.), *Corpus Iuris*, 1997. On the diverse models for establishing a European single judicial space and the concepts of harmonisation, unification and cooperation; see U. Sieber, "Die Zukunft des Europäischen Strafrechts", 2009 *ZStW* 121, no. 1, pp. 17 ff. and also U. Sieber, "Rechtliche Ordnung in einer globalen Welt", 2010 *Rechtstheorie* 41, no. 2, pp. 180 ff.

of other Member States, who didn't see the need for such an institution, and claimed that insofar as their national systems were already acting effectively with fraud against the financial interests of the Union, the subsidiarity principle of European law was not being complied with.[2]

If all this was not enough, "Brexit" and the Greek crisis gave rise to doubt if it was the adequate moment to discuss the EPPO, where other priorities were seen as more pressing and where the EPPO could create additional tension in a European Union navigating these storms. In such a context, there were even voices stating that the project was dead and, the more optimistic, that it would be sensible to set it aside for a while.

Yet those fears were not borne out, and the decisive commitment of several countries towards "more Europe", as well as the indefatigable work of the Commission, finally made it possible to reach an agreement for the establishment of the EPPO, albeit through enhanced cooperation.

Apart from the uncertainties involved in carrying out a study of a legal institution that might never become a reality, we faced the added difficulty that the object of our study was constantly changing. In the course of the negotiations since the Proposal for a Regulation was adopted in 2013, the text has been subject to continuous changes, resulting in the initial structure of the EPPO being completely transformed: while the *Corpus Iuris* designed a powerful institution that would act within a single legal space under its own procedural rules throughout the whole investigation, and only deferring to national laws at the trial stage, such a scheme was completely abandoned. In view of the fact that this initially proposed model of the EPPO based on a vertical structure would not be accepted by all Member States, concessions were introduced towards greater collegiality in decision-making at the level of the Central Office of the EPPO. The EPPO, as Illuminati points out, has undergone a process of "renationalisation", with logical doubts as to whether such a model will be adequate for achieving the goals the EPPO was created for.

The profound changes to the EPPO during these years of negotiation also meant that we needed to modify and update the contributions to this volume. Faced with the dilemma of publishing the studies quickly or waiting for a more certain outcome, we finally opted for the latter. This caused not only delays in publishing the results but additional work. I want to express my gratitude to all the contributors to this project, not only for their patience but also for the enormous effort they have made in updating and revising their chapters, sometimes more than once.

The present study, which has been possible thanks to the funding of the project of the Spanish Ministerio de Economía y Competitividad, "Investigación y prueba en los procesos penales en Europa. La creación de una Fiscalía Europea" (DER

[2] The fears of a European Union assuming too many national competences are highlighted in the "White Paper on the Future of Europe. Reflections and Scenarios for the EU27 by 2025" of the European Commission of 1 March 2017, COM(2017)2025, p. 24: "There is far greater and quicker decision-making at EU level. Citizens have more rights derived directly from EU law. However, there is the risk of alienating parts of society which feel that the EU lacks legitimacy or has taken too much power away from national authorities."

2013-44888-P), is the result of the joint effort of renowned academic researchers, with broad expertise in European criminal law and the EPPO, enriched with the views of highly qualified practitioners—mainly, but not only, public prosecutors—who have extensive experience in international cooperation in criminal investigations and from their posts have followed closely the legislative process towards the establishment of a EPPO. Many of the topics addressed in this volume were discussed among academics and practitioners during a seminar organised jointly by the Spanish Public Prosecution Office and the research project. Our gratitude again to all those who participated and made it possible.[3]

Legal science, which is often criticised for not always using an empirical methodology—which according to Rudolph von Jhering,[4] does not prevent considering the legal studies as scientific—cannot, however, turn its back on the social reality and professional sphere where the laws are to be applied. This is why from the beginning it was considered crucial to count on the contributions of those who have followed the process of the creation of the EPPO "from within" and experienced public prosecutors. The sum of both views has provided us with a broader outlook that has proved to be very enriching.

This volume analyses the achievements made so far in the Regulation on the EPPO, as well as the compromises that had to be accepted in order to reach an agreement among the Member States. It further addresses the pending issues and future challenges the EPPO is facing in the near future (it will not start working before 2020, according to Article 120 of the Regulations). In this research, we have tried to cover the most relevant aspects of the present EPPO Regulation to offer a deeper understanding of this institution, as well as a critical analysis of pending issues, with the aim of providing guidance for implementing the EPPO and providing also a good understanding of and integration into national justice systems.

The topics that are discussed in each chapter include the two-tiered structure of the EPPO and its complex decision-making process, the definition of material competence, choice of forum, the initiation and conclusion of proceedings and the admissibility of evidence or the relationship of this EPPO with other European institutions as well as with national authorities. In most chapters, the issue of the protection of fundamental rights appears, if not as a guiding thread, as the main subject of the analysis. Despite the risk of overlap, due to the importance of the dimension of fundamental rights in any criminal procedure in order to reach the necessary balance between the defence and prosecution, several chapters have been devoted to this topic.

There are undoubtedly many other issues to be addressed, but we hope that this book at least serves to broaden the understanding of the challenges the EPPO will

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[3] I want to express my special gratitude to Rosa Ana Morán, Head of the International Cooperation Unit of the General Public Prosecution Office of Spain, for co-organizing the Seminar held back in December 2015, but especially for her professionalism and continuous support.

[4] See R. Von JHERING in his opening lecture when joining his Lehrstuhl at the Vienna University on 16 October 1868, which can be read in O. Behrends (ed.) *Ist die Jurisprudenz eine Wissenschaft?,* Göttingen 1998, pp. 47–92.

face in fighting fraud against the financial interests of the European Union. It also has to be kept in mind that this institution is not aimed at protecting an administrative institution or a distant supranational body; its aim is to protect the rights of each citizen of the Union, as European taxpayers: fraud against the Union is fraud against the rest of its citizens, which explains why it is so important to ensure uniform action and protection at the level of the entire territory of the European Union.

The issue of the implementation of the EPPO Regulation at the national level, and the legislative reforms that will be required in each of the Member States for this multi-level and integrated model to work, is not addressed here and only indicated tangentially. But, undoubtedly, this is the next challenge to be faced in each State.

The first chapter of Antonio Martínez Santos analyses the fundamental principle of the independence of the EPPO and the safeguards provided in the Regulation for ensuring it. Although national public prosecution offices in EU countries are only rarely conceived of as independent institutions—and, on the contrary, it is often expressly provided that they will be subject to the principle of hierarchy—due to the supranational character of the EPPO, its independence is of foremost importance. In this vein, it is not enough to proclaim that the EPPO will act independently, but its entire structure and the distribution of functions, together with its budgetary autonomy, should safeguard its independence. After a rigorous study of the EPPO's structure, the author raises the question of whether the safeguards of the independence could not have been better drafted, since relevant issues in this regard have not been reflected in the Regulation, but are deferred to the future internal rules of procedure.

In the second chapter, David Vilas addresses the complex regulation of the material competence of the EPPO. Obviously the power of this new institution is determined by the scope of its competence, which is only specified in a generic way in Article 86.2 TFEU. Having been involved directly in the negotiations, the author has been witness to the stance of some Member States trying to reduce to a minimum the areas of competence of the EPPO. The distribution of competences between the EPPO and national authorities has always been a thorny issue, as it addresses directly the scope of powers of the EPPO and the amount of sovereign power the Member States are willing to yield. The material competence of the EPPO has finally been regulated by way of referral to Directive 2017/1371, and its exercise will depend on the seriousness of the offence and the damage caused, as well as the connection with other offences.

The third chapter is dedicated to assessing such important issues as the principle that should guide the EPPO when deciding whether or not to exercise jurisdiction or the right to evocation, as well as when the centralised EPPO should take a case from a European Delegated Prosecutor. Helmut Satzger argues very strongly that these decisions—and therefore the relationship between the national authorities and the EPPO—should be governed by the principle of complementarity, for several reasons: because applying the complementarity principle would be the most consistent approach to the principle of subsidiarity which legitimises action at Union level and because this would avoid tensions with those States that still do not see clearly that a supranational body can take over criminal cases through the evocation. Such an argument, although not free of controversy, seems very interesting.

There has been a long debate about what should be the rules for determining the jurisdiction of EPPO proceedings, the margin for choosing the jurisdiction and the criteria that should guide the decision on the choice of forum. It is not the first time that Michele Panzavolta has addressed this issue, an issue that directly affects the fundamental right to a judgement predetermined by law and the principle of criminal legality, which allows him to provide an in-depth study on this matter. The author highlights how the choice of forum—or "allocation of competences" in terms of Article 26 of the Regulation—is regulated based on vague criteria that will need to be defined at European level. This is, for example, the case with the identification of the place that is the "focus of the criminal activity", which is equivalent to the traditional *forum delicti commissi* but which is interpreted in different ways according to the different national legal systems of the EU. He also analyses the reasons why the resolution of possible conflicts of jurisdiction should have been entrusted to a European court, since national courts can only rule on their own jurisdiction and cannot decide which European Delegated Prosecutor—or better yet, the prosecutor of which State—should carry out the investigation.

Jorge Espina analyses how the relationship between the future European Public Prosecutor's Office and Eurojust will be structured, recalling that Article 86 TFEU establishes that the European Public Prosecutor's Office (EPPO) would be created "from Eurojust". Without going into all the possible interpretations, this expression could mean—about which much has been written already—the author adopts a very pragmatic approach when addressing the relationship that the EPPO and Eurojust should have according to the Regulation. Having complementary functions, Eurojust and the EPPO will benefit from close cooperation, and the author strongly contradicts those voices that argue that the EPPO does not need the support of Eurojust, being able to coordinate itself its own transnational investigations. Two elements are pointed out to explain the increased need for cooperation: first, the fact that EPPO investigations will continue to be governed by national law and, second, because interstate cooperation mechanisms will continue to be necessary, since not all Member States are participating in the enhanced cooperation of the EPPO.

Michele Caianiello dives into the issue of the closing of an investigation by the EPPO and its impact on the national level. Again, it is an aspect that affects the distribution of powers between the supranational institution and the Member States in the exercise of criminal action. The oversight of both the decision to prosecute as well as the decision not to prosecute is always one of the most delicate issues in any criminal justice system, since its regulation and compliance must serve to prevent the risks of an abusive or selective use of criminal law by any State. This author studies all the circumstances foreseen in the Regulation for closing a case as well as for transferring a case to the national authorities. Finally, he explores the consequences of the decision to close a case, as well as the elements that would allow a reopening of the investigation.

My chapter highlights some aspects of cooperation between European Delegated Prosecutors in cross-border investigations. In particular, I try to clarify how the assignment system should work and how well it will provide for more effective cooperation than the European investigation order. It should be underlined that the

EPPO, as it is now envisioned, will start working via enhanced cooperation, so that in cross-border investigations the assignment system will still coexist with mutual recognition instruments in cross-border investigations. Fragmentation has thus not been avoided completely. Finally, I discuss the impact of the referral to Directive 2013/48/EU on legal aid in the cross-border investigations within the proceedings of the EPPO.

Silvia Allegrezza and Anna Mosna analyse the problems of the admissibility of transnational evidence in EPPO procedure. The authors emphasise how the initial idea of establishing a single legal space, where the EPPO would act under its own set of rules on investigative measures that would be applied in a uniform way across the entire EU, has completely disappeared in the Regulation. Under the present system, where the idea of harmonising the investigative measures has been abandoned and the principle of *locus regit actum* has been upheld, the EPPO rather resembles an intergovernmental structure, hardly compatible with the unity of action that would be desirable.

Mercedes de Prada and Antonio Zárate delve into the implications of the entering a guilty plea at the national level in an EPPO procedure. First, they analyse the transaction model that was envisaged in the Proposal of the Commission, which would be applied uniformly in all EPPO proceedings, regardless of the State that had jurisdiction to prosecute. As the Regulation refers generically to the "simplified prosecution procedures", even if the Permanent Chambers will decide on the proposed agreement, the rules to be applied will be different in each Member State. As the authors argue, this compromised solution has prevented moving forward with legislative harmonisation in the field of negotiated justice and plea agreements. It will be important to see what the guidelines are that are adopted by the College with regard to the entering of plea agreements.

The following chapters deal with the protection of fundamental rights. The contribution of Nuria Diaz Abad compiles the EU legislation as well as the case law applicable in relation to the European Directives on the rights of suspects and defendants in criminal proceedings, while Giulio Illuminati's contribution offers a critical view of the system for the protection of fundamental rights in transnational EPPO proceedings. Faced with a powerful supranational structure such as the EPPO, the rights of the defence continue to rely on diverse regulations in the national law of each State, save the minimum harmonisation the European Directives foresee. As this author highlights, both the "renationalisation" of EPPO investigations and the referral made by the Directives on fundamental rights of suspects and defendants to national legislation fail to aid in advancing towards higher common standards of procedural safeguards. In the opinion of this author, as long as the European Union does not aspire to improve the level of protection of the defendant's rights in transnational criminal procedures, the principle of equality of arms will remain a mirage. He argues that the present system still favours efficiency in prosecution, without ensuring at the same time the rights of the defence in a supranational scenario. Stefano Ruggeri's chapter questions if the protection of the fundamental rights of the suspects and defendants are effectively safeguarded in the diverse stages of the proceedings of the EPPO. He further discusses the uncertainty regarding the moment

since when a person has the formal status of suspect, the elements that flow in the decision to institute a case and the compatibility of such decisions with the legality principle of criminal prosecution in certain countries, such as Italy. Besides offering an interesting analysis of the procedural safeguards in the EPPO Regulation, he also analyses them from a national perspective of the Italian system. Finally, he introduces the debatable question whether the procedural safeguards should also be ensured across borders *ratione personae*.

The last chapter deals with a topic of great technical complexity, but at the same time of enormous practical relevance, as it is closely connected to the exercise of the competence by the EPPO—and directly affects the EPPO's powers—namely, the exchange of information between the EPPO and national authorities and the case management system. It is a difficult issue, which goes far beyond the legal field, but Pedro Pérez Enciso has not shirked the task of analysing it in a comprehensive way. More than any other public institution, the EPPO needs to legitimise itself by acting independently but also effectively. The rules on information exchange, the channels provided for it and the case management system used are essential elements both to prevent cases being withheld from the EPPO competence and to ensure that supranational coordination is really effective.

We have before us of one of the most innovative and ambitious projects in criminal justice: a European Public Prosecutor's Office, which will act in all the States of the European Union through its decentralised bodies. The Regulation has not managed to set up its own jurisdiction or create a single legal space in the territory of the European Union to fight effectively fraud against the financial interests of the EU. The initial project, despite its coherence and its justification, might had been too premature—or too ambitious—to be accepted by the Member States, still very focused on their own internal affairs and primarily concerned with defending their own sovereign powers. It is easy to criticise this attitude of the Member States for lack of political vision and for sticking to traditional notions of sovereignty. However, caution before the unknown might also be seen as a positive stance, and it has to be accepted that major reforms have their own pace and, as history shows, their pace is usually much slower than some of us would desire.

At the moment, I believe the approval of this Regulation, despite being the result of a compromise that cannot be described as ideal and despite the failure to reach unanimity for the establishment of the future EPPO, still represents a very important achievement. The present challenge is starting this institution upon solid and transparent decisions. Its acceptance and legitimation will come demonstrating efficient, independent function, coupled with the respect of the fundamental rights of the defence. Only thus will this challenge have been worth it. A lot of work lies ahead, but there is also a lot of interest in making this institution useful and respected. The risk of it becoming a heavy bureaucratic machine, that once established needs to justify itself and its added value is there and is one of the fears expressed in recent years. But it would be worse if it became an instrument that allowed selective justice or failed because of the lack of loyal cooperation of the Member States, on whose actions the administration of justice will ultimately rely.

Only once the EPPO starts working and demonstrates its true added value, it will be time to consider whether this supranational structure should not extend its powers to fight other grave crimes also requiring a highly coordinated criminal investigation, as in the fight against international terrorism. It is a subject that I already addressed more than 15 years ago, and several voices have already claimed publicly that the EPPO should also deal with the investigation of terrorism crimes.[5] This might be the next challenge to be addressed once the EPPO is already functioning.

Freiburg i. Br., Germany
May 2018

Lorena Bachmaier Winter

[5] As clearly expressed by the President of the EU Commission Jean-Claude Juncker, in the State of the Union Address 2017, Brussels 13 September 2017, and also by the President of France in his speech on 27 September 2017 at the Sorbonne University: "Initiative pour l'Europe – Discours d'Emmanuel Macron pour une Europe souvraine, unie, démocratique", accessible under http://www.elysee.fr/declarations/article/initiative-pour-l-europe-discours-d-emmanuel-macron-pour-une-europe-souveraine-unie-democratique/.

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**Michele Caianiello** is full professor of criminal procedure at the University of Bologna, where he is currently also dean of the Law School of Bologna. He obtained his law degree from the University of Bologna in 1994 (with honours) and obtained his PhD from the same University in 2000. He has published extensively in the criminal law field, with focus on protection of suspects, victims, the ICC and evidence law. He is member of the editorial board of various reviews, as well as book

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# The Status of Independence of the European Public Prosecutor's Office and Its Guarantees

**Antonio Martínez Santos**

**Abstract** The aim of this paper is to analyse the safeguards for the independence of the new EPPO, and how this topic has evolved during the long process of negotiations from the first proposal to the final adoption of the EU Regulation establishing a European Public Prosecutor's Office. This is undoubtedly one of the areas where there is great difficulty in achieving balance: on the one hand, it is true that the effectiveness of the work of the European Public Prosecutor's Office requires a status of reasonable independence with regard to Member States and the European authorities. On the other hand, however, this status of independence may collide with some particularly sensitive areas from a legal and political point of view, in particular the principle of subsidiarity, sovereignty of States, and the democratic legitimacy of European institutions.

## 1 Introduction

The aim of this contribution is to analyze the guarantees for the independence of the European Public Prosecutor's Office, from the Commission Proposal in 2013 to the final adopted version of the Regulation on the European Public Prosecutor's Office (EPPO) in October 2017. This is undoubtedly one of the areas where there is great difficulty in achieving balance: on the one hand, it is true that the effectiveness of the work of the EPPO requires a status of reasonable independence with regard to Member States and the European authorities. On the other hand, however, this status of independence may collide with some particularly sensitive areas from a legal and

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L. Bachmaier Winter (ed.), *The European Public Prosecutor's Office*,
Legal Studies in International, European and Comparative Criminal Law 1,
https://doi.org/10.1007/978-3-319-93916-2_1

political point of view (in particular, the principle of subsidiarity, the sovereignty of States, and the democratic legitimacy of European institutions).

As is widely known, Article 86 TFEU merely states the possibility of establishing an EPPO through a special legislative procedure. It does not develop the organic aspects of the institution, which are merely outlined: with deliberate ambiguity, the Treaty only states that the EPPO should be created "*from Eurojust*". Much has been written about the meaning of this laconic expression in the text of the Treaty, but the truth is that according to Article 86 TFEU, nothing is defined as regards the structure (collegiate or hierarchical) of the new body, nor in terms of its legal status, the appointment of its components, or the accountability rules applicable to the EPPO and its members. In practice, this means that the European legislator had here a wide margin of action with which to approach the design of the new institution, in accordance with criteria of political and practical opportunity.

There is, however, broad consensus when considering that a future EPPO, even if it were to proceed only as a result of the implementation of the enhanced cooperation mechanism (Article 86(1) III TFEU), should be independent in order for it to function properly.[1]

Within the flow of official documents, this consensus in favor of the independence of the EPPO is reflected not only in the Commission's 2001 Green Paper and in the replies to it,[2] but also (and much more recently) in the sixth and seventh recommendations of the European Parliament's resolution of April 29, 2015,[3] as well as in the advisory opinion issued by the European Agency for Fundamental Rights.[4] It even appears in the joint statement signed by sixteen delegates of national parliaments gathered in the French National Assembly on September 17, 2014.[5]

[1] In this regard, see Ligeti and Simonato (2013), p. 12; Ligeti and Weyembergh (2015), p. 56.

[2] COM (2001) 715, section 4(1)(1). As will be seen, in this respect the Green Paper was entirely faithful to the content of Article 18 of the *Corpus Juris.* See Delmas-Marty (ed) (1997); and also the follow-up study: Delmas-Marty and Vervaele (eds) (2000).

[3] P8_TA-PROV (2015) 0173. In that resolution, the European Parliament stated that "it is crucial to ensure the establishment of a single, strong, independent EPPO that is able to investigate, prosecute and bring to court the perpetrators of criminal offences affecting the Union's financial interests", because "any weaker solution would be a cost for the Union's budget". At the same time, it stressed that "the structure of the EPPO should be fully independent of national governments and the EU institutions and protected from political influence and pressure". The EU Parliament therefore called for for "openness, objectiveness and transparency in the selection and appointment procedures for the European Chief Prosecutor, his/her deputies, the European Prosecutors and the European Delegated Prosecutors", expressing its conviction that "in order to prevent any conflicts of interests, the position of European Prosecutor should be a full-time position."

[4] FRA Opinion 1/2014 [EPPO] of 4 February 2014. On the basis of ECtHR case-law, the Agency places special emphasis on the quasi-judiciary nature of the European Public Prosecutor's Office and therefore urges the European legislator to provide clearer rules and more specific safeguards to ensure the independence, impartiality, and accountability of the EPPO. The full opinion can be consulted at: http://fra.europa.eu/sites/default/files/fra-2014-opinion-european-public-prosecutors-office_en.pdf (accessed March 2018).

[5] This joint statement (which only British, Swedish and Dutch parliamentary delegates refused to endorse), expressly states at the end: "ongoing negotiations should ensure the independence, the efficiency and the added value of the EPPO." A record of the meeting, including the full speeches of the participants, can be found at: http://www.assemblee-nationale.fr/14/europe/declaration/c0154_en.pdf (accessed March 2018).

Incidentally, the general tone of this last document was quite critical both of the Commission's Regulation proposal and of its reaction to the various parliamentary opinions which transpired in the weeks following the publication of the proposal for a Regulation, and which set in motion the "mechanism of subsidiarity control" envisaged in Articles 6 and 7 of the Second Protocol to the TFEU (the so-called 'yellow card procedure').[6]

The strong emphasis that has been put on the independence of the EPPO (both by legal scholars as well as by politicians) should not be overlooked. The general rule in legal systems of most EU Member States is that national prosecutors should be subject to a system of hierarchical dependence and ultimately subordinate either to the Ministry of Justice or to some other Government-designated authority.[7] However, this perspective must necessarily change when it comes to a criminal prosecution body called to act in an international context.[8] In this new area, the very legitimacy of the institution demands a status of independence: insofar as its existence and action presuppose a prior cession of sovereignty by the States in which it is to operate (at least in relation to the prosecution of a particular class of offenses), its decisions will only be perceived as legitimate if they are adopted in accordance with the law and apply strictly technical principles (that is to say, if they take place in a sphere protected from pressures or intrusions from persons or authorities in respect of which the cession of sovereignty has not occurred).

This is not, however, the only reason for providing the EPPO with clear safeguards to its independence. There are also powerful arguments of a practical nature: as proven by numerous studies carried out over the last few years, offences against the Union's financial interests do not constitute a real priority for the authorities of the Member States—either because of scarcity of resources, structural deficiencies, or simple criminal policy reasons.[9] This fact alone should not cause surprise, nor scandal, but certainly triggered all the initiatives to better protect the financial

[6] Fourteen national parliaments sent a reasoned opinion within the deadline provided for in Protocol II of the TFEU (which ended on 28 October 2013). The Spanish Parliament did not raise any objections or reservations, even though the Commission's proposal could lead to serious criticisms from a constitutional point of view (e.g., regarding the right to an ordinary judge predetermined by law). The Commission responded to parliamentary opinions by means of the communication of 27 November 2013 [COM (2013) 851], arguing that the 2013 proposal for a Regulation was fully in line with the principle of subsidiarity and would therefore not be withdrawn, but that the opinion of national parliaments would be taken into account in subsequent work. For an overall assessment of the "yellow card procedure" regarding the European Public Prosecutor's Office, see Fromage (2015). Opinions of the Chambers can be consulted at: http://www.ipex.eu/IPEXL-WEB/dossier/document/COM20130534.do (accessed March 2018). See also Wieczorek (2015).

[7] See Wade (2013), p. 461.

[8] An analysis that takes into account the international framework on the independence of prosecutorial authorities (and specifically the criteria of the United Nations and the Council of Europe) can be found in Symeonidou-Kastanidou (2015), pp. 256–264.

[9] See, for example, the *Euroneeds Report* of the Max Planck-Institut für ausländisches und internationales Strafrecht. The full report can be consulted at: https://www.mpicc.de/files/pdf1/euroneeds_report_jan_2011.pdf (accessed March 2018). Important in this respect are also the annual reports of OLAF, available at: https://ec.europa.eu/anti-fraud/about-us/reports_en (accessed March 2018).

interests of the Union at a supranational level whose decision-making procedures are also functionally and operationally independent of the authorities of the Member States, and therefore capable of overcoming national inactivity.

Of course, independence must necessarily be coupled with accountability, to prevent and react against possible abuses or arbitrariness, and allowing, if necessary, oversight on the use of the EPPO's powers by the subjects integrated in the EPPO, especially since we are talking about an institution which, over time, will take decisions that will directly affect the rights and liberties of the European Union's citizens.[10]

As the EPPO Regulation has been under discussion until very recently, being addressed at regular meetings held every few weeks, it is not surprising that there are significant differences between the original proposal and its final version (in fact, from the organizational point of view, the current text has little to do with the original). It would be pointless to refer in this analysis to an already discarded draft, and hence the 2013 proposal will be only taken into account for the purpose of making comparisons with the latest available documentation.

The reasons for the profound changes mentioned above are well known: following the so-called 'yellow card' procedure, and although the Commission initially stated its determination to move forward with the project, the Council felt compelled to reformulate the Regulation proposal taking into account the suggestions, comments, and objections raised by the Member States to the original text. Thus, under the Greek Presidency (first half of 2014) there was a major structural change in the draft, with the introduction of a collegiality factor in the organization of the EPPO and the removal of the principle of exclusive competence.

The Italian Presidency (second half of 2014) maintained the refurbishment carried out under the Greek Presidency, modifying various aspects of major importance (among other changes, it removed the reference to the Union as a "single legal area" which, by influence of the *Corpus Juris*, had been included in Article 25 of the original proposal).[11] Under the Presidencies of Latvia, Luxembourg, the Netherlands and Slovakia, work continued on the line opened by the Greek Presidency. Given the level of consensus reached, it was to be expected that the Regulation as such would not deviate too much from this line, at least as far as the organization and

[10] See Opinion No. 9(2014), of the Consultative Council of European Prosecutors (CCPE) to the Committee of Ministers of the Council of Europe on European norms and principles concerning prosecutors, done in Strasbourg, 17 December 2014. This Opinion contains the Charter, called "the Rome Charter". Especially interesting for our topic are paragraphs IV, V y VI of the Charter and 94 to 96 of the Explanatory Note. The document is accessible under https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCPE(2014)4&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true (last accessed 5.3.2018). At the moment of writing this article, a new opinion of the CCPE on "Independence, accountability and ethics of public prosecutors" is being discussed. Adoption is to be expected for the end of 2018.

[11] For a critical review, see Erbeznik (2015), pp. 209–221.

structure of the new EPPO are concerned, an expectation which has been indeed confirmed by the final text of the Regulation.[12]

## 2 What Independence for the Future European Public Prosecutor's Office?

The first question to be addressed is: how should the 'independence' of an institution such as the European Public Prosecutor's Office be understood? Is it a type of independence analogous to that attributed to the judicial bodies in a democratic State, or do we speak of something different?

In order to answer these questions, it may be fruitful to consult the various EPPO-related documents that have been published over the years.[13]

Article 18 of the *Corpus Juris* (Florence version), which concerned the status and structure of the 'European Public Prosecutor', already stated that the EPP should be "independent as regards both national authorities and Community institutions". In the corresponding paragraph of the implementing provision pertaining to this article, it was additionally proclaimed that members of the EPP should be "completely independent in the performance of their duties"; that they should "neither seek nor take instructions from any government or from any body, be it national or European", and that they were not to be permitted, during their term of office, "to engage in any other occupation, whether gainful or not".[14]

In a similar vein, the "Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor" assimilated the independence of the members of the European Public Prosecutor's Office to that of the judges of the Court of Justice of the EU. In the eyes of the Green Paper, independence should be an "essential feature" of the European Public Prosecutor's Office, warranted by the latter's status as a "specialised judicial body".

Moreover, the Green Paper stated that the EPPO should be independent "both of the parties to any dispute and of the Member States and the Community institutions and bodies". More recently, Article 5 of the proposal for a Regulation on the establishment of the European Prosecutor's Office of 17 July 2013 proclaimed that "the European Public Prosecutor's Office shall be independent. The European Public Prosecutor's Office, including the European Public Prosecutor, his/her Deputies and the staff, the European Delegated Prosecutors (EDPs) and their national staff, shall neither seek nor take instructions from any person, any Member State or any

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[12] See the Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office. See also the draft contained in the Council document 9941/17, of 30 June 2017, which can be consulted at: http://db.eurocrim.org/db/en/vorgang/306/ (accessed February 2018).

[13] See extensively on United Nations and Council of Europe criteria, see Symeonidou-Kastanidou (2015), pp. 256–264.

[14] For a historical approach, see Delmas-Marty (2010), pp. 163–169.

institution, body, office or agency of the Union in the performance of their duties. The Union institutions, bodies, offices or agencies and the Member States shall respect the independence of the European Public Prosecutor's Office and shall not seek to influence it in the exercise of its tasks".

The Explanatory Memorandum of the proposal justified these provisions according to the need to ensure that the EPPO could exercise its functions and use its powers in a way that made it "immune *from any improper influence*" (emphasis added). The emphasis on the independence of the institution was also reflected in Recitals 10, 11 and 15 of the proposal.

In the final version of the text of the Regulation, former Article 5 has become Article 6. Its content is essentially the same, although certain adjustments have been made following the overall organizational changes made in the Regulation. Thus, the subjects of the independence proclaimed by the Regulation are now better detailed; and there is also a reference to the mission of the European Public Prosecutor's Office to act in the interest of the Union as a whole.

The text of the provision reads now as follows: "The EPPO shall be independent. The European Chief Prosecutor, the Deputy European Chief Prosecutors, the European Prosecutors, the EDPs, the Administrative Director, as well as the staff of the EPPO shall act in the interest of the Union as a whole, as defined by law, and neither seek nor take instructions from any person external to the EPPO, any Member State of the European Union or any institution, body, office or agency of the Union in the performance of their duties under this Regulation. The Member States of the European Union and the institutions, bodies, offices and agencies of the Union shall respect the independence of the EPPO and shall not seek to influence it in the exercise of its tasks".

It can be said that, as it has been understood by the various official documents, the independence of the EPPO has several dimensions: on the one hand, it integrates the classic meanings of exclusive submission to law and absence of dependence on the will of the national authorities of the Member States (as well as the European authorities, institutions and bodies). But on the other hand—and this is crucial—it has also ended up incorporating an important element of attention to *the interest of the Union as a whole*: the EPPO must always act to protect the interests of the Union, disregarding private interests from companies, individuals, or States. It is necessary to insist on this point, since it is a definite departure from the parameters of intergovernmental cooperation prior to the Treaty of Lisbon (the old "Third Pillar logic"): the very purpose of the creation of the EPPO is for it to be conceived as an institution endowed with a clear European vocation, aimed at safeguarding genuinely European interests (even though, as will be seen later, the recent changes that have taken place in the organizational model of the Office unfortunately point to a certain departure from this original purpose).

## 3 The Guarantees of the Independence of the European Public Prosecutor's Office in the Regulation of 2017 and in the Pre-legislative Work of the Council

### *3.1 The Organizational Structure of the European Public Prosecutor's Office*

The 2013 Regulation proposal provided for a relatively simple organization for the future EPPO, based on an outline which had two main elements: at the head of the office would be the European Chief Prosecutor along with the four Deputy European Chief Prosecutors, all appointed by the Council with the approval of the European Parliament.[15] At a lower level would be the EDPs (at least one for each Member State), chosen by the European Chief Prosecutor himself from among the lists of candidates forwarded by the States, which would constitute the real keystone of the system in the EDPs dual status as both National and European prosecutors (i.e., the so-called "double hat" system). The EPPO would also have exclusive competence in the investigation and the filing of criminal charges with respect to the crimes envisaged under Articles 12 and 13 of the 2013 proposal. It was then considered that the simpler the organization chart and the rules of attribution of competence, the more agile and efficient the institution would be in the long run, and the easier it would be to ensure its independence.[16]

This basic outline was sharply criticized by some Member States. It was said, among other arguments: that it did not respect the principle of subsidiarity, that it was not sufficiently justified from the point of view of the attainment of the objectives set out by the TFEU when establishing the possibility of creating the EPPO, that those objectives would be better achieved by providing it with a collegial structure, and that the lack of definition of the rules for attribution of ancillary competence generated legal uncertainty and opened the door to an unwanted extension of the competence of the new body.

Objections of a political nature aside, it is true that the 2013 proposal had significant technical shortcomings: for example, it did not define satisfactorily the relationship between the EPPO, the existing cooperation agencies and the authorities of the Member States, which in the long run would have given rise to quite a number of perplexities.

From the Commission's communication of 27 November 2013 onwards [COM (2013) 851], the discussions within the Council were in line with a thorough remodeling of the institution, providing it with a new structure and better defining its competences.[17] At least since December 2015, there existed broad political agreement on the content of Articles 1 to 35, which were combined into a consolidated new version of the proposal for a Regulation, drafted under the Luxembourg

[15] See Bachmaier Winter (2015) and White (2013).

[16] See Caianiello (2013), pp. 115–125.

[17] On the negotiations, see Naszczynska (2016), pp. 55–58.

Presidency of the Council.[18] From that moment onwards, the wording of these articles was "frozen" pending a full text. In the meantime, pre-legislative work focused on the second part of the proposal for a Regulation, where relevant developments occurred every few weeks.[19]

In general terms, the EPPO is now defined in the Regulation as an "indivisible body of the Union", which will operate "as one single Office with a decentralized structure" (Article 8(1)). From an organizational point of view, the EPPO will be divided into two levels: a central level and a decentralized one (Article 8(2)). The "central level" will be located at the headquarters of the institution in Luxembourg, and will consist of a number of bodies and subjects: the College, the Permanent Chambers, the European Chief Prosecutor, the Deputy European Chief Prosecutors, the so-called European Prosecutors and the Administrative Director. The 'decentralized level' will be composed of the EDPs, whose main task consists of working in and from the Member States (Article 8(4)).[20]

As regards the competence of the EPPO, it has ceased to be exclusive (as was previously envisaged in Articles 12 and 14 of the 2013 Regulation proposal) and has simply been given a preferential character with respect to that of the authorities of the Member States. In that sense, Article 25.1 of the EPPO Regulation provides that if the EPPO exercises its jurisdiction in relation to an offense falling within its scope, national authorities of the States concerned should refrain from exercising their own, and specifies that this exercise of powers by the EPPO may be carried out in two ways: either by initiating an investigation in accordance with the provisions of art. 26, or by making use of the "right of avocation" conferred by art. 27 with respect to investigations already initiated in any Member State (of those within its territorial scope of action, it is understood).

The functions and the system of appointment and removal of the following internal organs of the EPPO are discussed briefly below: the College, the Permanent Chambers, the European Chief Prosecutor, the Deputy European Chief Prosecutors, the European Prosecutors, the EDPs, the Administrative Director and the seconded national experts.

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[18] See *The Report on the State of Play* contained in Council document 15100/15 of 22 December 2015; Available at http://db.eurocrim.org/db/en/doc/2404.pdf (accessed February 2018).

[19] One of the latest information notes from the Dutch Presidency of the Council, dated 3 March 2016 (Council document 6667/16), indicates that there existed a technical agreement back then on arts. 48 to 53 (budgetary questions), 55 (collaboration of national experts), 56, 58a (common provisions for cooperation with other bodies and institutions) and 62 to 75 (general provisions on the European Public Prosecutor's Office). In addition, an announcement was made on the introduction of three further precepts relating to the "Administrative Director" of the institution, who would manage the budget and administrative and personnel aspects. In this regard, see http://db.eurocrim.org/db/en/doc/2458.pdf (accessed March 2018).

[20] See also Met-Domestici (2017), pp. 143–149.

### 3.1.1 The College

The College, which will be composed of the Chief European Public Prosecutor and as many European Prosecutors as participating Member States, will be the governing body responsible for the general supervision of the activities of the EPPO.[21] In this sense, its fundamental task will be to take strategic decisions and to adopt criteria regarding the general issues that may arise from the matters in which the institution is involved, in order to guarantee a certain coherence or unity of criteria of the EPPO in all its territory of operation. The College may not make operational decisions in particular cases (Article 9(2)).

It will also be up to the College to approve the internal rules of procedure of the EPPO and its future modifications (Article 21), as well as to set up the Permanent Chambers in accordance with the stipulations of the aforementioned rules of procedure (Article 9(3)).

The existence of a stable body at the apex of the organization of the EPPO operating on the basis of criteria of collegiality was not provided for in the original proposal for a Regulation published by the Commission in 2013, which aimed rather at a vertical structure, based on a hierarchical conception of the functioning of the projected institution. Certainly, the 2013 proposal made a small concession to the defenders of the principle of collegiality (as it was proclaimed both in the presentation of the document and in the accompanying press note), when providing in art. 7 for a sort of "mini-College" entrusted with the approval of the internal rules of procedure of the EPPO, and which would consist of ten members: the European Chief Prosecutor, his four Deputies and five EDPs which were meant to reflect "the demographic and geographical spectrum" of all Member States.

However, it was then firmly believed that a permanent assembly with decision-making capacity in matters of ordinary dispatch, but constituted according to national parameters (one representative per Member State), would prove to be impractical and would seriously undermine the operational capacity of the new institution in the long term, placing its independence at risk with respect to the Member States and subsequently rendering it ineffective in practice. It was also argued that the creation of a body with the characteristics of the EPPO required a different approach from that which had been used up to now to set up European cooperation agencies and institutions in criminal matters (notably Eurojust) and that in Western comparative law there are no precedents for collegiate organs of investigation and criminal prosecution, given their lack of practical usefulness.

Judging by the reactions to the 2013 Regulation proposal, none of these arguments were held to be convincing. Several of the reasoned opinions issued by the national parliaments in the weeks immediately following the publication of the proposal stated that both the principle of subsidiarity and the very legitimacy of the new

[21] The EPPO Regulation distinguishes up to three different forms of supervision, which also have a diverse content and scope: *general oversight*, *monitoring and directing* and *strict supervision*. In this regard, see Council document 15100/15 of 22 December 2015, No. 12; as well as Recital No. 23 of the Regulation.

institution required abandoning the hierarchical model for another inspired by the principle of collegiality, by bringing into its decision-making centers members who acted as nationals of the various States and who, at the same time, had a close relationship with their internal judicial systems (the closest thing to *a link* with national authorities). In its reply to the national parliaments, the Commission denied that the adoption of a hierarchical structure would in itself infringe on the principle of subsidiarity and insisted that, in any case, the EPPO is a body of the Union, which means that the actual form of its internal organization is not an issue to be clarified in terms of the application of the principle of subsidiarity.[22]

In any event, the discussions which took place within the Council after resuming the work on the draft Regulation led to the elimination of the original organizational structure and its replacement by the current collegiate model. The misgivings which, from the point of view of the independence of the EPPO, could arise from the introduction of national elements into its internal government are now addressed in two ways: on the one hand, it is stipulated that the College will not take decisions on particular matters. On the other hand, Article 6 includes all members of the College (although not the College itself as such, which may be significant) in the enumeration of beneficiaries of the statute of independence that it proclaims (further specifying, as has already been said, that they must always act in the general interest of the Union as a whole).

### 3.1.2 The Permanent Chambers

The EPPO Regulation provides for the creation of "Permanent Chambers" within the EPPO. Although the Permanent Chambers are key elements in the design of the Office, the Regulation does not predetermine either their number, or the way in which they are to be erected. It also does not specify their composition, or the rules for the division of competences between them, or the procedure of decision making within them. All these are meant to be issues to be dealt with in due course by the internal rules of operation adopted by the College.

Each Permanent Chamber will have two permanent members and will be chaired either by the European Chief Prosecutor, by one of the Deputy Chief Prosecutors or by the European Prosecutor appointed for that purpose.[23] The main function of the

[22] According to the Commission's reasoning, "a collegial structure is not necessarily less centralised than that of the proposal: it is merely a different way of organising the European Public Prosecutor's Office, which would in any event remain an office of the Union. Hence the comparison between the decentralised model of the proposal and the collegial structure preferred by a number of national Parliaments is not a comparison between action at the Union level and action at the Member State level, but a comparison between two possible modes of action at the Union level. In the Commission's view, that is not a question concerning the principle of subsidiarity". In this regard, see [COM (2013) 851], pp. 2–5.

[23] It is also envisaged that in each Chamber's deliberations on particular cases there shall also be present the European Prosecutor entrusted with the supervision of the work of the Delegated Prosecutor in charge of the case (Article 10(9)). Other European Prosecutors or other Delegated

Permanent Chambers is to make certain critical decisions regarding the prosecution of crimes that fall within the scope of the competence of the EPPO. Specifically, the Permanent Chambers will be the bodies in charge of carrying out the assignment (and, if necessary, the reallocation) of cases between the EDPs, as well as agreeing on the joining of cases (or the dividing of connected cases). They may also order a Delegated Prosecutor to initiate a criminal investigation, or to exercise the right to evocation in a case before the national authorities of the State in which he renders his services. They can even impart orders or binding instructions to the Delegated Prosecutors as to how to deal with the matters in which they are intervening (Article 10(5)). In addition, it will be up to the Permanent Chambers to decide, in view of the draft resolutions handed to them by the Delegated Prosecutors under their supervision, if a particular case is to be brought to judgement or if, on the contrary, the case is to be dismissed; if a transaction with the alleged perpetrator is to be entered into; or if the case in question is to be referred to the national authorities of a Member State.

The Permanent Chambers will therefore be the organizational units in which some of the most important decisions will be taken in relation to the work carried out by the EDPs in their Member States of origin. In that sense, it is crucial to ensure their independence. It should be noted, however, that some of the decisions of the Permanent Chambers are delegable to the European Prosecutors, under the terms of Article 10, section 7 of the Regulation.

### 3.1.3 The European Chief Prosecutor and the Deputy Chief Prosecutors

Under the final version of the EPPO Regulation, the European Chief Prosecutor has lost many of the powers conferred on him (or her) by the 2013 proposal, which in turn have been reallocated to the Permanent Chambers. Article 11(1) now merely states that the EPPO will organize the work of the Office, direct its activities and take decisions in accordance with the Regulation and the internal rules of procedure of the EPPO; adding that he will be assisted in these duties by two *Deputies*, who will also replace him when he is absent or unable to meet his obligations.

In addition, the European Chief Prosecutor will preside over the internal governing bodies of the EPPO (over the College in any case, as well as over those Permanent Chambers that are not chaired by a Deputy Chief Prosecutor or by a European Prosecutor), exercising the deciding vote when necessary. The Chief Prosecutor shall also represent the institution before the other bodies of the Union, its Member States, international organizations, and also before third States. He will have to appear annually before the European Parliament, the Council and the national parliaments that request him to give a general account of the activities of the EPPO (although he may be replaced by a Deputy Chief Prosecutor where hearings before national Parliaments are concerned). He will have to negotiate with the authorities

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Prosecutors with a potential interest in the case on which the deliberation is to be held may also be present, but these in turn are not entitled to vote.

of the Member States the number of EDPs to be appointed in each of them, as well as the distribution of powers among the Delegated Prosecutors operating in their territory. Finally, he must give the go-ahead when the national authorities intend to cease or discipline a Delegated Prosecutor on grounds relating to his or her work as such (if for other reasons, it shall suffice for the European Chief Prosecutor to be informed).

Aside from these powers, the European Chief Prosecutor will be responsible for preparing the proposals to be submitted to the College for the taking of certain decisions, such as the adoption of the internal rules of procedure of the EPPO (Article 21(2)), the appointment of the Delegated Prosecutors according to the lists forwarded by the member States, the adoption of the annual budget (Article 92) and the appointment of the Administrative Director of the institution.

Additionally, the European Chief Prosecutor may request the Permanent Chambers reconsider certain decisions, such as the delegation of functions to the European Prosecutors or the decision to refrain exercising the competence in favour of the national authorities in relation to a particular case.

The European Chief Prosecutor shall be appointed by the European Parliament and the Council by mutual agreement (Article 14(1)). The appointment shall be for a period of 7 years with no possibility of renewal, and may only be awarded to a person who is an active member of the public prosecution service or the judiciary of a Member State (or, alternatively, a person who is or has been an active European Prosecutor). The candidate must meet the following additional requirements: he or she must be a person whose independence is beyond doubt, must have sufficient managerial experience, must be qualified to hold the highest prosecutorial or judicial offices in his or her State of origin, and must at the same time have relevant practical experience of national legal systems, financial investigations, and international judicial cooperation in criminal matters.

As regards the selection process, an open call will be published in the Official Journal of the European Union. Once the applications have been submitted, a selection panel consisting of twelve members (appointed by the Council following a proposal from the Commission) will draw up a list of the most suitable candidates and forward it to the European Parliament and the Council, which will in turn make the final decision over the appointment.

The sole grounds on which the European Chief Prosecutor may be dismissed before the expiration of the term of office are resignation, loss of the ability to perform his or her duties, or serious misconduct. In the last two cases, the procedure of removal is outlined in Article 14(5): the European Parliament, the Commission or the Council must request the CJEU to cease the European Chief Prosecutor, and it is for the CJEU to agree to it (although the procedure to be followed by the Court is not described in the Regulation).

As for the two Deputy Chief Prosecutors, they should be appointed by the College among European Prosecutors through the procedure established by the internal rules of procedure of the EPPO. The appointment of each Deputy will be for 3 years, as long as the elected officials remain as active European Prosecutors, since both appointments must be held simultaneously. If at any time the Deputy

Chief Prosecutors cease to be able to fulfill their duties, the College may decide to dismiss them from that position.

The specific functions of the Deputy Chief Prosecutors are not detailed in the current version of the Regulation: section 2 of Article 15 refers to the internal rules of procedure the establishment of the rules and conditions for the exercise of this position.

### 3.1.4 European Prosecutors

The European Prosecutors are national prosecutors with a triple function: firstly, they will be in charge of supervising the performance of the Delegated Prosecutors from their own State of origin, according to the indications given by the Permanent Chamber to which they are subject. They will present case summaries and resolution proposals for their respective Chamber on the basis of drafts submitted by the Delegated Prosecutors and may also give instructions to the latter in relation to particular matters, provided that the interests of justice, the coherent functioning of the EPPO or the effectiveness of investigations or of the prosecution require it. Secondly, they will play an important role as a channel of communication between the Permanent Chambers and the Delegated Prosecutors: among their tasks is to ensure that information flows between the Delegated Prosecutors and the headquarters of the EPPO. Finally, it can be assumed that they will also act in a certain way as a link between their Member State of origin and the EPPO, in a similar way to how the national members of Eurojust operate.

The figure of the European Prosecutors did not exist in the Commission's initial 2013 Regulation proposal. Its creation follows the principle of collegiality: as members of the College, it is hoped that they will introduce a collegial factor into the core of the EPPO, where formerly only the European Chief Prosecutor and his Deputies existed. European Prosecutors are also expected, as national experts and members of the judicial or prosecutorial career in their home State, to be able to elucidate for the College the peculiarities of their national domestic law regarding cases being investigated or prosecuted in their State of origin.

The procedure for the appointment of European Prosecutors is delineated in Article 16 of the EPPO Regulation. Thus, a selection panel will be set up in accordance with the provisions for the appointment of the European Chief Prosecutor. Each Member State shall send to the panel a series of three candidates who are members of their prosecution service or their judiciary, whose independence is beyond doubt, who are eligible for a high position in the prosecution service in their State of origin, and who have at the same time relevant practical experience in international affairs, in financial investigations, and in international judicial cooperation in criminal matters. The selection panel will then give a reasoned opinion on each proposed candidate, forwarding all opinions to the Council, which will then make the selection and final appointment of one European Prosecutor for each Member State by simple majority. The selection panel shall have the right of veto: if it rejects a candidate, its rejection shall be binding on the Council.

Together with the appointment of each European Prosecutor, the College shall designate a temporary substitute from among the EDPs of their Member States of origin, in the event that the designated European Prosecutor unexpectedly loses the capacity to continue in office. If this happens, the substitute will temporarily exercise the functions of the European Prosecutor removed until a new one is named (or until the holder recovers, if the cause of the withdrawal is temporary).

The appointment of European Prosecutors will be subject to a non-renewable term of 6 years (although they may be extended for a further period of 3 years, at the discretion of the Council). The renewal of the whole body of European Prosecutors will be carried out by thirds every 3 years (Article 16(4)).

As for the loss of the European Public Prosecutor status, the resignation or abandonment of the post (Article 16(6)), as well as relief by the CJEU, may be requested by the European Parliament, the Council or the Commission, if they consider that the person concerned has lost the capacity to perform his duties or that he is guilty of some serious misconduct (Article 16(5)).

### 3.1.5 European Delegated Prosecutors

The EDPs are the true cornerstone of the EPPO. Once appointed, they shall operate as its agents in the Member States, having the same powers as the national prosecutors in their country in relation to matters of the competence of the Office. They are the ones that will directly carry out the investigations, who will bring cases before the national courts of the State where the trial will take place, and participate in the taking of evidence and formulating and filing appeals against the decisions of said Courts when needed. However, the Delegated Prosecutors will not be entirely free to direct the proceedings according to their own will: pursuant to Article 13(1) of the EPPO Regulation, they must at all times comply with the orders and instructions of the Permanent Chamber entrusted with the case, as well as the indications of the European Prosecutor who acts as its supervisor.

It is envisaged that at least two Delegated Prosecutors must be present in each State participating in the EPPO, a number that may be increased if the European Chief Prosecutor considers it appropriate, in agreement with national authorities. The Delegated Prosecutors will not be employed with EPPO business fulltime, but may continue to function as members of their national prosecution service. If a situation arises where their internal tasks prevent them from fulfilling their role as Delegated Prosecutors, they shall bring it to the attention of their European Prosecutor of reference, who will then consult with the national authorities to determine the order of priorities or, alternatively, to propose to the competent Permanent Chamber the reassignment of the case to another Delegated Prosecutor operating in the same Member State.

Article 96(6) of the EPPO Regulation seeks to ensure the independence of the Delegated Prosecutors by stating, on the one hand, that national authorities should facilitate the exercise of their functions as members of the EPPO and, on the other hand, that those authorities must also refrain from carrying out any action or

implementing any policy that may adversely affect Delegated Prosecutors in their careers as national prosecutors or judges. In addition, they must provide them with the necessary resources for the exercise of their function, while ensuring their full integration into the national prosecution services for the entire duration of their appointment as Delegated Prosecutors. All things considered, all of these obligations fall squarely within the "principle of loyal cooperation" enshrined in Article 4(3) TEU.

The appointment of the Delegated Prosecutors will be carried out by the College, upon proposal of the European Chief Prosecutor. The Chief Prosecutor's proposal will in turn be based on the nomination made by the Member States. The appointment will be for a renewable term of 5 years.

Candidates for appointment as Delegated Prosecutors need to be active members of the public prosecution service or judiciary of their respective Member States. Their independence shall be beyond doubt and they shall possess the necessary qualifications and relevant practical experience of their national legal system (Article 17(2)). From a labor law point of view, the Delegated Prosecutors will be part of the professional category of the so-called "special advisers". According to European Union law, special advisors are subjects who by virtue of their exceptional qualifications, and in spite of their dedication to other professional activities, are employed in one of the European institutions (either on a regular basis or for specified periods of time) and whose salaries are charged to the global credits authorized in the section of the specific budget corresponding to the institution of which they depend.[24] The Regulation justifies this decision according to the need to safeguard the independence of the Delegated Prosecutors while ensuring their "European vocation". At the same time, it provides that the remuneration of these professionals shall be set by the College and includes only the fees due for their work for the EPPO (they will therefore continue to receive payment from their respective Member State of origin as members of the national prosecution service, maintaining the rights and duties related to that condition).

The Delegated Prosecutors may cease in their duties in case of resignation, loss of their position as members of the prosecution service or judiciary of the State of origin, or because their services are no longer necessary to fulfill the role of the EPPO. In any of these cases, the Member State concerned shall immediately inform the European Chief Prosecutor and, if necessary, nominate another candidate to fill the vacancy.

If a Member State decides to dismiss or to take disciplinary action against any of the EDPs acting on its territory for reasons unrelated to their work as such, it shall suffice to inform the European Chief Prosecutor before any action is taken. On the

[24] See Article 96 of the EPPO Regulation; and also Article 5 of the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the EU, which can be found at: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:01962R0031-20140501&from=IN (accessed March 2018).

other hand, in order to dismiss or to start a disciplinary procedure against a Delegated Prosecutor on grounds relating to his or her work as such, the Member State shall have the consent of the European Chief Prosecutor. If it does not, the affected State may request the College review the matter (Article 17(4)).

### 3.1.6 The Administrative Director

The discussions under the Dutch Presidency of the Council in the first half of 2016 led to the emergence of the Administrative Director of the EPPO. This new figure, much like the College, the Permanent Chambers or the European Prosecutors, was not envisaged in the 2013 Regulation proposal. As it is now contemplated, the Administrative Director shall be in charge of managing the instrumental bureaucratic organization of the Office. The position will have various attributes. The most important among them involve the day-to-day administration of the institution, the execution of the budget, the recruitment of staff, and the preparation of annual reports on the administrative management of the Office and the implementation of the budget.

The appointment of the Administrative Director will be carried out by the College, based on a list of candidates presented by the European Chief Prosecutor, which must be drawn up as part of a selection process which shall be regulated in the internal rules of procedure of the EPPO. The appointment will be made for 4 years, renewable for a maximum of 4 more years (Article 18).

It is further envisaged that the Administrative Director shall be independent in the exercise of his duties, without prejudice to the accountability to the European Chief Prosecutor and to the College (which may remove him from office via a decision taken by a two-thirds majority of its members). Among other things, this statute of independence implies that the Administrative Director shall not heed orders or instructions from any national Government or any other body or institution (Article 19(2)).

### 3.1.7 Seconded National Experts

Finally, provision is made for the possibility of incorporating national experts on a secondment basis into the EPPO (Article 98(1)). The EPPO Regulation does not develop the status and functions of these experts, limiting itself to establishing that they will be subject to the authority of the European Chief Prosecutor, leaving the remaining issues to the discretion of the College, which should formulate rules in this regard. It is not, however, a figure unknown in Union law, as many other European institutions (such as the Commission or Parliament) have been using it for many years.

### 3.2 Regulatory Autonomy of the European Public Prosecutor's Office

It can be said that one of the most important guarantees of the independence of the EPPO is the self-regulatory power conferred on it by the Regulation. In a transnational context such as the European one, with a plurality of states involved and different political interests at stake, the fact that the Office is capable of endowing itself with its own rules of internal functioning is crucial to protect it from political debate and to avoid tensions in that field which may interfere with its ordinary work.

In this sense, Article 21 of the EPPO Regulation provides that, as soon as the EPPO is set up, the College will lay down a set of internal rules of procedure governing the organization and work of the new institution. It is clear from the wording of the Regulation that these 'rules of procedure' will be both an organic development of the various figures that compose the European Public Prosecutor's Office and their powers, and of its proceedings in the strict sense.

Thus, among other aspects, the internal rules of the Office will establish the concrete forms for exercising the powers entrusted to the College in Article 9, the constitution of the permanent chambers, as well as their number, their composition, the distribution of matters between them and their rules of operation (Article 10), the powers of the European Chief Prosecutor regarding the organization and direction of the institution (Article 11), the system of substitution of European Prosecutors (Article 12(1)), the procedure for the transmission of information, through the European Prosecutors, between the headquarters of the Office the Delegated Prosecutors (Article 12(3)), the selection process and the functions of the Delegated Prosecutors (Article 15), the regime for the filing of information sent to the EPPO and for verifying the credibility of the same (Article 24), the use of the Case Management System by the Delegated Prosecutors to comply with their duty to inform the European Chief Prosecutor and the Permanent Chamber on which they depend (Article 28), or the selection process of the Administrative Director of the EPPO (Article 18(2)).

It is noteworthy that, in spite of the extreme importance of some of these issues and their direct impact on the normal functioning of the institution, it has been preferred to refer their arrangement to the inner rules of the institution rather than directly address them in the Regulation. The reason is twofold: on the one hand, as has just been said, it seems that in this way it is guaranteed (at least to the greatest possible extent) that the internal proceedings and the work of the EPPO are organized according to strictly technical criteria, thus strengthening its independence from political influences. On the other hand, there is a clear advantage in delaying the discussion of these aspects to the moment when the EPPO is created: by doing so, the Regulation has avoided a situation in which the possible disagreements on the technical details related to the organization and functioning of the new institution could have ended up stalling the negotiations for its creation.

Obviously, reservations may be raised as to the legitimacy of transferring the power to regulate such important matters to the Office itself—especially when, as is

the case, the possible outcome is not subject to any control by the ordinary legislator: the Regulation only provides for the European Chief Prosecutor to prepare the draft of the internal rules and to submit it to the College for approval, which will require a two-thirds majority of favorable votes. Any subsequent changes that may be carried out may occur at the initiative of any European Prosecutor, requiring its definitive adoption by the same majority within the College. However, for the reasons set out above, perhaps it would have been advisable to subordinate the effective entry into force of the internal rules of procedure approved by the EPPO to the definitive confirmation or ratification by European Parliament or the Council (or by both of them at the same time).

### *3.3 Budgetary and Managerial Autonomy of the European Public Prosecutor's Office*

The independence of an institution such as the EPPO requires a certain degree of financial autonomy, which is specified in the existence of a separate budget and an autonomous system of management. In this sense, the EPPO Regulation provides for the Union supplying funding for the EPPO from its General Budget.

Thus, according to Articles 91 and 92 of the Regulation, each year the Administrative Director will prepare a proposal for a budget for the EPPO and forward it to the European Chief Prosecutor, who will then draw up a draft estimate of the revenue and expenditure of the Office, which will comprise among other things the remuneration of the European Prosecutors, the Delegated Prosecutors and the Administrative Director; as well as the remuneration of the rest of the staff, of the administrative and infrastructure costs, and the operational expenditure.[25] The draft will be submitted to the College for approval and, once approved, it will be forwarded to the Commission, which will then enter it into the proposal for a General Budget of the EU submitted to the European Parliament and the Council (which are, as it is known, the ultimate budgetary authorities of the Union). The execution of the budget is the responsibility of the Administrative Director of the EPPO, who will authorize the expenses to be incurred within the limits set by the budget (Article 93).

Among the various possible alternatives, the chosen model ensures that the most delicate aspects related to the funding of the EPPO are removed from the direct control of the Member States. It should be noted in this regard, however, that according to the Regulation, the costs of investigative measures undertaken by the Office shall in principle be covered by the national authorities carrying them out. Only when these costs turn out to be "exceptionally high" could they be reimbursed by the EPPO, at least partially.[26]

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[25] On the concept of "operating expenses" and the question of who should pay them, see the consultation presented in Council document 6667/16 of 3 March 2016.

[26] See the Recitals No. 112 and 113 of the Regulation.

Regarding the staff provisions, the EPPO Regulation contains a number of dispositions clarifying the employment status of the personnel of the EPPO. In all cases the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the EU apply[27] (as well as the Protocol on the Privileges and Immunities of the Union), but the specific labor conditions of the different subjects involved may vary. Thus, the European Chief Prosecutor, the European Prosecutors, and the Administrative Director shall have the status of "temporary agents",[28] whereas the Delegated Prosecutors, as mentioned above, will be hired as "special advisers".[29] The authority which will authorize the signature of employment contracts in the name and on behalf of the EPPO shall be the College, although when it comes to hiring administrative staff in the service of the institution, the College will delegate this role to the Administrative Director.

## 4 Concluding Remarks: Some Problematic Aspects

In the light of all of the above, notwithstanding the critical considerations that could be made about the legislative policy options that have come to prevail in the design of the EPPO, it may be concluded that significant and effective progress was made in pre-legislative work on the desirable independence of the future institution: the attributions of the different bodies that compose it, as well as the dynamics of its internal functioning, have been better specified; some inaccuracies have been eliminated in matters of special relevance and a variety of aspects that were dealt with in a vague and ambiguous manner in the original 2013 Regulation proposal have been at last adequately defined.

However, there are still important issues that need to be addressed. Moreover, at the same time, due to the deep rethinking of the organizational and work model, new concerns have arisen which may not have been sufficiently taken into account.

Firstly, in relation to a good number of key aspects (e.g., the organizational and managerial powers of the European Chief Prosecutor, or everything related to the Permanent Chambers: their number, composition, division of competences between them and their rules of operation), the current version of the EPPO Regulation makes profuse references to the internal rules of procedure adopted by the College. As we have already seen, there are pragmatic reasons behind this decision: it is highly likely that dealing with these matters at the pre-legislative level would have

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[27] See Regulation 31 (EEC) 11 (EAEC), which can be found at: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:01962R0031-20140501&from=IN (accessed March 2018).

[28] See Article 2(a) of the Staff Regulations of Officials and the Conditions of Employment of Other Servants.

[29] See Article 5 of the Staff Regulations of Officials and the Conditions of Employment of Other Servants.

complicated the discussions substantially, making agreement difficult and bringing negotiations to all but a standstill.

From the point of view of the independence of the EPPO, a certain degree of regulatory autonomy is certainly desirable, even to a greater extent than in the case of internal institutions of the Member States which perform similar functions. However, the European legislator must carefully weigh the number and kind of matters which are to be referred to the power of self-regulation of the Office, it being an institution that, for better or worse, is going to have a very direct impact on the fundamental rights and liberties of European citizens.[30] At stake is the very democratic legitimacy of the new body's action in particular cases, and hence there are certain issues in respect of which the proceedings for the adoption of the internal rules of procedure laid down in the Regulation might turn out to be insufficient. It may thus be necessary to consider the need for the internal rules to be approved by other European institutions that do have the legitimacy to issue provisions of general scope, which the EPPO in principle lacks.

Turning to the proceedings for the adoption of the internal rules laid down in the current version of the Regulation, other types of objections are raised. Article 7 of the original Regulation proposal of 2013 established a much more agile and simpler channel than the current one, insofar as it provided for the formation of a kind of "mini-College" for the sole purpose of approving the internal rules of procedure of the Office (rules whose function was exclusively "to govern the organization of the work of the Office" and to "include general rules on the allocation of cases"): in the proposal of 2013, the European Chief Prosecutor, his/her Deputies, and five Delegated Prosecutors (elected in accordance with a system of equitable rotation reflecting the geographical and demographic distribution of the Member States) were in charge of adopting the internal rules of procedure by simple majority. It was sought to ensure that the internal rules of the EPPO would be approved on the basis of purely technical criteria, thus removing them from the influence of political dispute.

In contrast, the current version of the text contemplates in its Article 21 the procedure explained above: the European Chief Prosecutor will prepare a draft that will be submitted to the College, requiring a two-thirds majority vote for its approval. That the entire College in its current configuration participates in the decision deserves, at first sight, a favorable judgment, because it seems that in this way the safeguards of the independence will be greater. The fact is, however, that the reinforced majority required, coupled with the specific design chosen for the composition of the College (based on the "Eurojust logic" typical of the model of intergovernmental cooperation which preceded the Lisbon Treaty) can make it difficult to achieve the necessary consensus in the adoption of rules that are useful, clear, and simple enough to be operative.

Secondly, it is to be feared that the complexity of the EPPO at the organizational level, far from facilitating the independence of the Delegated Prosecutors in their day-to-day work at their Member States of origin, will in fact impair their ability to operate effectively: as a member of the EPPO, every Delegated Prosecutor will be

[30] See Luchtman and Vervaele (2014), pp. 141–150.

subject simultaneously both to a Permanent Chamber (which shall take the most important decisions regarding the cases being investigated by the Delegated Prosecutor), and to a European Prosecutor of reference from the same Member State, who will supervise his work, who will serve as a transmission belt between the Delegated Prosecutor and the Permanent Chamber to which he is attached (and as a liaison between the EPPO and the State of origin itself), and who may also issue direct orders and binding instructions to the Delegated Prosecutor.[31] In this sense, it would be advisable to better demarcate the functions of the different organs involved, so that the responsibilities are clear and the possible uncertainties minimized.

It is also doubtful whether, in the current version of the Regulation, the position of the Delegated Prosecutors is sufficiently secured: although they undoubtedly are the most important piece of the EPPO, Delegated Prosecutors are not protected by irremovability and the causes of the loss of their position are contemplated in a rather general way, both in the cases in which the initiative of the dismissal comes from the College and in those other cases in which it is the Member State of origin who intends to remove the Delegated Prosecutor from his or her position.

Obviously, Delegated Prosecutors should not be exempt from oversight, but it seems that the need to ensure their independence makes it advisable to better delineate the cases in which they may be dismissed before the end of their term of office. Furthermore, the famous double-hat approach*,* that is, the fact that the Delegated Prosecutors are expected to combine their work for the EPPO with their functions as members of the national judiciary or prosecution service of their home State, can interfere negatively in the exercise of the functions and the competences entrusted to them.[32] Again, Article 13(3) of the Regulation, which seeks to counter this risk, seems too vague to be effective.

Thirdly, the liability regime of the EPPO and its agents is probably not precise enough in the current version of the Regulation. This is quite an important issue, as if the accountability regime of the EPPO and its agents were more clearly specified, the existing mistrust among the States in the independence of the institution would surely be diminished.

It is generally envisaged in the Regulation that the EPPO will answer to the European Parliament, the Commission and the Council, and that it must send them an annual report of its activities. On the other hand, it is established that the European Chief Prosecutor has a duty to appear before the European Parliament and the Council once a year to give a general account of the work of the Office. In both

[31] See Kuhl (2017), p. 138. There has been some political disagreement between the different States on this issue. France has always been committed to a strong central office, in line with the current version of the text of the Regulation, while other States (notably Sweden, Cyprus, the Czech Republic, Finland, Croatia, Hungary, Malta, the Netherlands, Portugal, and Slovenia) advocated for a greater role for the European Delegated Prosecutors, even if it meant the establishment of a mechanism through which functions of the Permanent Chambers could be delegated to them. Portugal and Slovenia even argued that the power of the Permanent Chambers to take decisions in relation to particular cases should be abolished, and their role limited to general supervision. In this regard, see Council document 15100/15 of 22 December 2015, No. 15 and 20.

[32] See Meij (2015), p. 111; and also the critical perspective of Pawlik and Klip (2015), p. 185.

cases we are talking about an accountability of a rather political nature, as evidenced by the fact that, in these occasions, the institution is not allowed to give explanations regarding particular cases. There is no provision for disciplinary (or criminal) liability for members of the EPPO—that are not under the national disciplinary liability regime—and, as regards non-contractual liability, there is only one generic provision, Article 113(3), which stipulates that the EPPO will "make good any damage caused by the EPPO or its staff in the performance of their duties, insofar as it may be imputed to them", in accordance with the general principles common to the law of the Member States of the EU. It is further established that the CJEU shall have jurisdiction in disputes over compensation for damages, but provisions are not made regarding several important aspects such as the requirements for the filing of claims or the particular proceedings to be followed before the Court.

Finally, it would seem that the proclamations made in the EPPO Regulation on the independence of the EPPO would be nothing more than a show for the gallery if they are not accompanied by effective mechanisms to protect that independence whenever it is endangered; an issue which, most regrettably, has not been adequately addressed. The specific form of such mechanisms should depend both on the level on which the threat to the independence of the institution exists and on the source from which it originates, since interference in the work of a Delegated Prosecutor by national authorities of the State in which the procedure is being carried out, for example, should not be necessarily resolved in the same way as an interference at institutional level between different Union bodies. One possible way would be to grant the European Chief Prosecutor the power to seek the protection of the CJEU[33]; but there are arguably also other plausible alternatives worthy of attention.

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[33] This is the solution proposed by Lohse (2015), p. 169.

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# The Material Competence of the European Public Prosecutor's Office

**David Vilas Álvarez**

**Abstract** This contribution tries to analyse one of the main challenges to be faced for establishing an efficient and powerful European Public Prosecutor's Office: the real consequences of its material competence and the concurrence of this competence with the current national systems. Indeed, this new European Agency will have to determine in practice the competences provided by the Regulation. The concurrence of these competences with the national ones will determine the measure of its powers and efficiency.

Starting from the competences defined for the EPPO in the Treaty of the European Union and in the Regulation, this study will try to analyse the scope of the material competence of this new EU Agency. The scope is defined through cross-references between the EPPO's Regulation and the PIF Directive. As the PIF Directive defines the crimes against the financial interest of the Union, indirectly establishes the competence's framework for the European Public Prosecutor Office, including the controversial issue of VAT frauds. Finally, the study will address the complicated system of the distribution of competences and sharing of information between the different relevant investigating institutions, which can lead to problems between the EPPO and the national authorities, in particular when PIF crimes are connected to non-PIF crimes. As the author has been directly and actively involved during the negotiations of the Regulation as a representative of the Spanish Government, this contribution will provide an interesting perspective on the real powers the new EPPO is granted.

## 1 Introduction

The extent of the power of any institution or body is determined by the competences that such institution or body is able to exercise. In particular, these powers are determined by its material competence, even more than by its territorial or

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L. Bachmaier Winter (ed.), *The European Public Prosecutor's Office*,
Legal Studies in International, European and Comparative Criminal Law 1,
https://doi.org/10.1007/978-3-319-93916-2_2

functional ones. However, providing competences is not enough if the exercise of these competences is somehow limited, as in the case of the European Public Prosecutor's Office (EPPO). We will realize that this is the case of the Regulation establishing the EPPO.

The scope and exercise of the material competences of the EPPO have been the main topic of many discussions.[1] The scope of its powers determined that some Member States—e.g. Italy—finally agreed to join the enhanced cooperation procedure leading to the establishment of this agency; whilst on the other hand, some Member States of the European Union preferred not to join the enhanced cooperation procedure mainly because they considered that the competences of the EPPO were conceived in a too broad way, namely, Poland, Hungary, Sweden, Ireland, United Kingdom and Denmark.

The definition of the material competences of the EPPO has been one of the last and most important remaining issues in the EPPO negotiation.[2] In fact at the end of 2016 this topic impeded the reaching of the unanimous agreement on the establishment of the EPPO, as foreseen by the Treaty on the Functioning of the European Union (TFEU). France and Spain then led the launching of the procedure of enhanced cooperation for the EPPO in March 2017, reaching a general agreement on it in June 2017. Consequently, on 5th October the proposal was accepted and the JHA Council adopted the final text at the 13th October 2017 meeting.

## 2 Legal Basis: What the Treaty of the European Union Envisaged for the European Public Prosecutor's Office

The powers of the EPPO are materially defined *a priori*, by Article 86(2) of the TFEU.[3] In order to understand that attribution of competences,[4] it is necessary to mention two dispositions of the Treaty, as they determine the purpose of the creation of the EPPO and its connection with the Union's budget.

On the one hand, Article 86(1) TFEU indicates that "In order to combat crimes affecting *the financial interests of the Union*, the Council, by means of regulations

[1] Council Regulation (EU) 2017/1939 of 12 October 2017, implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ("the EPPO"), 31.10.2017, L 283/1. In the same sense, Herrnfeld (2017), p. 387.

[2] On the provisions regarding the competence in the Proposal *for a Council Regulation on the establishment of the European Public Prosecutor's Office*, 17.7.2013, COM (2013) 534 final, see, among others, Moreno Catena (2014), pp. 41–50; Bitzilekis (2015), pp. 112–119; Herrnfeld (2017), pp. 387–392; Sicurella (2016), pp. 109–137, in particular pp. 119 ff.

[3] Article 86(2) TFUE: "The European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, *offences against the Union's financial interests*, as determined by the regulation provided for in paragraph 1…"

[4] On the legal basis of the EPPO in the TFUE, see also, Zwiers (2011), pp. 385 ff; Vervaele (2017), pp. 414–420.

adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust." On the other hand, Article 325 TFEU mentions the necessary protection of such interests.[5] That Article in particular imposes a general obligation to fight against fraud and other illegal activities affecting the Union's financial interests, an obligation which applies equally to Member States and all the Union's institutions, bodies, offices and agencies.

Consequently, this European institution is the appropriate body to make sense of the substantive rules of Article 325, which was designed to protect the budget of the Union through the mechanisms of criminal law, with at least the same care as individual Member States protect their own national budgets. It will be created, therefore, with the primary goal of combatting by means of criminal law any fraud against the financial interests of the Union, complementing the administrative work initiated by the European Anti-Fraud Office (OLAF).[6] The OLAF shall exercise the Commission's powers to carry out external administrative investigations for strengthening the fight against fraud, corruption and any other illegal activity adversely affecting the Community's financial interests.[7] We must remember that OLAF is an "office" of the Commission, which surely will be greatly affected by the setting up of the Prosecutor's Office. The currently discussed amendments seem to show that OLAF might be partially integrated into the EPPO.[8]

The Commission's proposal includes in its impact assessment the following[9]:

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[5] The link between both Articles is not straightforward. For example, the Commission has always considered that Article 325 is the proper legal basis of the proposal for a directive for the protection of the financial interests of the Union (hereinafter PIF), because this Article would replace the former Article 280(4) of the Treaty establishing the European Community (TEC) which contained the sentence "These measures shall not concern the application of national criminal law or the national administration of justice." This wording was deleted by the Lisbon Treaty. So Article 325 would introduce a sort of special regime for these matters in the field of criminal law. The Council Legal Service issued a legal opinion dated 22th October 2012. "The proposed Directive pursues the objective expressed in Article 83(2) TFEU which is to ensure the effective implementation of a Union policy submitted to harmonisation measures with the aim of ensuring the effective implementation of this policy through the establishment of "minimum rules with regard to the definition of criminal offences and sanctions in the area concerned." The deletion of Article 280(4) would be compensated for by introducing the new wording of Article 83(2).

[6] Regulation (EU, Euratom) No. 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No. 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No. 1074/1999 (OJ L 248 of 18.9.2013).

[7] On the functioning of OLAF see the evaluation report of 2.10.2017, prepared in accordance with Article 19 of the Regulation: Report from the European Commission to the European parliament and the Council "Evaluation of the application of the Regulation", accessible at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2017:589:FIN.

[8] On the impact of the establishment of the EPPO upon OLAF, see Venegoni (2017), pp. 193–196; Janda and Panait (2017), pp. 182–187.

[9] Commission Staff Working Document Executive Summary of the Impact Assessment. Accompanying the document Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, Brussels 17.7.2013, COM(2013) 534 final; accesible under http://eur-lex.europa.eu/legal-content/ES/TXT/?uri=CELEX%3A52013SC0275.

> Prosecuting offences against the EU budget is generally considered of secondary importance by the authorities in a number of Member States. As there is no EU authority for investigation and prosecution of cross-border offences affecting the EU's financial interests, national law enforcement efforts remain fragmented. Current levels of information exchange and coordination at national and European level are insufficient to effectively prosecute offences affecting the EU's financial interests. Coordination, cooperation and information exchange obstacles occur at different levels and between different authorities and are a major impediment to the effective investigation and prosecution of offences affecting the EU's financial interests. Only a very small part of the total amount of fraud is ever recovered from criminals: below 10%. The deterrent effect of the current enforcement regime is therefore insufficient. **There is no centrally placed body that can deal with these obstacles and ensure continuity in the investigation and prosecution process."** On top of that, although OLAF is a key player at EU level in the fight against fraud and irregularities, it is limited in its activities to administrative investigations, and submitting the results to national authorities, who may decide against any criminal law follow-up. Existing and planned measures, including the Commission's Anti-Fraud Strategy (CAFS) and the reforms of Eurojust, Europol and OLAF are insufficient to address these problems, even if all possibilities offered by the Treaty were to be used to the maximum extent.

The EPPO is therefore a European body established with the aim of combatting fraud against Union's budget by means of criminal proceedings aimed at the application of harmonised sanctions.[10] It will complement, and partially absorb, means already developed by OLAF with this same goal.[11]

The Treaty itself foresees even more: the possibility of a larger or extended scope of the competences of the EPPO. In fact, though probably not considering the immediate future, Article 86(4) TFEU adds that the European Council may, at the same time or subsequently, adopt a decision amending paragraph 1 in order to extend the powers of the EPPO to include serious crimes having a cross-border dimension, and amending paragraph 2 accordingly with regards to the perpetrators of, and accomplices in, serious crimes affecting more than one Member State.

This option always seemed to be far away. However, recently during October 2017, the Italian Justice Minister, the French President[12] and the Commission's President[13] mentioned the aim of extending EPPO's competence to transnational terrorism. In any case, it seems that before assuming such important tasks it will be necessary to first concentrate in the setting up the EPPO and consolidate its functions.

[10] On the added value of the future EPPO see Bachmaier Winter (2015), pp. 121–144.

[11] In the same sense, see Klement (2017), pp. 196–199.

[12] Speech given at the University of the Sorbonne of 28.9.2017, accessible under http://www.elysee.fr/declarations/article/initiative-pour-l-europe-discours-d-emmanuel-macron-pour-une-europe-souveraine-unie-democratique/.

[13] Jean-Claude Juncker on the "State of the Union", Brussels 13.9.2017, accessible at http://europa.eu/rapid/press-release_SPEECH-17-3165_en.htm.

## 3 Material Competence of the European Public Prosecutor's Office: Determination by a Dynamic Reference to the PIF Directive

We already pointed out that the EPPO's task will be to combat fraud against financial interest of the EU through criminal law. This requires defining which specific criminal offences affect these interests, because these will be the offences within the Office's scope. The determination of these crimes can be done in two ways.

One way, preferred during the negotiations by some Member States, consisted of defining such conducts in the Regulation itself: the Regulation would define individually each act to be prosecuted by the institution. However, in this case, the scope could not be changed if the Regulation were not changed under the unanimity rule provided in Article 86 TFUE.

Another way, preferred by other Member States by sake of consistency, consisted of using already existing legal instruments, which define these criminal acts in a harmonised manner: under this method, the competences of the Office could be indirectly altered by changing the definition of PIF crimes. That implies the submission of these changes to the ordinary legislative procedure, which does not require unanimity.

The latter was the chosen option. Article 22(1) states that:

> The EPPO shall be competent in respect of the criminal offences affecting the financial interests of the Union that are provided for in Directive (EU) 2017/1371, as implemented by national law, irrespective of whether the same criminal conduct could be classified as another type of offence under national law.

Therefore, the competence of the EPPO is based on a definition of these behaviours by reference to the PIF Directive,[14] which describes these acts for the purpose of harmonisation—even though they are implemented by national law.[15] Such reference is logically dynamic: if the PIF Directive changes in the future, any change would indirectly alter the competence of the EPPO. Some Member States would have preferred the other solution, seeking to solidify the powers of the institution and argue that different legislative procedures are applicable.

As to the harmonisation, the PIF Directive finally introduced a certain harmonization regarding VAT transnational in its Article 3(2)(d). Consequently, Article 22 of the EPPO's Regulation mentions VAT frauds in Article 22(1):

> As regards offences referred to in point (d) of Article 3(2) of Directive (EU) 2017/1371, as implemented by national law, the EPPO shall only be competent when the intentional acts or omissions defined in that provision are connected with the territory of two or more Member States and involve a total damage of at least EUR 10 million.

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[14] Directive (EU) 2017/1371, on the fight against fraud to the Union's financial interests by means of criminal law, of 5 July 2017, OJ 28.7.2017, L 198/29.

[15] On the lack of harmonization and the resulting implementation patchwork on the PIF offences so far, see Vervaele (2017), pp. 421–425.

This provision includes the current definition of VAT fraud affected by PIF Directive. If this description of the VAT fraud were to change—e.g., in order to add to the PIF crimes less serious VAT frauds—, the subsequent harmonisation of these crimes would not affect the competences of the EPPO.

Nevertheless, the method of providing competences to a body by referral is not new at all: on the contrary, judicial competences often change according to modifications of substantive criminal law. What is more, the static reference introduced by Germany in the final text of the Regulation could be counterproductive to their interests: VAT currently constitutes a financial interest of the Union, as the *Taricco* case explains.[16] This is a consequence of the VAT being one of the budgetary resources of the European Union. However, this could change—a majority of Member States would prefer to substitute this resource with another, against the Commission's wishes. If this were the result of the new Financial Framework—to be applied from 2021—VAT would disappear as a financial interest of the Union in general terms and in the PIF Directive specifically. However, the mention of VAT in the Regulation would be retained, unless a unanimous decision removed it.

Finally, Article 22 presents a new fourth paragraph, along the same restrictive lines as the competences of the EPPO: "In any case, the EPPO shall not be competent for criminal offences in respect of national direct taxes including offences inextricably linked thereto. The structure and functioning of the tax administration of the Member States shall not be affected by this Regulation." This new paragraph, whose practical consequences are not clear, implies that the EPPO cannot investigate direct tax criminal offences, even if they are related to VAT fraud, relationship that is quite usual.

## 4 PIF Directive: Competence Framework for the European Public Prosecutor's Office. PIF Directive and VAT

We already have seen that defining the powers of the EPPO demands first a definition of the PIF crimes to be combated, because these offences constitute the area of its competence. This definition is done through the text of the PIF Directive.

Two things must be previously clarified. On the one hand, what are the revenues and expenditures of the Union? Essentially, the revenues we are referring to are common custom tariff duties and other duties or contributions derived from certain markets, such in sugar; a State contribution, calculated as a rate which varies between the different Member States, of the harmonised VAT assessment bases, and other contributions as a result of the application of a uniform rate of gross national income.[17]

[16] *Ivo Taricco and others* C-105/14, judgment of 9 September 2015.

[17] In particular, Article 2(1) of the 2014/335/EU Euratom Council Decision of 26 May 2014 on the system of own resources of the European Union (OJ L 168, 7.6.2014) describes as own sources of the Union all revenues from the following:

In terms of unwanted expenses, usually they appear in the proper application of subsidies or below market loan operations granted by the European institutions, or in fixing the proper prices of European administrative procurement procedures.

On the other hand, and before proceeding, we must have an idea of the crimes, or more precisely, harmonised criminal conducts that may involve a loss of such revenues or expenditures. It is not the object of this work to transcribe the content of the PIF Directive, although, on the basis of the previous ideas, and translating to a Spanish criminal context descriptions of behaviours that it relates, we could say that the EPPO would be competent to deal, basically, with crimes consisting in smuggling, subsidies fraud, fraud against the Union budget, the use or presentation of false, incorrect or incomplete statements or documents related to them, and fraud against the European procurement procedure—in particular through the unlawful use of insider or restricted information (Articles 2 and 3 of the Directive). These competences will extend to money laundering, active and passive bribery, and embezzlement linked with the former crimes, as well (Articles 4 and 5).[18]

All these acts will only be necessarily considered as an offence in accordance with the Directive if they are committed intentionally and they cause damage to the Union budget exceeding 10,000 euros, which does not prevent any Member State setting lower thresholds—or even no thresholds—when transposing it.

These criteria exclude various forms of smuggling, which do not involve a loss of financial income, for example, when the traffic of the good object of the crime is illicit, such as drugs or imported unauthorized copies of intellectual property products.

It should be recalled also that, if the behaviour generated damage exceeding 100,000 euros, the crime would be considered "serious," with the consequence that its minimum penalty must be at least 4 years of imprisonment and the statute of limitations period must not be shorter than 5 years.

In the light of this description, it is necessary to comment on the following:

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(a) traditional own resources consisting of levies, premiums, additional or compensatory amounts, additional amounts or factors, Common Customs Tariff duties and other duties established or to be established by the institutions of the Union in respect of trade with third countries, customs duties on products under the expired Treaty establishing the European Coal and Steel Community, as well as contributions and other duties provided for within the framework of the common organization of the markets in sugar;

(b) without prejudice to the second subparagraph of paragraph 4, the application of a uniform rate valid for all Member States to the harmonized VAT assessment bases determined in accordance with Union rules. For each Member State the assessment base to be taken into account for this purpose shall not exceed 50% of gross national income (GNI), as defined in paragraph 7;

(c) without prejudice to the second subparagraph of paragraph 5, the application of a uniform rate, to be determined pursuant to the budgetary procedure in the light of the total of all other revenue, to the sum of GNI of all the Member States.

[18] Articles 301, 305(3), 306, 308, 390, 419 to 421 and 432 of the Spanish Criminal Code and Articles 2(1) and 2(3) b) of the Spanish Organic Act for repression of smuggling (Ley Orgánica 12/1995, of 12 December, de *Represión del Contrabando*).

First, some of the described PIF offences, which in fact already appear in the Convention for the protection of the financial interests of the Union of 1995 and the two additional protocols thereto of 1997, are of an instrumental nature (as in the use or presentation of false, incorrect, or incomplete statements or documents) or tend to facilitate profiting from the result of a previous crime (as in money laundering). It has to be borne in mind that this is important for the treatment given to related and instrumental crimes in the EPPO Regulation.

Secondly, the offence consisting in taking part in a criminal group or organisation, which in the Spanish Criminal Code has appeared as a standalone crime since the Code's reform in 2010, is not in itself a PIF crime. In any case, if the PIF crime is committed through a criminal organisation, each Member State must consider it as an aggravated circumstance (Article 8 of the Directive), except if that Member State already punishes this conduct as a standalone crime, where the concurrent sanctions would be applied, as they would be in Spain (Recital 18).[19]

Smuggling affecting the Union budget is currently fought effectively in Spain, when not through the activity of the Guardia Civil, then through the tax authorities (the *Agencia Estatal de Administración Tributaria*, A.E.A.T.), of which the customs authorities constitute a unit. The Custom Surveillance Service (*Servicio de Vigilancia Aduanera*), which is part of this unit, serves as its judicial police. Part of its activity is intended to combat trafficking of illicit goods but also to combat the smuggling of the licit ones (hydrocarbons and tobacco, mainly). However, the struggle against major international criminal associations probably will be better tackled at the European level by a European institution.

Subsidy fraud constitutes another offence not often prosecuted, especially when the funds come from Union budget, probably because of the recurrent lack of effective checking of their actual destination. An institution specialized in this matter is likely to be very helpful.

### *4.1 PIF Directive and VAT*

We have already seen that VAT is one of the revenues of the Union. In practice, this resource is determined, less by a proportion of the collected VAT, than by an economic or budgetary calculation of the national harmonised tax base, in total and per year, which ranges from 0.30% to 0.15%.[20] This macroeconomic approach is not applicable in every case. Any attempt to calculate a specific amount defrauded from the EU in each VAT tax offence is not easy, nor necessarily even possible. If, for

[19] From a practical point of view, this set of offences is not statistically frequent in Spain. According to the most reliable statistics from the Spanish Public Prosecutor's Office, there have been approximately 1000 such annual proceedings, some of them involving only small frauds.

[20] Over the period 2007–13, a reduced rate of 0.225% for Austria, 0.15% for Germany and 0.10% applies to the Netherlands and Sweden. 0.15% applies to the Netherlands, Germany and Sweden from 1 January 2014 until 2020.

instance, we assume that the crime consists of a voluntarily wrongful application of different rates on an unaltered VAT basis, there would actually be no damages for the Union. Therefore, from a strictly budgetary and tax point of view, in our opinion, it is not correct to affirm that VAT is a financial interest of the Union. On the other hand, given the link between taxable national VAT bases and subsequent transfers to the Union, it is true that the Union has a legitimate financial interest, though we should qualify it as indirect, in the growth of the taxable base (rather than in the collection) of VAT in all Member States.

There is another reason to support the idea of not considering VAT as a financial interest of the Union: the 1995 Convention did not include, nor were likely to include, VAT as a financial interest of the Union. Moreover, the Council had objected that possibility explicitly.[21]

Beyond this position, shared by the vast majority of Member States, which had the consequence that, for the purposes of the PIF Directive, VAT disappeared as a financial interest of the Union during the negotiation in the Council of the European Union against the criterion of the Commission, the truth is that this debate has reappeared since the *Taricco* judgment. Since this judgment, the arguments in favour of reintroducing VAT as a financial interest of the Union are firmer. In addition, these arguments have implied the necessity of determining the competence of the EPPO over VAT fraud.

In fact, the Commission and the European Parliament have been defending during this process the following ideas:

1. The legal basis for PIF Directive should be Article 325 TFEU and not Article 83, as chosen by the Council; namely, the obligation of the Member States to have the same legal and substantive weapons to combat national and European tax fraud, as we have seen before.
2. The consideration of VAT as a financial instrument of the Union, because it indirectly determines the budget of the institutions of the Union. It should be stressed that such income represent 13% of the total revenues, which should not make us forget that at least in 5 Member States VAT revenues represents 50% of the total tax income.[22]

[21] The Explanatory report on the Convention on the protection of the European Communities' financial interests (Text approved by the Council on 26 May 1997, 97/C 191/01, OJ C 191, 23.6.1997) states that revenues does not include revenue from application of a uniform rate to Member States' VAT assessment base, as VAT is not an own resource collected directly for the account of the Communities. Nor does it include revenue from application of a standard rate to the sum of all the Member States' GNP.

[22] In fact, and in order to illustrate the context it should not be forgotten that in Spain, in 2014, VAT was able to raise 56,174 million euros, more than 30% of total tax revenues, and in 2015 over 60,000 million, exceeding 6% of the GDP.

Such a position has already received some support in the Court of Justice of the European Union, in particular in two judgments, the *Commission v. Germany*[23] and *Åkerberg Fransson.*[24]

Such an approach has also been substantially strengthened with the issuance of the statement of the *Taricco* case, 9th September 2015. The ruling in essence declares the incompatibility with European law of the Italian legislation applicable to the case—already repealed—in terms of prescription. The reason for that incompatibility was that with this national legislation it was impossible in practice, according to the consultant Court and the CJEU, to implement effective and dissuasive sanctions in serious cases of VAT fraud—in this case, a liquor carousel fraud.

In particular, the judgment states the following:

1) VAT is financial interest of the Union for this purpose, even though it is not expressly mentioned in the 1995 Convention, which is the current standard at the European level on this issue (paragraph 41).
2) Therefore, it is necessary combat fraud in serious cases by effective and dissuasive sanctions, according Article 325 of the TFUE (paragraphs 39 and 41).

This decision turned the debate. The Parliament stated it would refuse its approval if the PIF Directive did not include VAT as a financial resource of the EU.[25] If the Directive were to be blocked, the applicable rule would be the 1995 Convention, but including in its scope VAT, because of the *Taricco* case. That would imply that Commission could oblige Member states to respect the Convention's system of thresholds (ECU 50,000, now EUR) when considering VAT. Therefore, Commission could argue that any VAT fraud over this amount should be criminalised.

According to Article 7 of the Directive, VAT fraud, if transnational and over 10 million euros, shall be punished by a sanction of 4 years' imprisonment at minimum. Spain already respects this obligation, imposing a sanction of 5 years' imprisonment from first 120,000 euros, annually calculated. The Directive's goal is to sanction carousel fraud, as Recital 4 acknowledges. In these cases, taking into account the seriousness of the crime and any cross-border implications, the EPPO appears competent by way of Article 22, and not by referral. Statistics indicate that there are only a few such cases in Spain each year.

[23] C-539/09, Eu:c: 2011:733, paragraph 72.

[24] C-617/10, Eu:c: 2013:105, paragraph 26. On this judgment, see among others, Calderón Ortega (2014), pp. 1–8; De Miguel Canut (2014), pp. 1–21.

[25] On the substantial divide the VAT issue has long caused in the EU, see also Vervaele (2017), p. 425.

## 5 Related Crimes, Including Inextricability and Instrumentality: The Case of Criminal Organisations and the Remaining Cases

In practice, economic crimes do not usually appear in isolation. We have already seen that the legislative technique of the PIF Directive has tended to include as PIF crimes some typical behaviours that only constitute instrumental crimes (such as use of false documents, embezzlement, or bribery). This does not prevent proceedings where PIF crimes and non-PIF crimes are both investigated. It is necessary to foresee in these cases if the competence corresponds to national investigative authorities. A clear example would be those cases where a VAT tax crime occurs alongside another kind of tax crime.

The solution to this problem was initially based on the recognition of a preference of the EPPO's competence over such offences, save the direct tax offences (current Article 22(4)). On the other hand, the definition of connected offences is not clear at all, despite the efforts undertaken at EU level, as under Article 3(2) of the draft Eurojust Regulation.[26]

This question is of upmost importance. If PIF crime is considered less relevant than a related national offence, the EPPO will be unable to exercise its competence. On the other hand, it is also possible for the EPPO to assume competence over national crimes that have to be investigated together with the EPPO's offences. In any case, the solution to this problem will largely depend on the decisions to exercise competence and the system of exchanging information. This has been the last issued to be agreed on among the 20 Member States participating in the enhanced cooperation procedure, due to the quite distinct opinions of Germany, Italy, and France, with Spain playing the role of mediator.

The clearest example of a related offence is the crime of taking part in a criminal group or organisation, at least for those Member States that treat it as an autonomous offence (Spain and Italy, among others). We must remind that, in these cases, sanctions for participating in criminal organisations are usually higher than PIF sanctions. So, in these cases, if the criminal organisation has the aim of committing PIF crimes (smuggling or carousel VAT fraud, for instance), the EPPO should retain its competences, avoiding a treatment different from that of other Member States.

The final solution has consisted of extending the competence of the EPPO to ensure consistency, regardless of the penalty for the crime, to prosecutions for taking part of a criminal organisation as a standalone crime.

Indeed, Article 22(2) of the Regulation states the following:

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[26] Eurojust's competence shall cover related criminal offences. The following offences shall be regarded as related criminal offences:

a) criminal offences committed in order to procure the means of perpetrating acts listed in Annex 1;
b) criminal offences committed in order to facilitate or carry out acts listed in Annex 1;
c) criminal offences committed to ensure the impunity of acts listed in Annex 1.

> The European Public Prosecutor Office's Office shall also be competent for offences regarding participation in a criminal organisation as defined in Framework Decision 2008/841/JHA, as implemented in national law, if the focus of the criminal activity of such a criminal organisation is to commit the offences referred to in paragraph 1.

Recital 57 complements the operative text: "The notion of offences relating to the participation in a criminal organisation should be subject to the definition provided in national law in accordance with Framework Decision 2008/841/JHA, and may cover, for example, the membership in, or the organisation and leadership of such a criminal organisation."

The solution is different for other related crimes. During the negotiations several concepts have been used around the idea of related crimes, in particular, inextricably linked and instrumental crimes. Lack of clarity on these concepts focused the negotiation on defining inextricability, through its relationship with the *ne bis in idem* principle and parallel investigations, even when the final text retains a mention of instrumental crimes in Article 25(3) a). Final Recital 54 ultimately stated the following: "The efficient investigation of offences affecting the financial interests of the Union and the principle of *ne bis in idem* may require, in certain cases, an extension of the investigation to other offences under national law, where these are inextricably linked to an offence affecting the financial interests of the Union. The notion of 'inextricably linked offences' should be considered in light of the relevant case-law which, for the application of the *ne bis in idem* principle, retains as a relevant criterion the identity of the material facts (or facts which are substantially the same), understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together in time and space."

Based on this premise, Article 22(3) has chosen to concede to the EPPO a primary or preponderant role, at least at first glance. Therefore, it provides the EPPO competence over cases where a PIF crime appears, as well other non-PIF crimes, provided these crimes are inextricably attached to the PIF one.[27]

Nevertheless, this rule presents two general derogations: first, affecting the competence itself, the already mentioned exception for direct tax crimes, where the national authority is competent because of the *vis attractiva* recognised in those crimes (Article 22(4)).

The second exception includes a set of cases limiting the exercise of these competences, as ruled by Article 25. Indeed, the exercise of the competences depends on criteria mentioned in this Article. In this manner, the initial priority of the EPPO has been replaced by a sort of concurrent competences, where the exercise of competence will depend on the seriousness of the damages derived of the related crimes. In such cases the national authorities will be able to retain competence.[28] Taking due account of the reporting obligations system, where national authorities make the preliminary decision to report or not to the EPPO after comparing sanctions and damages, can in practice lead to a significant limitation of the competence of the EPPO.

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[27] See, although with regard to the Proposal Regulation EPPO of 2013, Nieto and Muñoz Morales (2015), pp. 120–155, in particular, pp. 146–152.

[28] On the problems relating the deferral of the case to the national authorities, see Caianello, in this volume.

## 6 The Exercise of the Competence by the European Public Prosecutor's Office

As explained above, the EPPO shall be competent to investigate and prosecute PIF crimes and also non-PIF inextricably linked to the former. However, there are four cases in the Regulation in which such powers will be not exercised.[29]

**The first derogation** refers to the non-harmonised PIF offences, because of fraud involving amounts under the thresholds of the PIF Directive. Indeed, the EPPO will not investigate certain PIF crimes: those beyond harmonisation, in particular cases where a Member State has decided to punish conducts harming the EU budget with damages under 10,000 euros. In principle, in these cases the EPPO will be competent to investigate them, but will not exercise the competence. Such cases include some thousands of smuggling small cases in legal systems—such as the French or Polish, if they participated—, in which administrative sanctioning law does not distinguish between administrative and criminal infringement, as it does the Spanish law.

Article 25(2) points out that:

> Where a criminal offence falling within the scope of Article 22 caused or is likely to cause damage to the Union's financial interests of less than EUR 10,000, the European Public Prosecutor Office's Office may only exercise its competence if:
>
> a) The case has repercussions at Union level which require an investigation to be conducted by the European Public Prosecutor Office's Office, or
>
> b) Officials or other servants of the European Union or members of the Institutions could be suspected of having committed the offence.
>
> The European Public Prosecutor's Office shall, where appropriate, consult the competent national authorities or bodies of the Union to establish whether the criteria set out in points (a) and (b) of the first subparagraph are met.

In these petty cases, only the indirect European impact or links with corruption of European officials will justify in exceptional circumstances the exercise of competence.

Article 24(5), (9) and (10) reinforces the control of the EPPO over these cases by permitting the EPPO to seek information in order to supervise how national authorities apply these criteria.

The logic of this Article 25(2) is to avoid flooding an institution with many cases of little consequence, which are already diligently handled at the national level.[30]

The negotiation of **the second exception to the exercise of the competence** by the EPPO of concurrent PIF crimes and non-PIF crimes has been much more difficult to be drafted.

[29] On the criteria for exercising competence, see also Satzger in this volume.

[30] It should be noted that this text, though reasonable, generated intense discussions because some delegations wanted a higher monetary threshold, which would imply two different regimes between harmonised offences.

As mentioned earlier, Article 25(3), by reference to Article 17(2), states:

> The EPPO shall refrain from exercising its competence in respect of any offence falling within the scope of Article 22 and shall, upon consultation with the competent national authorities, refer the case without undue delay to the latter in accordance with Article 34 if:
>
> (a) the maximum sanction provided for by national law for an offence falling within the scope of Article 22(1) is equal to or less severe than the maximum sanction for an inextricably linked offence as referred to in Article 22(3) unless the latter offence has been instrumental to commit the offence falling within the scope of Article 22(1); or
>
> (b) there is a reason to assume that the damage caused or likely to be caused, to the Union's financial interests by an offence as referred to in Article 22 does not exceed the damage caused, or likely to be caused to another victim.
>
> Point (b) of the first subparagraph of this paragraph shall not apply to offences referred to in Article 3(2) (a), (b) and (d) of Directive (EU) 2017/1371 as implemented by national law.

This Article includes two criteria to define who will exercise the concurrent competence: seriousness of the sanction, and damage caused or likely to be caused.

If a PIF offence occurs concurrently with another non-PIF and both are related, it seems that the EPPO will investigate both if the PIF crime is sanctioned with a higher or equal penalty; and although if the non-PIF offence has a higher penalty, the EPPO will investigate it, if such offence has been instrumental to the PIF offence. Indeed, Articles like this one are not helpful for the aim of its application and will give rise to possible conflicts over the exercise of competence between the EPPO and national authorities around the idea of instrumentality, which is not clearly defined in the Regulation.

Moreover, this Article adds the criterion of damage, but without considering that at the national level those who have the condition of victim can be very diverse (municipalities, states, and regions can co-finance different investment projects though concurrent subsidies with other European institutions). Nevertheless, the damages of the different victims are not to be added to the overall damage to the Union in order to determine the exercise of the competence.

In short, Article 25 read together with Article 22, allows the conclusion that the EPPO will ordinarily investigate PIF crimes, and non-PIF offences instrumental or inextricably linked to the former, except

a. If the national offence warrants a greater sanction than the related PIF crime (e.g. concurrence with murder) by Article 25(3) a).
b. If the PIF crime is smuggling, where the EPPO will abstain exercising its competence.[31]
c. If the PIF crime, usually a VAT fraud, occurs concurrently with a direct tax crime.

[31] Germany and France, among others, included the damage criteria with the aim of excluding these crimes, because they incur a national debt bigger than the European one. However, this criterion is not applicable to other PIF crimes.

**A third case** of non-exercise of competence appears in Article 27(8):

> Where, with regard to offences which caused or are likely to cause damage to the Union's financial interests of less than EUR 100,000, the College considers that, with reference to the degree of seriousness of the offence or the complexity of the proceedings in the individual case, there is no need to investigate or to prosecute at Union level, it shall in accordance with Article 9(2), issue general guidelines allowing the European Delegated Prosecutors to decide, independently and without undue delay, not to evoke the case.

The guidelines shall establish clear criteria, taking specifically into account the nature of the offence, the urgency of the situation and *the commitment of the competent national authorities to take all necessary measures in order to fully recover the damage to the Union's financial interests.*

We see here the possibility of refraining the exercise of competence by the European Delegated Prosecutor (EDP), in cases below 100,000 euros and according with general guidelines. This Article resulted from a desire of some customs services, such as the French one, which are use to deal with smuggling cases quickly and informally, after payment of fees and fines, without the need of a prosecutor's approval. The damage can thus be recovered without involving the EPPO. The introduction of the damage criterion and its effects on smuggling poses a question about the convenience of this paragraph.

**The last case of non-exercise** of competences appears in Article 34(3), by ruling referrals. In this case:

> Where, with regard to offences which caused or are likely to cause damage to the financial interests of the Union of less than EUR 100,000, the College considers that, with reference to the degree of seriousness of the offence or the complexity of the proceedings in the individual case, there is no need to investigate or to prosecute a case at Union level and that it would be in the interest of the efficiency of investigation or prosecution, it shall in accordance with Article 9(2), issue general guidelines allowing the Permanent Chambers to refer a case to the competent national authorities.
>
> Such guidelines shall also allow the Permanent Chambers to refer a case to the competent national authorities where the EPPO exercises a competence in respect of offences referred to in points (a) and (b) of Article 3(2) of Directive (EU) 2017/1371 and where the damage caused or likely to be caused to the Union's financial interests does not exceed the damage caused or likely to be caused to another victim.
>
> To ensure coherent application of the guidelines, each Permanent Chamber shall report annually to the College on the application of the guidelines.
>
> Such referrals shall also include any inextricably linked offences within the competence of the EPPO as referred to in Article 22(3).

This article includes a discretionary prosecution criterion not well aligned with some Member States' interests, where the mandatory prosecution is to be respected, as is the case for example in Italy or in Spain.

**The result of this system** is a EPPO, which is formally competent for any PIF crime and for any crime inextricably related to a PIF crime. Nevertheless, this institution will not exercise its competence:

- In PIF crimes under 10,000 euros, with some exceptions of narrow application.
- In PIF crimes under 100,000 euros where the own institution would decide to refrain its exercise, because the lack of complexity or seriousness, or taking into account the ability to recover damages.

- In PIF crimes concurrent with non-PIF crimes sanctioned with higher or equal penalties, or causing greater damages to each victim, with the exception of organised crime where it constitutes an autonomous offence and the co-financing projects, where the damages criterion does not apply.

## 7 The Reporting Obligations of the Member States

As mentioned earlier, the powers of any institution or body are determined by the competence which it is able to exercise, not by the formally attributed to it. We have seen that the powers of the EPPO have been restricted in their exercise and they are also limited via the reporting system.[32]

Article 24 establishes a system whereby the Member State who knows of a PIF crime has to inform the EPPO of the facts only where the latter is able to exercise its competences. Therefore, it is for the national authorities to primarily assess the competence of the EPPO, in order to decide if it is necessary or not to report a crime to the EPPO. As a consequence, the rule in cases of conflict of competences referred to in Article 25 (6) will be apparently applied only for negative conflicts of (exercise of) competences and in any case, conflicts of competence will be decided by a national authority, as a rule a judge. Clear communication between the national authorities and the EPPO will be required to ensure that the competences of the latter are exercised as provided in the Regulation.[33]

Indeed, it would be strange to discover a positive conflict, because it would require the State to not consider the competence of the EPPO to apply, and the EPPO to disagree. In order to disagree, the EPPO first needs to know the existence of the alleged criminal facts, and these will not be communicated by the national authorities once they determine that the competence of the European institution does not apply. Therefore, we have another element of restriction of the possibility of the exercise of the EPPO's competence, by way of the restriction of the information to be sent.

In order to avoid this indirect conflict, during the last part of the negotiation the EPPO have been granted some ability to request information, by the amendments introduced in Article 24.

## 8 Conclusions

The above discussion leads us to conclude that the competences of the EPPO are conceived relatively broadly: they refer to all PIF crimes, including certain VAT tax crimes and to all related crimes, including criminal organization with the sole exclusion of directly related tax crimes.

[32] On the reporting system see extensively Pérez Enciso in this volume.

[33] In the same sense, Csonka et al. (2017), pp. 125–133, p. 128.

Nevertheless, the exercise of these competences has been limited during the negotiations. The EPPO will not exercise their current competences over certain PIF crimes with damages inferior to 10,000 euros; over certain PIF crimes with damages up to 100,000 euros; over those smuggling PIF crimes where the national damage would be bigger than the European one; and over PIF crimes where the sanction is not more severe than the related national crime. However, it will investigate co-financing projects, irrespective of the damages suffered by co-funding administrations.

Finally, national authorities will manage the information to be provided; some balancing elements have been introduced, though, in order to control such exchange of information, and not to isolate the EPPO.

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# The European Public Prosecutor's Office and Its Coordination with the National Public Prosecutor's Office: The Model of Complementarity

**Helmut Satzger**

**Abstract** On the 11th of October 2017, following a positive vote of the European Parliament, 20 Member States of the European Union (EU) adopted a regulation pursuant to Article 86 of the Treaty on the Functioning of the European Union (TFEU) in order to create an independent European Public Prosecutor's Office (EPPO) by means of enhanced cooperation. In comparison to the widely-criticised draft regulation that had been presented by the European Commission in 2013, the future EPPO will constitute a clearly weaker institution on the basis of a collegiate model. Although the decision of the enhanced cooperation seems to conclude a long search for the best design of an effective and sovereignty-sensitive EPPO, I want to present an alternative model which is inspired by the complementarity principle governing the allocation of jurisdiction between national courts and the International Criminal Court according to the Rome Statute. Transferred to the European context this means that the EPPO should only prosecute insofar as national prosecution authorities are unable or unwilling to genuinely protect the financial interests of the Union. Although the enhanced cooperation did not formally adopt a strict model of complementarity, the general idea will still provide for a valuable guideline as to when the EPPO should exercise its right of evocation and as to distinguish between the competences of the organs of the centralised and the decentralised level within the EPPO's general structure.

## 1 Introduction

Currently, the EU is experiencing serious difficulties. Fundamental problems—with catchphrases like "Brexit", "Grexit", the "Euro crisis" and the "migration problem"—are waiting to be solved. At the moment, we cannot predict what the EU will look like

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L. Bachmaier Winter (ed.), *The European Public Prosecutor's Office*,
Legal Studies in International, European and Comparative Criminal Law 1,
https://doi.org/10.1007/978-3-319-93916-2_3

in several years' time and which countries will fully—or only in part—participate in realising the original objectives of the founding Treaties. Nevertheless, the idea of creating an EPPO has been successfully kept on the European agenda. On the 11th of October 2017, following the approval of the European Parliament, 20 Member States adopted a regulation pursuant to art. 86 TFEU in order to create the EPPO by means of enhanced cooperation (Council Regulation).[1] The "fight for security and against criminality" has been rather popular both with many Member States and with large parts of the European population. Already in June 2013 the former EU Justice Commissioner Viviane Reding had proudly presented the Proposal for a Council Regulation on the establishment of the EPPO[2] with a lot of (political) optimism as to the date for the implementation of the new institution.

> Criminals who exploit legal loopholes to pocket taxpayers' money should not go free because we do not have the right tools to bring them to justice. Let's be clear: If we, the EU, don't protect our federal budget, nobody will do it for us. I call on Member States and the European Parliament to rally behind this important project so that the European Public Prosecutor's Office can assume its functions as of 1 January 2015.[3]

Of course, there was too much optimism involved on the part of the Commission. What Ms Reding and the Commission had had in mind was the quick establishment of a central and powerful European Prosecutor acting throughout all Member States. Nevertheless—taking into account the Member States' sensibilities and fears of loss of sovereignty in an important area like criminal procedure, where the protection of fundamental rights is at stake—the proposed regulation gave much space to the applicability of national law.[4] There was a lot of criticism from all sides[5]: Some feared the excessive powers of the new European body and its strong intervention in national prosecution,[6] others favoured more harmonisation and more European legal interference inasmuch as the EPPO should act on the basis of what could be called a "European code of criminal procedure" which—according to those authors—should have been created together with the EPPO.[7] Certainly, the (partly artificial) compromise between the application of supranational and national law in the proposed regulation could easily be criticised and it was indeed fair to put forward constructive criticism. But the aim of the Commission's draft regulation was very straightforward: the EPPO should constitute a powerful central prosecuting

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[1] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), OJ EU L283/22.

[2] COM(2013) 534 final; as to the development from the Corpus Juris to this proposal from the Commission see Nieto Martin and Muñoz de Morales Romero (2015), pp. 137 ff.; Killmann and Hofmann (2014), pp. 865 ff.; Ligeti (2011), pp. 51 ff.

[3] European Commission, Press Release of 17.07.2013, http://europa.eu/rapid/press-release_IP-13-709_en.htm.

[4] As to the essential contents of this proposal see Damaskou (2015), pp. 126 ff.; Drew (2015), pp. 15 ff.

[5] Opposed to the idea of a European Public Prosecutor's Office see e.g. Böse (2004), pp. 158 ff.

[6] Hecker (2015), pp. 528 ff.

[7] See. e.g. Grünewald (2015), p. 515; Magnus (2015), pp. 181 ff.; Radtke (2004), pp. 16 ff.

body whose functioning was clearly set out in the draft. Thus the Commission clearly had had an effective form of transnational prosecution in mind.[8]

The first problems arose, when in October 2013, 19 national Parliament chambers issued negative "reasoned opinions" stating that they found the EPPO proposal in breach with the principle of subsidiarity and thus initiated a so-called "yellow-card" procedure.[9] Although the arguments had been well founded, it was quite astonishing that it took the Commission only three weeks to affirm its position that the subsidiarity criterion had not been violated.[10]

Due to the resistance of several Member States, the Council subsequently decided to carry out an article-by-article review of the Commission proposal. During the last few years the Council has added some significant modifications to the original Commission document, driven always by the wish to find a compromise against the background of art. 86 TFEU requiring (at least in principle) unanimity between the Member States in order to establish the EPPO.[11] Although unanimity could not be reached, 20 Member States could still be convinced to adopt the amended proposal by means of enhanced cooperation. Unfortunately, however, all these amendments, modifications and supplements made the final regulation[12] highly complex.[13] In contrast to the Commission's original proposal, the Council's amendments neglected the idea of creating a powerful central body with one European Prosecutor at the top, but instead implemented a "collegiate system" which involves representatives of all Member States. Basically, the future EPPO will be structured with both a central level and a decentralised level. At the central level, there will be a European Chief Prosecutor heading the EPPO; however, his or her position has been considerably weakened compared to the Commission's original proposal. Instead of a strong Chief Prosecutor, European Prosecutors—monitored by Permanent Chambers—will supervise European Delegated Prosecutors that are handling the cases in their respective Member States of origin. Facing such a complicated structure, the EPPO is deemed to become, right from the start, a huge body with a great deal of staff not only at its central office but also in the Member States.[14]

In particular, the position of the European Delegated Prosecutors gives rise to the question whether such a prosecutorial "body" can act independently.[15] Acting as national as well as European prosecutors, their standing and willingness to represent the interests of the EU seems to be particularly fragile, a problem already

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[8] Affirmative Schramm (2014), p. 758; Zeder (2014), p. 248.

[9] See Article 7 of Protocol No. 2 to the Lisbon Treaty on the application of the principles of subsidiarity and proportionality; see Drew (2015), pp. 18 ff.; Esser (2014), p. 499.

[10] COM(2013) 851 final; hereto see Esser (2014), pp. 499 ff.

[11] Nevertheless "unanimity" only means 25 Member States, because Denmark does not take part and UK and Ireland have not "opted in"; see Drew (2015), p. 18.

[12] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), OJ EU L283/22.

[13] For an introduction to the new regulation see Brodowski (2017), pp. 684 ff.; Satzger and von Maltitz (2018), pp. 153 ff.

[14] See also Brodowski (2016), p. 110.

[15] Klip (2016), p. 513; Meij (2015), pp. 101 ff.

known from the original Commission proposal under the catchword of "double-hatted prosecutors."[16]

It would clearly overburden this contribution to paint an extensive picture of the future EPPO, summarise the criticisms brought forward against the Commission's original model and discuss all remaining problems and alternatives to the adopted model that have been suggested in the academic world.[17]

My contribution shall be based on the evaluation that all proposals for the structure and functioning of an EPPO based on art. 86 TFEU, including the now adopted model, contain more or less obvious weaknesses; none of them is 100% convincing. In the past, I had thus proposed a unique model based on a principle of complementarity, which should guarantee the EPPO's smooth functionality and acceptance among Member States.[18] Although the enhanced cooperation did not decide to implement such a complementarity model, it seems appropriate to recall the basic idea of the proposal, which may prove valuable for a coherent interpretation of the Council Regulation. In view of the adopted model, an interpretation based on the idea of complementarity seems particularly promising in order to shape the EPPO's relationship to the Member States' domestic prosecutorial agencies, as well as to determine the competences of its individual organs.

## 2 The Principle of Complementarity as the Fountain of Inspiration for an Alternative Model

### *2.1 Background*

In order for the work of the future EPPO to be accepted by its Member States, it must be kept in mind that due to the differing criminal law systems within the EU, criminal proceedings tend to be a very sensitive area for all Member States. Hence—as a matter of legal policy—the field of criminal law and procedure should not be a playground for revolutionary innovations. To the contrary, the EPPO—independent of its size and structure—should be integrated into the existing domestic systems as considerately as possible. This essentially political request clearly corresponds with the two fundamental legal principles enshrined in art. 5 TEU: the principles of subsidiarity and proportionality. Both principles limit the exercise of the EU's powers: The former principle means that the EU legislator may take action only on the condition that the goal pursued cannot be sufficiently achieved by measures taken at the national level, yet can be better achieved at the European level due to the scale or

[16] Surveys showed huge unwillingness on the part of the national prosecution services to cooperate with a European Public Prosecutor's Office, see Wade (2013), pp. 439 ff.

[17] See Parizot (2015), pp. 538 ff.; Helenius (2015), pp. 192 ff.; Pawlik and Klip (2015), pp. 183 ff.; Ligeti (2011), pp. 51 ff.; Zwiers (2011).

[18] Satzger (2013), pp. 206 ff.

effects of the proposed action.[19] The proportionality principle prescribes that EU action must be limited (in content and form) to what is necessary to achieve the objectives of the Treaties.[20] Thus EU institutions—if competent at all—have to choose the "least invasive" mode of legislation.

### *2.2 The Principle of Complementarity in the Rome Statute of the ICC*

In order to elaborate the least invasive EPPO design on the basis of the hybrid model prescribed by art. 86 TFEU, the relationship between the EPPO and national prosecutors must be the starting point. In this context it is most useful to have a look elsewhere, *prima facie* in an area which—at a first sight—has nothing to do with the EPPO.

In another international context the idea of subsidiarity played a very important role when designing a legal institution: When elaborating the Rome Statute in 1998, which is the founding treaty of the International Criminal Court in The Hague,[21] the so called "*complementarity principle*" was established.[22] This principle effectively governs the question whether a case dealing with international crimes is dealt with before national courts—which shall be the rule—or whether the International Criminal Court's competence is activated—which shall be the exception.[23] As we can see, the Rome Statue follows the idea of strict subsidiarity of the international vis-à-vis the national jurisdiction—at least as long as this solution is effective and justifiable in the particular case at hand.[24] The principle and its limits are established in art. 17 of the Rome Statute, according to which

> a case is inadmissible where [it] is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.

Under the aspect of "*unwillingness*" the Rome Statute especially enumerates cases where national proceedings were undertaken or national decisions were made only for the purpose of shielding the person concerned from the jurisdiction of the ICC (so-called "sham proceedings"), where there have been unjustifiable delays in

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[19] More in detail see Bang Fuglsang Madsen Sørensen and Elholm (2015), pp. 31 ff.; also Asp (2011), pp. 44 ff.; Hecker (2015), p. 294.

[20] See e.g. Klip (2016), p. 38; Ambos (2014), p. 445.

[21] http://legal.un.org/icc/statute/romefra.htm.

[22] See e.g. Ambos (2014), pp. 360 ff.; Esser (2010), pp. 136 ff.; Safferling (2011), pp. 282 ff.; Satzger (2015), pp. 81 ff.

[23] Fundamental analysis by Lafleur (2011), Stahn (2011) and Razesberger (2006).

[24] See e.g. Bantekas (2010), pp. 429 ff.; Ambos (2014), p. 363.

proceeding or where the national proceedings were not conducted independently and impartially (cf. art. 17(2) Rome-Statute).[25]

As to the "*inability*" of a State the Statute primarily mentions the case of a total or substantial collapse or unavailability of the national judicial system.[26] But apart from these cases, which relate to transitional justice e.g. after international conflicts or civil war, a State is also unable to genuinely carry out the prosecution if, for whatever reason, the law of that State does not provide the necessary substantive or procedural law in order to enable a successful prosecution of an international crime before national courts.[27] This exception may clearly apply to totally intact—even legally very developed—judicial systems, e.g. if the legal standards of the Rome Statute cannot be met in national law due to constitutional restrictions (*inter alia* the principle of legality).[28]

## *2.3 The Principle of Complementarity as a Parallel Mechanism for an Alternative Model of an EPPO*

### 2.3.1 The Criterion of Complementarity

The criterion of complementarity not only expresses the principles of subsidiarity and proportionality with full clarity, which are of imminent importance in European law, but it also strives to respect the remaining elements of sovereignty and national sensitivities in the area of criminal justice.[29] Thus the basic idea behind the "complementarity regime" could also be very useful in defining the mode of cooperation between national prosecution authorities and the EPPO.[30] According to a strict understanding of the complementarity principle, national prosecution authorities would in general remain competent for investigating and prosecuting crimes against the EU's financial interests. The EPPO should only and exceptionally be competent to prosecute crimes affecting the EU budget *if and insofar as* the national prosecution authorities are *unwilling or unable* genuinely to protect the financial interests of the Union.[31]

[25] In detail see Satzger (2018a), p. 246; Jurdi (2011), pp. 48 ff.; Azarov and Weill (2012), pp. 910 ff.

[26] See further Cryer et al. (2014), pp. 154 ff.; Fry (2012), pp. 35 ff.; Megret and Giles Samson (2013), pp. 581 ff.

[27] Satzger (2013), p. 210; Satzger (2018a), pp. 246 ff.

[28] Examples stemming from the German legal order are shown by Satzger (2012), pp. 285 ff.

[29] See e.g. Cassese and Gaeta (2013), p. 298.

[30] See already Satzger (2013), pp. 206 ff.; Satzger (2015), pp. 69 ff.; consenting e.g. Hecker (2015), p. 529.

[31] Critical with regard to this point Esser (2014), p. 499.

Giving some examples for what this would mean in the European context[32]:

- If national prosecution authorities shelter a person (e.g. a national politician or influential businessman) from criminal proceedings, the EPPO will consider this a case of "unwillingness" and take over the prosecution in order to effectively protect the Union's interests.
- If national authorities do not have the personal capacities or financial means to genuinely carry out the prosecution in each individual case or if there is a lack of time or a deficit in organisation, legal training or experience on the part of the national prosecution authorities to do so, the national prosecutors will have to be considered *unable* to genuinely carry out the prosecution and to effectively protect the financial interests of the EU. Thus the EPPO will take over effective prosecution.

Of course, one question is crucial: who is competent to decide whether the national prosecutors are "unwilling" or "unable" to protect European interests sufficiently. This question is fundamental, as the decision to take away the case from national prosecutors and to activate the competence of the EPPO also implies a kind of *public reprimand* in relation to the state which would normally be competent. Again here the situation is perfectly parallel to the constellation of principles applicable in international criminal law.[33]

The complementarity decision is far reaching and even politically stigmatising. Thus—at least from a long-term perspective—it should be taken over by a court on the European level. A European criminal court could easily be established as a specialised court according to Article 257(1) TFEU. Such a step is advisable[34]; it cannot be criticised as being disproportionate, as such a court could also be very useful—and may even be necessary—in the near future in many other contexts (as e.g. in relation to review the solution of conflicts of jurisdiction).[35]

In order to ascertain whether a Member State is "unable" or "unwilling" to prosecute effectively, an *un*ambiguous European benchmark is useful or even indispensable. Hence the clearer the European requirements vis-à-vis the national legislators are, the more workable such a model of complementarity is. In the context of the protection of the EU's financial interests the adoption of the recent "Directive on the Fight against Fraud to the Union's Financial Interests by Means of Criminal Law"[36] on the 5th of July 2017 was a clear step in the direction of further substantiating this benchmark.

[32] Also see Satzger (2015), p. 83.

[33] As to international criminal law see Safferling (2011), p. 284; Satzger (2018b), p. 340.

[34] As to the necessity of such a European criminal court with concrete proposals for his structure see Langbauer (2015), pp. 507 ff.; Esser (2010), pp. 136 ff.

[35] Also see Zimmermann (2014); Satzger (2015), p. 83.

[36] Directive 2017/1371/EU printed in OJ EU 2017 L 198/29.

### 2.3.2 The Situation in Relation to the ICC

However, it has to be admitted that the situation in relation to the International Criminal Court is not fully comparable to our situation, which makes the situation in Europe more difficult and clearly more complex:

- The prosecutor of the ICC does not—in contrast to the role given to the EPPO by art. 86 TFEU—act as a national prosecutor before national courts—the Rome Statute rather establishes a *full international judicial system* with the ICC as the competent court if the prosecutor of the ICC takes over prosecution.
- Moreover the Prosecutor of the ICC *applies uniform and directly applicable international criminal law*—the international crimes established within the Rome Statute itself—whereas within the EU there is, at least up to now, no supranational criminal law, only national laws (although harmonised by EU law) apply in relation to the protection of the financial interests of the EU.

### 2.3.3 Differences and Problems

Due to these differences, two particular problems may arise[37]:

Firstly, according to the hybrid system established by art. 86 TFEU, national courts remain competent for the main proceedings. Thus a model based on complementarity cannot bring any advantages if the reason for the delay or ineffectiveness of the protection of EU budgetary interests lies with the national courts. Although according to the complementary test, the EPPO would be competent to take over the case, the problem would not be able to be adequately addressed. The EPPO can try to accelerate proceedings and to overcome obstacles caused by the court by using remedies against wrong decisions, but only insofar as national law provides the legal framework for such remedies. If the legal system is slow and ineffective as such, even a dedicated EPPO will not succeed. The EPPO can only overcome ineffectiveness within national prosecution bodies—not within the courts. This is the necessary corollary of the hybrid model provided for in art. 86 TFEU—consequently the same problems arise irrespective of the model which is chosen for the design of the EPPO. As far as I can see, even in view of the recently adopted resolution to create the EPPO, these questions have not yet been solved. As long as there is no European Criminal Court, the only solution could be to initiate an infringement procedure against a Member State whose courts block effective prosecutions. The EPPO might communicate such problems to the Commission, who has the competence to bring the matter before the CJEU. In my view it would be advisable to assign the EPPO a right to initiate an infringement procedure (only) in these matters—without resorting to the Commission.

Secondly, if a Member State does not provide for adequate substantive law in order to protect the financial interests of the EU sufficiently—especially if it doesn't

[37] See further Satzger (2015), pp. 84 ff.

transpose EU directives correctly into national law—the (presumed) perpetrator cannot, according to the principle of legality, be prosecuted and sentenced in that Member State. The Member State would thus be "unable" to prosecute him or her effectively.[38] If, as a consequence, the EPPO took over prosecution, this would unfortunately not help, as the EPPO is, as every national prosecutor, bound by national criminal law and national constitutional law, and thus also by the principle of legality. Subsequently, without any legal basis in national criminal law, a successful prosecution is not possible in that state, even if conducted by the EPPO. But again—this is the logic and contingent consequence of the hybrid system as laid down in art. 86 TFEU, and certainly not a general weakness of the idea of complementarity.

## 3 The Principle of Complementarity as a Guiding Principle for the Future EPPO's Work

As I had previously suggested, the principle of complementarity could have been made the decisive criterion guiding the creation of an EPPO.[39] In view of its subsidiary competences, such institution would have been rather *resource-conserving* as the EPPO would only have had intervened exceptionally and on a case-by-case-basis. Thus the EPPO would not have had to become another "super-institution" with hundreds employees. In contrast, the now adopted model foresees several layers of authority, including the European Chief Prosecutor, as well as a European Prosecutor and at least two European Delegated Prosecutors in each Member State. Although such an expansive institution would not have been needed if the idea of complementarity had been strictly observed, the implementation of the principle seems still very valuable in view of the preservation of the principles of subsidiarity and proportionality.

Particularly in view of the considerable size of the future EPPO, there seems to be a probability that, especially if respecting those principles, the new European institution will not be constantly busy. However, it would be contradicting the legitimate sovereignty concerns of the Member States and the essential idea of subsidiarity and proportionality within the EU's legal framework to take the mere size of the institution as an incentive for the exercise of the EPPO's competence in individual cases and potentially even for transferring further competences to the EPPO, with the only motive being to operate it at full capacity. In this respect, the idea of complementarity could all the more create an important restrictive guideline for interpreting the EPPO's legal framework, particularly with regard to the exercise of the future EPPO's right of evocation and the relationship between the centralised and the decentralised level within its general structure.

[38] As to the application of the complementarity model, however, one reservation has to be made: the absence of a legal basis under national law may not be construed as an "unwillingness" on the part of the Member State if the State in question legitimately pulled the so-called "emergency brake" provided for by the Treaty itself (see art. 82(3) and art. 83(3) TFEU).

[39] Satzger (2013), pp. 206 ff.

### 3.1 The Role of Complementarity in the EPPO's Exercise of Its Right of Evocation

According to art. 25(1) of the Council Regulation, the future EPPO shall exercise its competence either by initiating an investigation or by taking over national proceedings by exercising its right of evocation. In comparison to the case of the initiation of investigations by the EPPO, the use of its right to evocation constitutes a stronger limitation of the Member States' sovereignty, as by having initiated criminal investigations, Member States will have demonstrated their general willingness and ability to genuinely carry out investigations on a domestic level. Therefore, art. 27(1) of the Council Regulation implements a time limit of a maximum of ten days that formally restricts the exercise of the EPPO's right of evocation. This restriction is however limited by art. 27(7)(2) of the Council Regulation which allows the EPPO to reconsider its decision not to exercise its competence in the event new facts provide a reason for doing so. Besides the formal time limit, the Council Regulation does not introduce any material criteria or guidelines as to how the EPPO should exercise its right of evocation. In view of the principles of subsidiarity and proportionality, this seems rather problematic, as such an important decision, considerably affecting the sovereignty of the individual Member State, is left to the general discretion of the EPPO. Therefore, I suggest that the EPPO's discretion in this regard should be guided by the idea of complementarity in order to take into account the legitimate sovereignty concerns of Member States. Only if the domestic prosecution agencies appear to be unwilling or unable to genuinely carry out criminal investigations on a domestic level, the EPPO should make use of its right of evocation. This would generally encourage the Member States to investigate and prosecute crimes against the financial interest of the EU on a domestic level, as the EPPO's exercise of its right of evocation would inevitably constitute a *public reprimand* with regard to the Member State's failure to comply with its obligations towards the EU. Even if the respective Member State appears willing and able to genuinely investigate at first sight, however, turning out otherwise during the following proceedings, this circumstance would constitute a new fact under art. 27(7)(2) of the Council Regulation, allowing the EPPO to reconsider its initial decision to refrain from exercising its competence.

### 3.2 Complementarity Guiding the Relationship Between the Centralised and the Decentralised Level Within the General Structure of the EPPO

Furthermore, the idea of complementarity can also provide for a guideline to separate the competences between the central and the decentralised level within the general structure of the EPPO. According to art. 8(2) of the Council Regulation, the EPPO is organised into these two layers of authority. The centralised level mainly

consists of the College, the Permanent Chambers, the European Chief Prosecutor and the European Prosecutors (art. 8(3)(2) of the Council Regulation), whereas the decentralised level consists of European Delegated Prosecutors who shall be located in the Member States (art. 8(4) of the Council Regulation). According to art. 17(2) of the Council Regulation, European Delegated Prosecutors need to be active members of the public prosecution service or judiciary of the respective Member States which nominated them.

The basic idea of separating a centralised from a decentralised level within the framework of one single institution is, on the one hand, the assumption that European Delegated Prosecutors will be best equipped to fulfil the prosecutorial duties before a domestic criminal court; on the other hand, actions taken by European Delegated Prosecutors may be regarded as less infringing on Member States' sovereignty than such taken by members of the centralised level. Acting as national as well as European prosecutors, their standing and willingness to represent the interests of the EU might potentially be particularly fragile; however, their actions may also appear less intrusive on state sovereignty due to their "double-hatted" nature. I argue that in view of state sovereignty concerns, European Delegated Prosecutors should generally take all investigatory and prosecutorial actions, as long as those are not explicitly granted to the centralised level. However, particularly in view of the danger of their potential disloyalty towards the EU due to their "double-hatted" nature, it appears vital for the centralised level (i.e. particularly the European Prosecutors and the Permanent Chambers) to possess the competence to direct, instruct, and even replace the European Delegated Prosecutor under certain circumstances.

The idea of complementarity should—once again—be made use of also in this regard in order to draw a distinct line of competence between the central and the decentralised level. Thus, Permanent Chambers and European Prosecutors may only intervene with the general competences of a European Delegated Prosecutor if he or she appears unable or unwilling to genuinely carry out his or her mandate. This basic idea is supported by art. 28(3) of the Council Regulation, which allows the responsible Permanent Chamber, on proposal of the supervising European Prosecutor, to reallocate a case to another European Delegated Prosecutor in the same Member State when the handling European Delegated Prosecutor (a) cannot perform the investigation or prosecution, or (b) fails to follow the instructions of the competent Permanent Chamber or the European Prosecutor. In exceptional cases, the supervising European Prosecutor may also conduct the investigations personally if—among other limited reasons—such reallocation did not achieve its promised outcome (art. 28(4)(c) of the Council Regulation).

Interestingly, the two decisive criteria seem to mirror the elements of the principle of complementarity: either a European Delegated Prosecutor is unable to and does therefore not perform the necessary investigation or prosecution, or is unwilling, which is best revealed if he or she fails to follow the instructions of the competent Permanent Chamber or the supervising European Prosecutor. Consequently, with regard to the replacement of a European Delegated Prosecutor, the Council Regulation already implements a basic form of complementarity.

However, concerning instructions and directions to be given to the European Delegated Prosecutor by the Permanent Chambers and the supervising European Prosecutors, the EPPO's legal framework does not explicitly refer to the idea of complementarity.

Besides some further specified cases, the competent Permanent Chamber, acting through the European Prosecutor, may give instructions to the handling European Delegated Prosecutor, "where it is necessary for the efficient handling of the investigation or prosecution, in the interest of justice, or to ensure the coherent functioning of the EPPO" (art. 10(5) of the Council Regulation). An identical competence is granted to the supervising European Prosecutors according to art. 12(3) of the Council Regulation. I argue that such instructions are, in general, only necessary for the efficient handling of the investigation or prosecution in the interest of justice, or to ensure the coherent functioning of the EPPO if the European Delegated Prosecutor is either unable or unwilling to genuinely carry out his or her mandate. Such an interpretation of the Council Regulation will assure that the main responsibility to carry out investigations and prosecutions will generally remain on the decentralised level, thereby mitigating legitimate sovereignty concerns brought forward by the Member States.

# 4 Conclusion: Advantages of implementing the Principle of Complementarity

Integrating the idea of complementarity into the legal regime of the future EPPO has a number of clear advantages, even if a more lightweight complementarity model has not been adopted by the enhanced cooperation[40]:

Firstly, the Member States and their prosecution authorities could themselves generally apply their national procedure and avoid external (supranational) interference by means of the EPPO's exercise of its right of evocation as long as they sufficiently protect the EU's financial interests. Thus a *high degree of coherence and self-determination* (sovereignty) would be upheld.[41]

Secondly, the implementation of the principle of complementarity would *give incentives to the Member States* to care in a timely and effective manner for the Union's interests,[42] particularly facing the threat of the EPPO initiating investigations before the respective domestic authorities or exercising its right of evocation. At the same time, Member States could retain the primary responsibility for EU-conforming behaviour. If, on the one hand, they—timely and genuinely—comply with the EU's prerequisites, no external interference will occur. If, on the

[40] Also see Satzger (2015), pp. 85 ff.; Satzger (2013), p. 211.

[41] Hecker (2015), p. 529.

[42] Especially a lack of motivation often became visible in the past, e.g. in the "*Greek Maize Scandal*" Case C-68/88, Commission v. Greece, ECR 1989, 2965.

other hand, the Member States do not protect the Union's interests adequately, the EPPO's interference would then be the justified consequence which also involves an internationally visible stigma.

Even if the EPPO is exercising its competence in a given case because the national prosecution authorities are either unable or unwilling to genuinely investigate crimes against the financial interest of the EU, the idea of complementarity can still provide for an important guideline as to the question on what institutional level the EPPO will exercise its competence. In view of the future EPPO's rather complicated structure, which includes a central and a decentralised level, the idea of complementarity underlines the general competence of the decentralised level, i.e. the European Delegated Prosecutors, which in general shall only be complemented by the activity of the Permanent Chambers and European Prosecutors in the case of unwillingness or inability.

Finally, one last consideration appears to be rather interesting and is in my view an important argument in favour of integrating the idea of complementarity: If all Member States complied fully with their obligations under European law, the future EPPO would not have to exercise its competence at all. This proves that such an EPPO would be "subsidiary" in the real sense of the word![43]

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[43] Also see Satzger (2015), p. 86.

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# Choosing the National Forum in Proceedings Conducted by the EPPO: Who Is to Decide?

**Michele Panzavolta**

**Abstract** The establishment of the European Public prosecutor would mark the birth of the first truly European form of prosecution. The European Prosecutor would investigate on a case and then bring it in front of a national court for adjudication. The paper discusses how the national adjudicating forum should be chosen for cases handled by the future European Public Prosecutor. It first looks at the current rules on overlapping of national jurisdictions. Then it considers what general overarching fundamental principles spelled out in national constitutions and European covenants are applicable and what their practical implications are. Finally it critically discusses the rules which have been approved, making where possible some interpretative suggestions for improvement.

## 1 Choosing Forum Between Multiple Jurisdictions: Framework and History

A discussion on the role of the European Public Prosecution Office (EPPO) in the choice of forum requires to briefly introduce the topic of conflicts of jurisdictions.[1]

The more crime becomes transnational, the more it is possible that national jurisdictions (*scilicet*, national rules on jurisdiction to prescribe)[2] overlap. In the classic approach based on national sovereignty, which was still followed for all of the twentieth century, the overlap was not a problem. Every nation state is sovereign in that

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[1] A comprehensive analysis of the topic is contained in the book edited by Luchtman (2013a).

[2] The concept of 'jurisdiction to prescribe' and its difference with 'jurisdiction to adjudicate' and 'jurisdiction to enforce' is explained—albeit very briefly—later in this paragraph. See also *infra*, footnote n. 7.

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L. Bachmaier Winter (ed.), *The European Public Prosecutor's Office*,
Legal Studies in International, European and Comparative Criminal Law 1,
https://doi.org/10.1007/978-3-319-93916-2_4

*superiorem non recognoscens (et non habet)*.[3] The Latin formula, which was initially used to assert the independence (first *de facto*, then *de jure et de facto*) of local kings from the emperor around the thirteenth and fourteenth century,[4] clearly expresses the autonomy of nation states. Such autonomy could not be thwarted by rules or decisions of other States.[5] Sovereignty entailed indifference. From a legal point of view, the fact that another State had taken action to punish the same crime was plainly irrelevant.

Things changed with the development of the European Union and of a common area of free movement of people, services, capitals and goods. Free circulation naturally intensifies cross-border crime, which then gives rise to the situation of multiple states simultaneously competent for investigating and prosecuting the same misdeeds. As the likelihood of overlaps of jurisdiction increases, it becomes clear that the situation of concurrent (or multiple) jurisdictions can no longer be ignored or dismissed as a side and unavoidable consequence of sovereignty and national rules on jurisdictions.

After all the overlap of jurisdictions—just like the gaps between jurisdictions—can create hindrances, problems and difficulties to the administration of justice. Positive conflicts of jurisdictions can hinder or negatively affect the efficiency of the investigations of each prosecuting country: countries might fight over evidence and defendants; evidence used in one country cannot be made available to the other country because it is already being used for justice purposes; defendants are not transferred (or surrendered) if proceedings against them are underway in the requested country (and in some countries proceedings cannot be carried out without the defendant being present); conflicting trial outcomes on the same case can affect the credibility of all States and negatively impact the level of security of a common European area. Negative conflicts of jurisdiction allow criminals to exploit the gaps between national rules of jurisdictions, exposing all countries to a greater criminal threat.[6]

Nevertheless the attempt to set out common rules for reducing or solving conflicts of jurisdictions has proved to be fraught with difficulties. The (rather recent) story of conflicts on jurisdictions can in this respect be viewed as a story concerning the evolution of the concept of sovereignty and of the difficulties to overcome it.

As mentioned, the original logic of sovereignty gave countries full freedom to establish their own jurisdiction on crimes (jurisdiction to prescribe). The states encountered no limits in establishing their jurisdiction even on crimes committed outside of their territory (extraterritorial jurisdiction to prescribe). States would

[3] Calasso (1957), pp. 13 ff.

[4] See an interesting discussion on the roots of the formula in Ullmann (1949), pp. 1–33.

[5] Bodin (1581), p. 161 "*la première marque du prince souverain, c'est la puissance de donner loi à tous en général, et à chacun en particulier; mais ce n'est pas assez, car il faut ajouter, sans le consentement de plus grand, ni de pareil, ni de moindre que soi*".

[6] On this issues see Thorhauer (2015), pp. 78–101. A list of the arguments for solving conflicts of jurisdictions can also be found in Wasmeier (2015), pp. 139–164 at 143–144.

however be unable to conduct investigations abroad, just like they could not enforce penalties abroad (jurisdiction to adjudicate and enforce).[7] But in the last decades new developments have taken place which move in the direction of (slowly) eroding these traditional pillars.

The Council of Europe recognized very early that conflicts of jurisdiction could be detrimental to the proper administration of justice. The most significant step it took to address the issue was the drafting of the European Convention on the transfer of proceedings in criminal matters.[8]

More significant is the work that has been done by the European Union (EU). Starting from 1997 the prevention of conflicts of jurisdiction appeared as one of the Union's competence in the field of judicial cooperation in criminal matters (the former third pillar). After Lisbon the relevant provision is to be found in Article 82 (2) TFEU (Treaty on the functioning of the European Union), which gives the Union the power to adopt measures to prevent, and now also settle, conflicts of jurisdictions.

In 2009, few months before the entry into force of the Lisbon Treaty, the EU passed Framework decision 2009/948/EU to directly address the issue of conflicts of jurisdiction.[9] According to this framework decision Member States shall exchange information whenever there are reasonable grounds to believe that parallel proceedings are underway. Furthermore, they shall enter into consultation every time that parallel proceedings are underway with a view to reaching a solution for the proper management of the conflict (which solution could be, but does not have to be, the concentration of criminal proceedings in one member State).[10] To this end Article 12 of the framework decision formally assigns Eurojust a facilitating role (for cases which fall within the remit of the agency). Eurojust is tasked with the role of helping judicial cooperation between the Member States. In the field of conflicts of jurisdiction Eurojust is given a consultative/advisory role with regard to the solution of

[7] On the difference between these three concepts of jurisdictions (jurisdiction to prescribe, to enforce and to adjudicate) see Böse (2013), pp. 73–87.

[8] The preamble of the Convention states: "Considering it useful to this end to ensure, in a spirit of mutual confidence, the organization of criminal proceedings on the international level, in particular, by avoiding the disadvantages resulting from conflicts of competence". It must be pointed out that despite the declaration in the preamble the Convention does not properly solve all conflicts of jurisdictions. By allowing a State to transfer its competence to a new State the convention creates a new ground for jurisdiction in the requested (or receiving) State (see articles 2 and 7). But the Convention provisions could narrow down the problems of conflicts of jurisdictions in all cases where the requested/receiving country could both take action on the basis of their own rules on jurisdiction to prescribe (see articles 7 and 8).

[9] Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings [2009] OJ L328/42. On the framework decision see the general illustration of Rafaraci (2010), pp. 121–150 at 146.

[10] Criticism on the failure of the Framework decision to create a real area of freedom security and justice by establishing a binding mechanism for Member States is expressed by Vervaele (2013), pp. 167–184 at 173 (also in Vervaele 2014a, pp. 279–301 at 287).

conflicts. Such role finds express mention also in the Eurojust decision.[11] According to the latter decision, Eurojust members shall be informed by national authorities of the possibility that a conflict of jurisdiction may arise (Article 13 section 7 (a)). Furthermore, according to Article 7, section 2, “where two or more national members cannot agree on how to resolve a case of conflict of jurisdiction as regards the undertaking of investigations or prosecution pursuant to Article 6 and in particular Article 6(1)(c), the College [of Eurojust] shall be asked to issue a written non-binding opinion on the case, provided the matter could not be resolved through mutual agreement between the competent national authorities concerned. The opinion of the College shall be promptly forwarded to the Member States concerned. This paragraph is without prejudice to paragraph 1(a)(ii)”.

Although the above European instruments represent a significant step forward in the attempt to address the issue of conflicts of jurisdiction, the EU does not (yet) have a system of binding criminal competences, neither has it a binding mechanism for solving conflicts of jurisdictions. States cannot be obliged to undertake prosecutions nor can they be required to drop cases or avoid instituting proceedings. The prerogatives of national sovereignty remain in this respect mostly unaltered.

The only mechanism with a binding force on the States’ power to exercise jurisdiction is the principle of *ne bis in idem*. The principle is enshrined in Article 54 Convention Implementing the Schengen agreement (CISA) and in Article 50 of the Charter of fundamental rights of the European Union (CFREU). When a State has positively exercised its jurisdiction, by finally disposing of a case on the merits, the other States are prevented from instituting proceedings. Although binding, the principle is not absolute in that it undergoes limits and exceptions. First, the *ne bis in idem* of Article 54 CISA is triggered only if, in case of a conviction, the penalty is enforced or is in the process of being enforced (enforcement condition).[12] Second, the principle does not bar simultaneous parallel proceedings (*lis pendens*). Third, Article 55 CISA allows contracting parties to introduce some listed exceptions to the principle and several countries have taken advantage of this possibility.[13] The *ne bis in idem* principle is therefore an inadequate device to solve conflicts of

[11] Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime [2002] OJ L63/1 as amended by Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Council Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime [2009] OJ L138/14.

[12] In the case of *Spasic* (27 May 2014, C-129/14) the European Court of Justice has ruled the enforcement condition to be in line with the CFR and, in particular, to be respectful of Articles 50 and 52 of the Charter. In the literature, see the critical reflections of Wasmeier (2014), pp. 533–554.

[13] The European Court of Justice was asked to consider whether the exceptions listed in Article 55 are compatible with Article 50 CFR and with the limitations to the Charter’s rights allowed by Article 52 CFR (case C-468/14, *Kossowski*). The Court did not provide an answer to the question as the decision on a preliminary issue made the point no longer relevant (CJEU, Grand Chamber, 29 June 2016, C-468/14). It remains likely that the issue be soon taken again in front of the higher European Court.

jurisdictions. Furthermore, the principle operates on a "first come, first serve" basis, which can induce inappropriate competing behaviours of national authorities. They could in fact feel pushed to rush into taking a decision, only in order to ensure the enforceability of their judgment.

The overall picture is that the issue of conflicts of jurisdictions is still mostly left to the willingness of Member States to find a common solution, with the *ne bis in idem* principle acting as an *ultimum remedium* (in those cases where the principle can apply).

Against this background the question that naturally arises is what rules of jurisdiction should be applicable with regard to the position of the future European public prosecutor.

## 2 EPPO and Jurisdiction

The project for the establishment of a European Public prosecutor dates back to more than two decades ago with the project *Corpus Juris*.[14] After years of proposals, analysis and long discussions, the EPPO finally received a formal recognition within the European Treaties with the Treaty of Lisbon.[15]

Article 86 § 1 TFEU states that "in order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust. The Council shall act unanimously after obtaining the consent of the European Parliament". The following paragraph clarifies that the EPPO "shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests, as determined by the regulation provided for in paragraph 1. It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences."

The TFEU does not clarify what is meant by competent courts. It is therefore for secondary legislation (law) to define the concept. According to Art. 86 § 3 TFEU, "the regulations referred to in paragraph 1 shall determine the general rules applicable to the European Public Prosecutor's Office, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions".

[14] On the origin of the project and its reception by governments see Spencer (2012), pp. 363–380 at 367 ff.

[15] In the vast bulk of literature on the European Public Prosecutor see, in particular, Ligeti (2011), pp. 52–66; Ligeti and Simonato (2013), pp. 7–21; Bachmaier Winter (2015), pp. 121–144; Wade (2013), pp. 439–486; Caianiello (2013), pp. 115–125; Damaskou (2015), pp. 126–153.

The Treaty leaves the issue of jurisdiction unanswered. Which national jurisdiction should be competent for the proceedings? Should the European regulation cover these issues? And if so, how should it address these issues?

An element of complication is given by the peculiar 'double layer-design' which characterizes the structure of the proceedings conducted by the EPPO according to the rules set out at Treaty level: a European investigative phase (carried out by European prosecutors) and a national trial phase (left to national courts). The problem of the choice of forum concerns the identification of the country where the trial will be conducted. It may however comprise the investigative phase, unless the European Regulation would succeed in establishing a fully European investigation entirely governed by European rules and reviewed by European courts. As we shall see, this has not been the case with the recently approved Regulation.

If the problem of the choice of jurisdiction extends to the choice of the place of the investigation, new questions arise. The courts of which country/countries should be competent for issuing an arrest warrant or for authorizing certain investigative measures? The issue becomes even more burning if there is no or insufficient harmonization at European level of the national rules on investigative powers. And how should the competence over investigation and trial interact? Finally, should the prosecutor be given the power to choose where the case will be investigated/prosecuted or not?

## 3 A Jurisdiction Established by Law?

The issue of the selection of the national forum essentially boils down to a major question: should the selection be done by the lawmaker or not? In other terms, should the jurisdiction be (previously) established by law?

Several Member States acknowledge the right of defendants to have their case tried by a previously legally identified judge. The safeguard of the lawful judge (*juge naturel*, *gesetzliche Richter*, *juez ordinario predeterminado*, *giudice naturale precostituito per legge*) is embedded in the Constitutions of most Member States. It is debatable whether the safeguard can be considered a common constitutional tradition.[16] There is in fact a significant divide in the understanding and application of the safeguard between common law (particularly England and Wales) and continental law. Also in the continent the member States have different views and approaches in their procedural laws with regard to the level of precision of the law which establishes and identifies the competent judge. Nonetheless the very core of the safeguards can be considered common, i.e. the part of the safeguard which refers to the right to be tried by ordinary courts (courts that are not ad hoc established) with a

[16] According to Article 6 § 3 TFEU, "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law".

view to ensuring that defendants are tried impartially and according to a uniform rule of law.[17]

The same logic can be found in international covenants. The safeguard is foreseen by the ECHR (Article 6 § 1), where all citizens are given the right to have their case decided 'by an independent and impartial tribunal established by law'. Similarly, but from the perspective of the protection of the right to personal liberty (as in cases of pre-trial detention), Article 5 § 1 (a) ECHR provides that the decision on the deprivation of liberty should be taken by the 'competent judge'. The Charter of Fundamental rights of the European Union (CFREU) carries a similar provision in Article 47 § 2: "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law". When compared with Article 6 § 1 ECHR, the provision of Article 47 emphasizes more clearly that the judge must be established at least before the case is tried (or, even better, before the crime is committed).[18]

All these national and international provisions concern the identification of the judge within a national setting. As I have already discussed in another contribution, the right to a previously established judge does not *per se* include the right to a previously established national jurisdiction.[19] As said earlier, the independence of each sovereign country entails that defendants cannot in principle claim the right to be tried before a predefined jurisdiction. The situation changes if the prosecution of crimes moves from a national to a European level. When prosecution is carried out by a European prosecutor, on behalf of all countries and for common European goals,[20] then defendants could rightfully invoke that the safeguard of the lawful judge be extended *a fortiori* to include the choice of national *forum*. From the perspective of national prosecution the identification of a competent court is done on the premise of the limits of national jurisdiction (and on the premise of the indifference for the jurisdiction of other countries). From a supranational European perspective, instead, the previous identification of the competent court can only be done if there is a clear prior identification of the country of investigation/prosecution. After all, if prosecution for a specific offence becomes possible in one Member States only, with the exclusion of other countries, there is no longer a reason why the national forum should not be established in advance.[21] Just like national

[17] I have more extensively elaborated upon these issues (the value of the safeguard of the previously established judge in comparative law, the case-law of the European Court of Human Rights, the difference between ECHR and CFR) in 'Il giudice naturale nell'ordinamento europeo tra presente e futuro', in Panzavolta (2005), pp. 107 ff. and later in Panzavolta (2013), pp. 143–166.

[18] For a more detailed analysis of these issues, I refer again to my works cited in the previous footnote.

[19] See my Panzavolta (2013), pp. 143–166.

[20] "When the criminal justice system is acting in relation to European goals, its dimension is also European. This is not only true in relation to crime control, but also in relation to applicable human rights": Vervaele (2013), pp. 167–184 at 172; also in Vervaele (2014a), pp. 279–301 at 286.

[21] It is exactly for this reason that I have connected the come into being of the right to a previously established jurisdiction (as part of the right to a previously established judge) to the full tightening of the *ne bis in idem* principle.

prosecutors cannot choose their national court at the expenses of a fair and uniform adjudication of cases, so should the European prosecutor not be entitled to freely choose the country of investigation/prosecution and the competent court therein.

The logic of the safeguard of the lawful (or legally established or natural) judge here discussed requires that the identification at European level of the country/judge be sufficiently precise, regardless of whether these rules are considered of procedural or substantive nature.[22] As mentioned the rationale lies in avoiding judgements taken by courts especially appointed, for the risk of bias and prejudgement it entails. Second, precision in the identification of the competent country and court is also required in order to protect the uniformity of the law. The historic roots of the safeguard point to the idea that cases shall be tried by 'ordinary courts', because they only could ensure the application and enforcement of the same (uniform) legal rules (in times where specially appointed courts had often the prerogative to depart from previously settled/codified law). This aspect proves to be particularly relevant in a European scenario where the choice of the country affects the substantive and procedural law applicable to the case.

It shall not be forgotten that the choice of venue made by a European public prosecutor involves more legal interests than the choice of a court within the national jurisdiction. Every choice of venue entails a conflict between the interest of efficient administration of justice and defensive rights.[23] But the choice of venue between two countries calls into play further variables. In fact, it entails the application to the case of different criminal substantive provisions (e.g. different description of conducts, different penalties, etc.). It also triggers the application of different procedural provisions (e.g. with regard to the right to a jury, the right to introduce evidence, the right to access the case file, etc.). Furthermore, choosing one country over another has significant practical implications in that it entails that a different language might be used, that the defence and his representatives might have greater distances to cover, greater practical difficulties, and so on.

The risk behind a Prosecutor going shopping for a forum across Europe is not just the risk of choosing a court (a judge) deferential to the prosecution's views, but even more the risk of choosing the legal setting (in terms of applicable substantive and procedural rules) which is most favourable to the prosecutor's interests. When leaving the choice of the country to the unfettered discretion of prosecutorial (quasi-judicial) bodies—such as the future EPPO—the risk is precisely that the choice be driven by the attempt of the prosecutor to find the country with the rules that are

[22] The dichotomy is instead emphasized by Böse (2013), pp. 73–87. The author concludes that rules on jurisdiction to enforce are procedural in nature and hence the need for flexibility should prevail over legal certainty. At European level, however, the rules on the identification of the competent national judge have a double nature, because they are procedural in nature but they also affect the applicable substantive national law.

[23] The more flexible the rules on the choice of venue, the more swifter and efficient the repression. On the other hand, avoiding abusive choices requires predefined and stiffer rules and forms of judicial control, which inevitably make the handling of a criminal case more cumbersome and slower.

more favourable (or least unfavourable) to the side of the prosecution; and the risk that the choice be done with a view to reducing the effectiveness of the defence.

A similar choice would precisely run counter the logic behind the safeguard of the legally established judge. Defendants could have to face contextual situations which impair the full exercise of their right to defence. Even more, defendants would be tried according to different rules depending on the prosecution's choice. This would undermine the safeguard's rationale of ensuring that defendants are tried according to a uniform rule of law. If the national rules of criminal law and procedure remain different, and thus defendants can be tried on the basis of different rules, the only way to grant a minimum of uniformity in the adjudication is by ensuring that the choice of forum be done according to clear, consistent and pre-defined criteria. As we already emphasized elsewhere, the less harmonization in the national laws, the more precisely established the judge in cross-border settings must be.[24]

What is important is that the EU Regulation grants sufficient foreseeability of the national venue and of the substantive and procedural rules which shall consequently be applicable. Whereas the selection of the competent judge within one jurisdiction leaves in principle the set of applicable rules unaltered, the selection of the national forum entails a significant change in the applicable rules. This is the reason why several authors have invoked the respect of the principle of legality and of fair trial as overarching principles which should guide the selection of the prosecuting country.[25] It is certainly true that legality requires that defendants be able to foresee in advance not just which court of which State will adjudicate upon the case but, even more, which rules will apply to their case. And it is part of the right to a fair trial the right to have a case tried in a place and according to rules which do not limit the effectiveness of the defence and make it possible to fight the prosecution with equality of arms. The perspective that is taken here is that these rights (principles of legality and fair trial) flank the right to a legally established jurisdiction—which, in a truly Europeanized context, is a necessary corollary of the right to be tried by a court previously established by the law. It is also worth mentioning that the applicability of the "principle of the natural court" (a synonym for previously established judge) to the determination of the prosecuting jurisdiction at European level has been formally recognised by the European Parliament.[26]

The critics might contend that the right to a legally established jurisdiction (as part of the legally established judge) is a duplication, exactly because its content is absorbed by the principle of legality and by the principle of fair trial. This is not the

[24] The reference goes to my Panzavolta (2013), pp. 143–166 at 160.

[25] See Luchtman (2013b), pp. 3–60. Similarly, Wasmeier (2015), pp. 139–164; Thorhauer (2015), pp. 78–101, at 90 ff.

[26] European Parliament Resolution of 12 March 2014 on the proposal for a Council regulation on the establishment of the European Public Prosecutor's Office (P7_TA(2014)0234, point n. 5 (i), stating that the EPPO should "comply with the principle of the natural court, which requires that the criteria determining which competent court is to exert jurisdiction are clearly established in advance".

case. It is evident that these rights largely overlap, but it is not true that the sum of legality and fair trial entirely absorbs the right to a legally established judge (and jurisdiction). Imagine that the European area of freedom security and justice was fully harmonized, to the extent that a change of the prosecuting country would entail no change in the applicable substantive and procedural rules. The principle of legality here would no longer demand an effort by the lawmaker to previously identify the jurisdiction of the trial. The principle of fair trial would simply require that the choice of prosecuting country be made not at the expenses of the defence, but it would not command the lawmaker to set out clear pre-established criteria, so as to allow the defendants to foresee where they would be tried. Furthermore, one should not forget that the principle of fair trial is a very large concept, which subsumes many different rights; and that the protection of fair trial is always viewed (by the European Court of Human Rights just like by many national instances) *in globo*, which means that the violation of a defence prerogative is not *per se* an indication of a violation of the fair trial principle. But if European prosecutors are allowed to shop for a forum and find the court that better suits their interests, could this ever be compensated by other safeguards? In other words, the separate existence of the right to a previously established judge (and jurisdiction) prevents that the arbitrary choice of forum be weighed against other aspects of the right to a fair trial. Asserting the existence of the right to a natural jurisdiction allows to put limits to the balancing exercise between safeguards which is instead always possible within the principle of fair trial. Hence, it should be reasonable to conclude that all three rights (legally established judge/jurisdiction, legality and fair trial) are equally applicable in this context.

The identification of the rights involved in the choice of forum is no futile exercise. It carries specific implications. The right to a legally established judge and the principle of legality speak to the lawmaker and require from him an identification of the court (or, more realistically, of the criteria for making the choice), which takes into account all relevant interests (the need to ensure an efficient administration of justice, the need to ensure a uniform application of the law, the need to identify an impartial adjudicating forum, the need to ensure an effective defence). The protective scope of these two rights does not end there. The drafting of legal guidelines or criteria for identifying the national *forum* in advance would be insignificant if their concrete application was not susceptible of judicial control.

The principle of fair trial speaks to the lawmaker but also to the judge and the parties involved in the case—and particularly to the prosecutor. If the prosecutor is given some discretion in making the choice, this could never be at the detriment of the defence. The principle does not necessarily require that the choice of the prosecutor be open to judicial review, but it entails that remedies should be available if the choice made was abusive.

## 4 The Rules in the EPPO Proposal

Not long after the adoption of the Lisbon Treaty the debate began on the rules of the Regulation that would establish the EPPO. In 2013 the Commission finally tabled a proposal of Regulation.[27] After a long period of discussions and negotiations, the text was eventually approved in 2017.

The rules on jurisdiction in the EPPO proposal have undergone significant changes during the negotiations between Member States. A look at the changes can help better understand the issues at stake.

According to the initial proposal of the Commission, the rules on jurisdiction were provided for by Article 27.[28] The article stated that the decision on the trial venue should have been taken bearing in mind the proper administration of justice and taking into account some criteria:

a) the place where the offence, or in case of several offences, the majority of the offences was committed;
b) the place where the accused person has his/her habitual residence;
c) the place where the evidence is located;
d) the place where the direct victims have their habitual residence.

The initial proposal did not expressly clarify whether the list was exhaustive.[29] It also did not elucidate whether the criteria were listed in order of importance, hence the conclusion that all listed criteria should be considered of equivalent weight in the decision. To put it in other words, it was left to the discretion of the EPPO to ponder the relevant criteria in the case at hand and balance them in order to select the appropriate forum.

The provision closely mirrored a rule which had been proposed by the drafters of the *Corpus juris*[30] (in both the 2000 and 1997 version). That provision contained the same criteria of the Commission proposal without establishing any hierarchy

[27] Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, Brussel, 17 July 2013, COM(2013)534final.

[28] Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, Brussel, 17 July 2013, COM(2013)534final. See also point 30 of the preamble: "Article 86 of the Treaty requires the European Public Prosecutor's Office to exercise the functions of the prosecutor, which includes taking decisions on a suspect's indictment and the choice of jurisdiction. (…) The jurisdiction of trial should be chosen by the European Public Prosecutor on the basis of a set of transparent criteria."

[29] Wasmeier (2015), pp. 139–164 at 150 observing that "other criteria may be of high relevance, such as the nationality and/or civil servant status of concerned persons (in view of consistency with relevant EU instruments, the seat of the EU and/or national institution or body managing the relevant budget and/or other places of important economic impact." The Author still concludes that the list of criteria should be read exhaustively.

[30] Delmas-Marty (1997).

between them for choosing the forum.[31] The choice of the drafters of the project to avoid a pre-established hierarchy between criteria was "deliberate" and was made "in order to maintain maximum flexibility".[32] The *Corpus juris* choice was not free from criticism. But it must at least be pointed out that it was made in the context of the principles endorsed by the project, among which the principle of European territoriality[33] and, with it, the possibility to have a European judicial review on the choice of the forum.[34] Subsequent academic proposals favoured the view that the criteria for the choice of forum should be listed in order of importance while fully upholding the principle of European territoriality: this was for instance the case of Rule 64 of the *Model Rules for the Procedure of the EPPO*.[35]

In light of the above remarks, it is no surprise that the proposal of the Commission on the choice of forum was received with much disapproval. Scholars immediately criticized the provision for allowing the risk of forum shopping by prosecutors.[36] More significantly a similar criticism was voiced by the European Parliament,

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[31] Article 26 of the draft of the *corpus Juris* (in the version agreed in 2000 in Florence) reads "Each case is judged in the Member State which seems most appropriate in the interest of efficient administration of justice, any conflict of jurisdiction being settled according to the rules set out hereafter (Article 28). The principal criteria for the choice of jurisdiction are as follows: a) the State where the greater part of the evidence is found; b) the State of the residence or of nationality of the accused (or the principal persons accused); c) the State where the economic impact of the offence is the greatest." The text can be consulted in Delmas-Marty and Vervaele (2000), p. 207.

[32] Manacorda (2000), pp. 207, 327–346, at 345.

[33] See Delmas-Marty and Vervaele (2000), p. 207, Appendix II, 188, where the principle is explained in the following terms: "the territory of the Member States of the Union constitutes a single area, called the European judicial area. The competence *ratione loci* of the EPP and of national prosecutors to issue warrants and judgements pursuant to the *Corpus Juris* extends to the entire European judicial area. The EPP brings investigations across the territory of the Union (…) and judgements delivered by the courts and tribunals of the Member States of the Union are enforceable throughout the territory of the Union". The explanation adds: "The EPP chooses the national jurisdiction of judgement, under the supervision of the European Court of Justice"; "The necessary corollary of the European territoriality is the unconditional recognition of the rule of *ne bis in idem*". See also Delmas-Marty (2000), pp. 37 ff.

[34] Although this latter possibility was introduced only in the second version of the *Corpus juris* (version 2000, adopted in Florence in May 1999; see Delmas-Marty and Vervaele 2000, p. 171) and was absent in the initial 1997 draft.

[35] The project was guided by Professor Ligeti of the University of Luxembourg in the period February 2010–March 2012. Rule 64 reads: "1. The EPPO shall prosecute the case in the jurisdiction which is most appropriate, taking into consideration, in the following sequence: a) the Member State in which the greater part of the conduct occurred, b) the Member State of which the perpetrator(s) is (are) a national or resident, and c) the Member State in which the greater part of the relevant evidence is located. 2. If none of the criteria listed in subsection (1) apply, the case shall be prosecuted in the jurisdiction where the EPPO has its seat. 3. The accused and the aggrieved party may appeal against the EPPO's choice of forum to the European court."

[36] Lohse (2015), pp. 165–182 at 181; Manacorda (2015), pp. 255–272 at 261; Allegrezza (2013), p. 9. See also similar critical remarks (by K. Ligeti and H. Matt) in the *Conclusions of the conference organised by the Lithuanian Presidency in cooperation with the European Commission and the Academy of European Law* (Vilnius, 16–17 September), Council doc. 13863/13 (Brussels 20 September 2013).

which demanded the introduction of a binding hierarchy between the criteria and of subsequent judicial review.[37]

Some authors tried to address the shortcomings in the Commission's provision on the choice of the forum by emphasizing the importance of the proper administration of justice, which should have represented the overarching principle for the choice (embracing both the respect of the principle of legality and fair trial).[38] The reasoning seemed to overestimate the concept of a proper administration of justice. Without a clear predefined set of criteria, it is difficult to see how the proper administration of justice could ensure the foreseeability which the principle of the previously established judge and the general principle of legality require. In any case, the interpretation effort remains insubstantial if the Prosecutor's choice is not amenable to judicial review.[39]

## 5 The Rules in the Final Text (and the Rejection of the Principle of European Territoriality)

During the negotiations between Member States the Commission proposal underwent several changes. As mentioned, the choice of the forum was among the amended parts. The text finally approved contains a new set of norms. Article 26 of the approved Regulation spells out the rules on the choice of jurisdiction taking into account some of the voiced criticism.[40] According to the latter article, the investigation of the EPPO is to be conducted in the Member State where the focus of the criminal activity is. If the investigation concerns several connected offences, it should take place in the Member State where the bulk of the offences has been committed. Deviations from the above criterion are possible, when "duly justified" taking into account the following criteria, in order of priority:

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[37] European Parliament Resolution of 12 March 2014 on the proposal for a Council regulation on the establishment of the European Public Prosecutor's Office (P7_TA(2014)0234, point n. 5 (i), criticizing the Commission proposal for granting the EPPO "excessive discretion". See also the proposal of modification at point n. 4.

[38] Wasmeier (2015), pp. 139–164 at 152.

[39] This is in fact the proposal of Wasmeier (2015).

[40] The final text of Article 26 has been slightly modified when compared with a previous version of the negotiated draft dating back to June 2015 (Council doc. No. 9372/15, Brussels, 12 June 2015). Article 21 section 4 of that text read: "A case shall in principle be handled by a European Delegated Prosecutor from the Member State where the focus of the criminal activity is or, if several connected offences within the competences of the Office have been committed, the Member State where the bulk of the offences has been committed. A Permanent Chamber may only instruct a European Delegated Prosecutor of a different Member States to initiate an investigation where that Member State has jurisdiction for the case and where a deviation from the above mentioned principles is duly justified, taking into account the following criteria, in order of priority: (a) the place where the suspect or accused person has his/her habitual residence; (b) the nationality of the suspect or accused person; (c) the place where the main financial damage has occurred."

a) the place where the suspect or accused person has his/her habitual residence;
b) the nationality of the suspect or accused person;
c) the place where the main financial damage has occurred.

The decision on the choice of forum is taken by the competent Permanent Chambers on the basis of a report (and draft decision) of the handling European Delegated Prosecutor (Article 10 section 3 and 4).[41]

When comparing the final text with the initial Commission proposal several remarks can be made. What has happened exactly?

The changes are significant and they certainly go in the direction of a more precise identification of the national *forum* by the European law, as had been explicitly requested by the European Parliament.[42] The finally adopted rules take the *locus commissi delicti* as their point of departure. The place where the offence is committed becomes the main parameter. Further—subsidiary—criteria are then added in a clear order of priority. The adopted text gives signs of a greater concern for the foreseeability of the forum where the proceedings will take place.

The other supplementary criteria have also changed. First of all, next to the residence of the suspect the new text introduces the nationality of the suspect. Article 26 of the Regulation does away with the criterion of the location of the evidence, which would have raised large difficulties of application in all cases where the evidence was located in more than one country or where it would be difficult to precisely establish the geographic location of the evidence (e.g. computer data stored in the cloud).

There is no longer a reference to the place of residence of the direct victims. Such a provision was rightly considered to be illogical in the context of offences where the main victim is the Union.[43] The criterion has been replaced with the place where the greatest financial damage was suffered.

It shall also be observed that according to the Article 26 of the Regulation the choice of country is made at an earlier stage in the proceedings. Differently from the Commission proposal and from previous drafts, the rules on the selection of the national forum are now included in the part on the initiation of the investigation—and become thus fully applicable already at an early stage of the proceedings. Nonetheless this is not so much the sign of greater concern for the right to a legally established judge. It is above all the consequence of a restructuring (during the negotiations in the Council) of the design of the European public prosecutor office along a more traditional approach based on national sovereignty.

There is in fact a trade-off between the centralization of the proceedings at European level and the procedural moment when the national forum must be selected. If the European prosecutor is taken to act during the investigations in a

[41] See in particular para (a) and (e) of Article 10 section 4. See also Recital 87. According to Article 10, section 9, the European Prosecutor does not have a right to vote in the decision taken by the Permanent Chamber. The rationale seems to exclude any bias that the supervising European prosecutor might have with regard to having the case prosecuted (or not prosecuted) in his/her Member State.

[42] See *supra* note 38.

[43] Wasmeier (2015), pp. 139–164.

single legal area, where the divisions between Member States are overcome (principle of European territoriality), the early selection of a national forum becomes less important. Such a scenario in turn requires that substantive and procedural rules across Member States be more significantly harmonized[44] and, even more, that the judicial control for the investigation phase be taken at centralized European level (as was the case in the *Corpus juris* project and in the *EPPO Model rules*). In such a paradigm it is reasonable that a European public prosecutor finds a European court as its judicial counterpart, and not a national court. On the contrary, if there is no single legal area during the investigations, and the division of sovereignty between countries remains (with the subsequent differences in applicable rules), an early selection of the national forum becomes essential (and judicial control and authorizations of investigative activities can remain confined at national level).[45] The finally adopted rule is therefore the sign of this changed perspective.

The idea that the European public prosecutor during the investigations acts within a single common legal area without borders has been dismissed during the negotiations. The compromise—not surprisingly—goes in the direction of a greater protection of sovereign prerogatives. Even in the investigation phase the national boundaries remain alive, with the European prosecutors acting within precise territorial limits and having to resort to assistance to obtain/gather evidence in other countries. The approved Regulation draws in fact a distinction between the "handling European Delegated Prosecutor" and the "assisting European Delegated Prosecutor" (see Article 2, point 6). The former is responsible for the investigation and prosecution of a specific case. Each case is therefore assigned to a handling European Delegated Prosecutor acting within one country. The handling European Delegated Prosecutor can act only act within the boundaries of the national jurisdiction. For cross-border activities he must turn to the assisting European Delegated Prosecutor, who is the European colleague competent for the state where an act must be taken or an authorization must be sought (see Article 31).

In essence, the Regulation confirms the current state of fragmentation of cross-border investigations across countries but it has structured the office so that it has ramifications in all Member States: such a web-structure should allow the EPPO to act—as swiftly as possible—across jurisdictions and it should minimize the practical problems related to acting in different jurisdictions. What is certain is that a similar design protects the prerogatives of nation states with regard to the administration of criminal justice and it is easy to understand why it was the preferred choice of the large majority of the negotiating countries. Such an arrangement, however, increases the importance of the choice of the country of the handling European Delegated Prosecutor, because the applicable rules will depend upon this choice. The redrafting of the rules on the choice of forum is therefore the consequence of this changed layout.

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[44] Espina (2010), p. 118: "la mejor solución para este tipo de problemas pasa por intentar conseguir la mayor aproximación posible entre las legislaciones de los Estados partícipes de la Fiscalía Europea, así como por el establecimiento de reglas claras obligatorias a seguir por el Fiscal a la hora de tomar una decisión acerca de cual sea la jurisdicción competente para un determinado caso". On a similar vein, Zwiers (2011), pp. 406–407.

[45] As already noted by Bachmaier Winter (2015), p. 142.

It must be said that even the initial proposal of the Commission was very timid on the concept of European territoriality. The proposal, while instituting a single territorial legal area for the investigative phase (article 25),[46] had not fully endorsed the concept by bringing it to its natural consequences, and particularly by establishing a European form of judicial control/review for the phase.[47] The European public prosecutor was in fact considered to be a national authority (article 36)[48] and all judicial interventions during the investigations were in that proposal put in the hands of national courts (connected to the country where the investigative act was performed).[49] Furthermore, procedural rules were only very mildly harmonized. In light of these asymmetries the overall result of the Commission proposal could not be considered satisfactory: it gave the European Prosecutor the possibility to act in a single legal area but with different applicable rules (depending on the country where the investigations took place) and uneven form of judicial controls.[50] The risk of conflicting judicial views in such a setup was very high[51] and the defence was put at great disadvantage by having to defend herself during the investigations in front of the courts of different countries (as could have been the case if the arrest was carried out in one state, the search of a private place in another and the seizure of assets in a third one).[52]

The mild harmonization of substantive and procedural rules (or the lack thereof) and the decentralization (at national level) of judicial controls is not compatible

[46] Article 25 of the Commission proposal reads: "For the purpose of investigations and prosecutions conducted by the European Public Prosecutor's Office, the territory of the Union's Member States shall be considered a single legal area in which the European Public Prosecutor's Office may exercise its competence." The importance of the principle of territoriality in the Commission proposal is particularly emphasized by Mitsilegas (2016), pp. 11–33, at 20 ff.

[47] The reasons behind the Commission's choice are illustrated by Csonka (2015), pp. 249–254. In short they are: the intent to ensure uniformity with the trial phase, by placing the judicial controls of the preliminary phase at the same national level; the aim to emphasize the role of national courts as first protectors of citizens' liberties (la "*primauté du juge national comme protecteur des droits dans l'ordre juridique européen*"); the intent to avoid solutions too European oriented, in light of the 'yellow cards' issued to the proposal by several national Parliaments for breach of subsidiarity. Vervaele (2014b), pp. 45–46, argues that "a choice for judicial control at the European level is (…) not fully provided for by the Lisbon Treaties".

[48] See also Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, Brussel, 17 July 2013, COM(2013)534final, 7 and points 37 and 38 of the preamble.

[49] For critical remarks on this issue see Manacorda (2015), pp. 264 ff.; Pawlik and Klip (2015), p.187 note that the concept of territoriality remains unclear; Franssenand and Vandebroek (2014), p. 533. An interpretative attempt to establish a European form of judicial control on the choice of forum within the context of the Commission proposal has been made by Wasmeier (2015), pp. 155–156, grounded on the need to respect the general principles of legality, foreseeability and fair trial and on article 263 and 267 TFEU.

[50] According to Allegrezza (2013), p. 5, the proposal has two souls: one more audacious and more European, a second more conservative and inclined toward the protection of national prerogatives.

[51] Caianiello (2013), p. 121.

[52] Allegrezza (2013), p. 6.

with the logic of a single legal area. In this respect, if there is limited harmonization of rules and the judicial oversight/control on the investigations is kept at national level, it is a positive fact that the choice of forum is made as early as possible in the proceedings, because at least it makes sufficiently clear and foreseeable what the applicable rules for the investigative phase will be. Nonetheless the fact remains that the decision to do away with the principle of territoriality (and to refuse to endorse its corollaries of a greater harmonization of laws and of a centralized judicial review at European level) remains a missed opportunity.

## 6 The New Rules on the Transferring of Proceedings to Another State

As the selection of the national forum is moved to an earlier stage, it becomes important to have rules on the possibility to transfer proceedings to another country. The earlier the decision on the selection of the forum is taken, the more likely it is that developments in the investigations will require to transfer the case to another State: for instance, new evidence might come to light which shows that the crime was committed in a different member state; or new elements might be uncovered which require to depart from the *forum commissi delicti* criterion, etc. In this respect the rules on the reallocation of the case (now contained in section 5 of Article 26) are a natural consequence of the new approach. Those rules were already foreseen in the proposal of the Commission (article 18 section 5) with a slightly different rationale: they were meant to ensure the efficiency of the proceedings and they only concerned the internal competence of the prosecutor, without affecting the existence of a single legal area (article 25). The criteria for reallocation were consequently extremely flexible.

The finally adopted rules on reallocation entail instead a new identification of the forum, in the context of segmented and different national legal areas. In this respect they are also the sign of a more laborious procedure, where sovereignty demands its price in terms of more rigid rules. As was already noted, in a context of divided national sovereignties, a change of country has a significant impact on the investigations, as it requires a change in the underlying applicable rules with the risk of evidence being declared inadmissible[53] and the risk of ineffectiveness of the investigative strategy previously followed.[54]

[53] Article 37 of the Regulation states that: “Evidence presented by the prosecutors of the EPPO or the defendant to a court shall not be denied admission on the mere ground that the evidence was gathered in another Member State or in accordance with the law of another Member State”. Despite its strictly mandatory tone, it is to be doubted that such a provision can operate without derogations, particularly when the rights of defendants are at stake. The rules on the gathering of evidence are part of a national whole: when a piece of evidence is taken out of its national context and used elsewhere, the risks of gaps and harm to the rights of defence increases.

[54] Wasmeier (2015), pp. 139–164 at 149: “a switch to another jurisdiction and legal system may require a reorientation of the course of the investigation and/or of the steps taken”.

## 7 Problematic Issues: Understanding the "Focus" of the Criminal Activity

Although Article 26 of the Regulation attaches greater importance to the precise selection of the forum and establishes a clearer hierarchy between criteria, some problematic issues concerning the principle of foreseeability of the choice remain open.

First, the same way in which Article 26 expresses the criterion of the *locus commissi delicti* is questionable. What is the exact meaning of the expression "focus of the criminal activity" which appears in section 4 of Article 26? Does it refer to the commission of *actus reus* (or at least part of it) in the territory of the country? Or is it instead a less technical formula to include cases where the harm of the conduct was entirely or mostly felt in one country, while the *actus reus* took place in another country? And if it refers to the perpetration of the crime (i.e. the commission of the *actus reus*), does it allow to differentiate between the different acts that compose the *actus reus*, by arguing that only some specific acts characterize the focus of the prohibited conduct? For instance, could it be said that the place where a criminal fraud to the EU budget was devised is the focus of the criminal activity compared to the place where false declarations were submitted to the European institutions? Or viceversa?

The word 'focus' is not a technical legal term and it depends on how the interpreters understand this word. It would seem sensible to intend it as a synonym for "fact" or "conduct" so as to bring the formula in line with the way in which the traditional principle of the *locus commissi delicti* is expressed. Such interpretation can also be supported with the observation that the negative consequences (the harm) of the offence are not considered to be part of the offence by the same text, since the financial damage of the crime appears now as a separate—and subsidiary—criterion of jurisdiction. Even so not all problems would be solved. Doubts concerning the localization of the *actus reus*—and particularly whether it should be done with regard to a specific part of the conduct—could still arise.

The concept of *locus commissi delicti* is indeed very clear when looked at from a theoretical perspective, but in practice it often proves incapable of solving conflicts of jurisdictions. What is exactly the place of the conduct when the conduct is carried out across different countries? For instance, if a fraud is perpetrated by forging invoices in different countries where exactly does it take place? Or where is the crime perpetrated if the plan is organized in a different country from the one where the fraudulent action is perpetrated and gains obtained?

The current experience of conflicts of jurisdictions shows that often the overlap of jurisdiction is merely the effect of the simultaneous application in each country of the territoriality principle of jurisdiction.

The latin expression '*commissum delictum*' refers literally to the moment when the crime is perpetrated (*commissum*). This should mean—and is taken to mean in some countries—that the relevant place is the one where the crime was fully

perpetrated, i.e. where the crime came to full existence in all its constituent elements: the different place where acts of planning, preparation, or of intermediate execution, of the crime were carried out is irrelevant. But not all States follow this same approach when identifying the place of the crime. And often the discussion remains open even within the same country.[55]

Furthermore, many countries adopt extensive rules when it comes to apply their national criminal law.[56] For national jurisdiction to trigger it is often sufficient that a part of the offence has been committed in the territory of the country. A large number of countries adopt theories according to which an offence falls within the national jurisdiction if only one element of the crime has been committed in their territory. Such theories (sometimes called "ubiquity theories") are employed for instance in Belgium,[57] in the Netherlands,[58] in France,[59] in Italy.[60] Even in England the latest adopted statutes seem to favor this jurisdictional approach.[61]

In light of these interpretations the potential for overlap between jurisdictions remains quite high. This means that the criterion of the territoriality does not always allow to identify precisely one (and one only) country of jurisdiction. The possibility would remain that the public prosecution chooses—maybe at the detriment of

[55] See the English fluctuation between an "initiatory" approach and a "terminatory theory" in Massa (2011), pp. 103–121.

[56] Wasmeier (2015), pp. 139–164 at 143.

[57] In Belgium the *objectieve ubiquiteitsheorie* (objective ubiquity theory) is consistently upheld by both scholars and courts. The case-law of the Belgian Court of cassation is clear in stating that an offence is considered to be committed if one of its constituent elements took place on Belgian territory (see, for instance, Hof van Cassatie, 2de Kamer, 7 June 2011, *Tijdschrift voor Strafrecht*, 2012, 23). Even an aggravating circumstance would be considered sufficient: Cour de cassation, 2e ch., 24 June 2001, P.00.1627.F, *Revue de droit penal*, 2001, 721. At times the Court tries to avoid that these already broad criteria are interpreted even more extensively (see Dewulf 2012, pp. 69–72), but the fact remains that the ubiquity theory allows Belgian courts to extend national jurisdiction to many cases which had only a minimal connection with the country.

[58] The Criminal code does not clarify what is meant by crime committed in the Netherlands (article 2). But the case-law has clarified that the commission of one constituent element in the Netherlands would suffice ("*indien nast in ook buiten Nederland gelegen plaatsen kunnen gelden als plaats waar een strafbaar feit is gepleegd, is op grond van de hiervoor genoemde wetsbepaling [*scil. *Art. 2 Sr.] vervolging van de strafbare feit in Nederland mogelijk, ook ten aanzien van de van dat strafbare feit deel uitmakende gedragingen die buiten Nederland hebben plaatsgevonden*"): see Hoge Raad, 2 February 2010, 08/02915, *Nederlandse Jurisprudentie*, 2010, 89; Id., 27 October 1998, 108895, in *Nederlandse Jurisprudentie*, 1999, 221. See Jorg et al. (2012), p. 215. See also Massa (2011), p. 109.

[59] According to Article 113-1 of the French criminal code "*L'infraction est réputée commise sur le territoire de la République dès lors qu'un de ses faits constitutifs a eu lieu sur ce territoire*".

[60] Article 6 section 2 of the Italian criminal code states that the offence is considered to be committed in the territory of the State if the conduct (or the omission) took place in whole or in part on Italian territory or if the event which is the consequence of the conduct has taken place on the territory ("*quando l'azione o l'omissione, che lo costituisce, è ivi avvenuta in tutto o in parte, ovvero si è verificato l'evento che è la conseguenza dell'azione od omissione*").

[61] See Massa (2011), pp. 103–121 at 108.

the defence or simply to avoid excessive workload of some prosecutors[62]—the country of investigation and prosecution among the several countries where the offence has been perpetrated.

In this respect it would have been appropriate to require some more precision from the European legislature. The minimum step would have been to elucidate the concept of *locus commissi delicti* (the "focus" of the criminal activity) by making clear what perpetration means. The lawmaker should have particularly clarified whether the offence is to be located where it was planned, where it began, where it came into existence in all its constituent elements or where it ended (i.e. where the last bit of the conduct took place regardless of the fact that all constituent elements of the crime had already materialized).

It is here important to emphasize that an effort of greater precision would have required to go well beyond this minimum clarification. Greater precision in this matter can only be pursued by drafting rules which help clarify when and where an offence exactly takes place. This can be done only with reference to the specific constitutive elements of each offence. The right approach would have therefore been to introduce provisions detailing the precise moment of commission for each of the offences for which the EPPO is competent.[63] Such a clarification could have been done in the instrument concerning the material scope of the EPPO, although some lurking problems would have remained. It should be recalled that the substantive scope of the Prosecutor's competence is contained in the directive 2017/1731/EU on the fight against fraud to the Union's financial interests, which was approved in July 2017.[64] Many scholars have criticized the Commission's choice of the directive as the appropriate legal basis. They believe that a regulation would have been a more adequate choice than a directive.[65] The choice made entails in fact that the States retain a margin of flexibility in the implementation of the instrument, which might lead to the final adoption of partly divergent rules. In this context one could wonder whether it would have been appropriate to suggest the introduction in the directive of more specific rules on jurisdiction than what is currently foreseen by Article 11

[62] Reference to an even workload between European Prosecutors is made in several points of the preamble of the Regulation (see points 25, 27, 29), showing that it was a point of concern during the negotiations.

[63] For instance, the question is whether the crime of Article 3, section 2, (a), (i) of directive 2017/1371/EU is located where the fraud was devised, or where one false or incomplete document was submitted, or where the last false or incomplete document was submitted, or where the funds or assets of the Union misappropriated or wrongfully retained. Or to give another example, where is passive corruption (Article 4, section 2, (a) of directive 2013/1371/EU) exactly to be located? Where the public official requests the advantage—or accepts the promise of it—or where the advantage is received?

[64] Directive 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law [2017] OJ L198/29. The directive has also undergone a long period of negotiation from the moment of the first commission Proposal in 2012: see Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law (COM/2012/0363 final—2012/0193 (COD)), Brussels 11 July 2012.

[65] Venegoni (2012); Pawlik and Klip (2015), pp. 183–193.

of that directive.[66] One could in fact observe that, even if offence-related rules on jurisdiction had been agreed upon and established in the directive, there would be no guarantee of a uniform picture after the process of national implementations of the directive. Nonetheless the introduction of similar rules would have helped reduce the uncertainty over the concrete application of the territoriality principle of jurisdiction to each case. Furthermore, it is not to be expected that national substantive rules will diverge much after the implementation of the directive.

## 8 Other Problematic Issues (and the Inadequate System of Judicial Review)

Regardless of the way in which the formula *locus commissi delicti* can be more precisely interpreted, a further difficulty concerns the—very frequent—situation of joint (or connected) offences. Article 26 of the Regulation vaguely points to the country where the "bulk of the offences has been committed". Let alone that the notion of "connected offences" is not defined in the text and differs from country to country, the concept of "bulk of the offences" is even more puzzling: should the prosecutor count the number of offences connected (after having established when a connection is present), and then go to the country where the most offences are located? Or is such an arithmetical approach not necessary, with the prosecutor having the possibility to take the investigation (and the trial) to the country where the most significant (or serious) offences have been committed? Once again greater precision could have been achieved only by defining the concept of "connection" and maybe by establishing an order of priority (or severity) in the offences related to the protection of the financial interests of the Union.

Another problem with the current text on the EPPO concerns the possibility to depart from the main criterion of the *locus commissi delicti* and to resort to subsidiary criteria of jurisdiction. The law provides for a hierarchy but does not clarify the parameters in light of which a departure from the main criterion is warranted. The use of subsidiary criteria is merely connected to the formal parameter of a duly justification. It remains difficult to foresee when the prosecuting authorities could consider the departure to be duly justified. Even in case of judicial control of the decision, it is hard to see how a judge could properly control whether the given reason for departure is adequate or not.

[66] Article 11 reads: "1. Member States shall take the necessary measures to establish their jurisdiction over the criminal offences referred to in Title II where: (a) the offence is committed in whole or in part within their territory; or (b) the offender is one of their nationals. 2. For the case referred to in point (b) of paragraph 1, Member States shall take the necessary measures to ensure that their jurisdiction is not subordinated to the condition that the prosecution can only be initiated following a report made by the victim in the place where the offence was committed, or a denunciation from the State of the place where the offence was committed. 3. Member States shall ensure that their jurisdiction includes situations where an offence is committed by means of information and communication technology accessed from their territory."

On top of all there is no express provision in the regulation concerning the judicial review of the decision on the choice of forum. The only applicable rule on this matter is the general provision contained in Article 42, section 1.[67] It states very generally that procedural acts are subject to judicial review in front of the "competent" national court.[68] Article 42 allows a form of centralized (i.e. European) judicial control only for the prosecutorial decision to dismiss a case (Article 42, section 3).

The lack of adequate centralized judicial scrutiny of the choice is in fact the greatest problem of the adopted rules. As seen above, the current layout remains anchored at the division between national sovereignties. It rejects the idea of a single territorial area and it excludes all forms of judicial scrutiny at European level. The only judicial control can take place at national level. Let alone the concerns that this construction raises in terms of disparity of rules and rights which could apply during the investigative and/or trial stage, the problem is that a national court can hardly perform a proper control of the Prosecutor's choice of the forum.

A national court can simply establish whether the case can be prosecuted and tried in front of the courts of its State in light of the applicable national rules on jurisdiction to prescribe, but it would not be in a position to establish which country should/could prosecute with exclusion of the others.[69] Such a form of control is supranational in nature: it concerns not just the position of one country, but that of multiple countries. It is a decision which rests above the prerogatives of a single national sovereignty.[70] A similar judicial intervention could therefore be devolved only to a European body,[71] be it the European Court of Justice,[72] the General Court

[67] See also point n. 87 and 88 of the preamble.

[68] If read too literally, the text of the provision could even cast doubt as to whether the decision to choose a Member state as the country of investigation/prosecution falls thereunder. It seems sensible to answer the question in the affirmative. In any case it is most likely that States ensure a form of judicial control at the latest at the trial stage, when the adhered court has to determine whether it is competent to adjudicate on the case.

[69] The argument has been clearly illustrated by Wasmeier (2015), pp. 139–164.

[70] The specificity of this decision (in terms of its intrinsic supranational feature) is acknowledged also by Csonka (2015), pp. 249–254 at 253–254, who remains open to the introduction of a form of European judicial control on it.

[71] This is the approach taken by the European Parliament Resolution of 12 March 2014 on the proposal for a Council regulation on the establishment of the European Public Prosecutor's Office (P7_TA(2014)0234, point n. 5 (i) and more strongly by the European Parliament Resolution of 29 April 2015 on the proposal for a Council regulation on the establishment of the European Public Prosecutor's Office (P8_TA(2015)0173), point n. 24. In the last resolution the Parliament "affirms that the right to a judicial remedy should be upheld at all times in respect of the EPPO's activity", but it draws a difference between decisions taken by the EPPO and investigative or procedural measures. In the first case, the Parliament "believes (…) that any decision taken by the EPPO should be subject to judicial review before the competent court" and in particular it "stresses that the decisions taken by the Chambers, such as the choice of jurisdiction for prosecution, the dismissal or reallocation of a case or a transaction, should be subject to judicial review before the Union courts". On the contrary, judicial review for investigative or procedural measures could be deferred to national courts (see point n. 25 of the Resolution). On this point see also Parizot (2015), pp. 538–545.

[72] As explicitly suggested by Lohse (2015), pp. 165–182 at 181.

or a specialized chamber of the General Court established on the basis of Article 257 TFEU. In this respect it seemed that Article 263 TFEU (particularly section 1, 2 and 4) offered a suitable legal basis for such control.[73]

The importance of having a centralized judicial review at European level was even greater in light of the difficulty to establish clearer jurisdictional criteria. The greater the flexibility of the legal criteria employed in the choice of forum (and, therefore, the greater the discretion left to the EPPO in selecting the country of investigation/prosecution), the earlier a European Court should take a position on the competent jurisdiction, in order to immediately dispel all doubts on the possibility of an abusive and/or inadequate choice.

Nonetheless the negotiations showed from the beginning that it would have been impossible to reach consensus on the establishment of a centralized form of judicial review. It appears that concerns for the overload of work of European judicial institutions, coupled with the will not to further erode national sovereignties in the administration of criminal justice were the key reasons to turn down a judicial control exercised at European level.

While a national control on the choice of jurisdiction remains insufficient to protect the interests at stake behind the choice, it is at least advisable that the judicial decision/control by national authorities be carried out at the earliest possible stage.[74]

## 9 Final Remarks (Can the Defence Have a Say?)

When compared with the initial Commission proposal, the finally adopted text shows signs of improvement. It endorses the logic of the need for clear and hierarchical criteria in the selection of the competent forum by the EPPO. This moves in the direction of a greater foreseeability in the choice of forum. The move is to be welcomed but it is insufficient. The listed criteria cannot ensure a satisfying degree of foreseeability for the defence in a context where the disparity of applicable rules between countries remains so significant. Furthermore, there is nothing to prevent the risk of an abusive choice of forum by the EPPO. With such vague rules the EPPO could have the concrete possibility to choose the forum, and consequently the applicable substantive and procedural rules, at the detriment of the defence. In a common legal area with largely harmonized rules it could be acceptable that the law identify the competent forum the way Article 26 does. In the chosen setting, however, which still remains loyal to the traditional division of sovereignties during the investigation, the precision of the legal indication is crucial. The European lawmaker should have particularly clarified the concept of 'focus' of the criminal activity with regard to the different constituent elements of each crime. To minimize these shortcomings the EPPO should draft guidelines that clarify the concept of

[73] Negri (2015), pp. 54–66 at 59, 61 ff. For the opposite opinion, see Vervaele (2014b).

[74] On the concept of judicial control and on the different forms of it, see Allegrezza (2015), pp. 35–53.

focus of criminal activity, with regard to each of the offences for which the EPPO is competent. The guidelines should also help clarify the other subsidiary criteria involved in the choice and how they will be interpreted (e.g. when there will be a good reason to depart from the territoriality principle). Such guidelines would not be judicially binding but they could help increase the current level of foreseeability and address some of the shortcomings previously highlighted.

In the absence of 'sharper' criteria, it was critical to provide for compensating safeguards, starting with the establishment of a proper form of judicial intervention/control on the choice of forum.[75] The last word on the decision on the choice of forum should have been given to a European judicial body. A national court is not well positioned to make or control a choice which is supranational in nature. Out of all the decisions that the EPPOs (and, particularly, the Chamber) could take in their work, the one concerning the choice of the competent forum is the one which necessarily should be devoted to a European Court. In the current layout the only possibility that remains is that a judicial authority requests a preliminary ruling of the European Court of Justice on the interpretation of the Regulation (see Article 42, section 2), but this would only allow the Court in Luxembourg to clarify the interpretation of the rules of the Regulation. It certainly would not permit the European court to choose a country over another, particularly in the absence of sharper rules on the competent jurisdiction.

An aspect which the lawmaker seems to have entirely overlooked is the possibility to allow the defence to participate in the decision on the forum insofar as possible. As mentioned, the choice of a forum has significant implications for the defence and it was worth considering the possibility of involving the defence in the decision-making process (depending of course on the stages of the proceedings and on whether the defence was informed of the opening of a case). The possibilities of the defence depend now entirely on what the national law permits and it is unlikely that the national rules offer the defence much more than a chance to challenge the decision after it has been taken.

In this respect I would like to conclude these remarks with a final suggestion. The European Public prosecutor moves from the premises of a duty to protect financial interests which applies EU-wide. Everywhere in Europe the financial interests of the Union require to be protected.[76] This protection should have a minimum of uniformity in that it has to be effective and the CJEU is ready to enforce such duty.[77] If

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[75] The relationship between flexible rules on the choice of forum and judicial control (of a European Court) was already well highlighted by the drafters of the *Corpus juris*: "the flexibility makes it even more necessary to have the possibility of control. In the system retained, this would mean eventual *a posteriori* control by the ECJ. (…) But such a process would be cumbersome and slow. An *a priori* control by the pre-trial chamber [scil. European pre-trial chamber] would be preferable": Delmas-Marty (2000), p. 95.

[76] See Article 325 TFEU, particularly section 4 which demands the European institutions to ensure "effective and equivalent protection" of those interests.

[77] Vervaele (2014b), pp. 45–46, talking of 'quality standards'. For a recent example of the willingness of the CJEU to enforce such uniformity, see case C-105/14, 8 September 2015, *Taricco* (concerning an inadequate statute of limitations with regard to tax frauds).

we take this premise to its logical conclusion we could argue that the venue of the proceedings[78] is not a relevant issue from the perspective of the European prosecution. Wherever the case is taken, rules of criminal law and procedure should be in place in order to ensure that the Union's financial interests are duly protected. The choice of venue has instead a great impact on the position of the defendant. The right of defence can be affected not only with regard to the change of the legal setting, i.e. the applicable substantive and procedural rules, but also as to the practical implications of preparing a defence (the distance the defence needs to cover, the official language used, etc.). In light of this, would it be so awkward to give defendants a right to have the trial held in the MS of residence/nationality when they so request?

The current rules leave some interpretative margin to pursue the proposed course of action. As seen above, they allow the EPPO to depart from the rule that the investigation and the trial take place in the country where the focus of the criminal activity was located, and this by giving preference to the criteria of the place where the suspects have their residence or of the place of nationality of the suspects. The rules could therefore be interpreted as to require that the place of residence or nationality always be preferred whenever the suspect has requested to hold the trial in one of those countries.[79] In other words, the request of the suspect to hold the trial in the country of nationality or residence could be interpreted as a good and mandatory reason for departing from the criterion of the place of the focus of criminal activity.[80]

With the interests of the European Union uniformly protected across the EU, it does not seem unreasonable that the defence has a say. Giving the defence the possibility to exercise his rights properly and to take the case to the country where the effectiveness of the defence is mostly safeguarded: would this not be the sign of a truly European mutual trust?

[78] Meaning essentially the venue of the trial. But the same would be true with regard to the country where the strategic decisions of the investigations are taken (e.g. decision to prosecute, decision to dismiss, decision to out the suspect in pre-trial custody, etc., with exclusion of course of the investigative activities which inevitably need to be conducted where the evidence is).

[79] It could then be argued whether an exception to this interpretation could be allowed for the case of multiple suspects/defendants in the same case who have different nationality and/or residence and who all simultaneously request that the trial be held in their country of residence/nationality.

[80] It appears slightly more difficult to reach the same interpretation with regard to the phase of the investigation, given that the defence might not even be informed of the existence of an ongoing investigation at the moment of the choice of the forum. It could be argued that the defence ought to be informed beforehand of the choice during the investigations, in order to be given the chance to express her view and to express her preference for one country. Nevertheless the interpretation might collide with the principle of the secrecy of the investigations that is still upheld in the majority of countries and might at times even endanger the efficiency of investigations.

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# The Relationship Between Eurojust and the European Public Prosecutor's Office

**Jorge A. Espina Ramos**

> *It ought to be remembered that there is nothing more difficult to take in hand, more perilous to conduct, or more uncertain in its success, than to take the lead in the introduction of a new order of things (…). This coolness arises partly (…) from the incredulity of men, who do not readily believe in new things until they have had a long experience of them.*
>
> Machiavelli, *The Prince*

**Abstract** The EPPO will have to rely on other partners to carry out its tasks, and Eurojust will play a significant role, not only because of the wording of article 86 TFEU indicating the EPPO should be established "from Eurojust" but mainly because the everyday work of both partners will require a sound relationship at various levels (institutional, operational and administrative) in order to produce the desired efficient results. The EPPO and Eurojust cover different areas which are crucial to the fight against PIF crimes and have different powers and tools to carry out their respective mandates. This means their roles should not be defined as being in opposition, but rather as mutually complementary.

The opinions expressed are purely personal and do not necessarily reflect the opinions or positions of any of the bodies or institutions for which I have worked or currently work for (in particular, the Spanish General Prosecutor's Office or Eurojust).

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L. Bachmaier Winter (ed.), *The European Public Prosecutor's Office*,
Legal Studies in International, European and Comparative Criminal Law 1,
https://doi.org/10.1007/978-3-319-93916-2_5

# 1 Introduction

After a very interesting period of negotiation, we have now a European Prosecutor's Office (EPPO hereinafter) ready to start functioning in the near future. The time for discussions and debates focusing on whether we should have an EPPO at all are over, and now we have a new Regulation on the EPPO,[1] which has clarified many of the old questions and doubts, but at the same time has left others to be answered as the new body starts functioning.[2] This means the time has come to start dealing with certain details that previously were considered premature, when wider and more substantial issues had to be discussed and settled. And certainly among these details we cannot avoid dealing with something which has caused a lot of comment and discussion, but has not led to many concrete conclusions: the type of relationship that should be established between the newly set up EPPO and the already-existing Eurojust.[3]

Although it may sound odd, I must start by stating that, in my view, the issue of this relationship must be addressed without getting lost in the analysis of the expression contained in Article 86 TFEU, where it was stated that the EPPO would be established "from Eurojust".[4] In my opinion, this phrase is totally irrelevant from

[1] For the purposes of reference in this paper I will use the term EPPOPr to refer to the COM Proposal on EPPO published on 17 July 2013—COM (2013) 534 final—and EPPOReg will mean the final text adopted, Council Regulation (EU) 2017/1939 of 12 October, published on 31 October 2017. The reference to the new Eurojust Regulation will be *EJReg*, which refers to the Proposal drafted by the COM—COM (2013) 535 final—on which a General Approach was reached at the Council in February 2015—Interinstitutional file 2013/0256 (COD), although references to EPPO had been exccluded from such General Approach. Luckily, during the proofreading of this contribution, a final agreement was reached on 19th June 2018 and, pending formal adoption, translation and publication, a final text of EJReg has been agreed.

[2] The final profile does not necessarily mean that it has to be assessed as positive. In my personal opinion the type of structure that has been designed by the Council, based on the collegial model defended originally by France and Germany and accepted by many others afterwards, and the extremely cumbersome and complicated mechanisms to establish the competence of the EPPO, will hardly produce a body ready to provide the results intended by the Treaty, but I will not go any deeper into these considerations, as the topic I have been asked to comment upon is a very different one.

[3] The connection is so necessary and obvious that it has had an impact on the way the draft Regulations on EPPO and Eurojust are being dealt with, the latter having been left untouched with regard to the possible relationship and connection with EPPO until these issues could be set by *EPPOReg*. This twin-track approach was the only way to ensure consistency between both future Regulations. On the relationship between Eurojust as a horizontal coordination agency and the EPPO—according to the Draft Regulation of 2013—see Luchtman and Vervaele (2014), pp. 132–150, pp. 134 ff.

[4] On the much discussed meaning of the expression "from Eurojust" in Article 86 TFUE, see, Ligeti and Weyembergh (2015), pp. 53–77, p. 69.

the perspective of the necessary relationship between both bodies.[5] With or without it, it would have been necessary to establish such links and connections as the only way for the EPPO to properly function. I will come back to this at the end of this contribution.

In my opinion, the key word is complementarity: the EPPO has been created in order to be able to do precisely what Eurojust cannot do: to act directly and autonomously on EPPO-owned cases, based on the specific legal framework provided by Article 86 TFEU and the subsequent EPPOReg. Therefore, it requires a vertical structure, designed to deal operationally with investigations and prosecutions as owners of the cases, as opposed to the horizontal role played by Eurojust,[6] focused on coordination and improving cooperation.[7]

This could lead us to say that Eurojust will certainly be a key co-operator with the EPPO, although after taking into consideration EPPOReg, I would hesitate to consider Eurojust the *main* body cooperating with the EPPO, as I think national prosecuting authorities will now deserve this title, particularly considering the system of attribution of competence designed by the Council.

But an interesting development which became apparent at the beginning of negotiations, is that the much sought inclusion of all Member States in the endeavour of the EPPO (excluding only the UK, Ireland, and Denmark) was not going to be achieved, and that, as became clear at the end of the Slovak Presidency in 2016 when Sweden announced it would not take part in the EPPO, the way forward had to be through enhanced cooperation, as allowed by Article 86 TFEU.[8] Such a situation, leaving Member States divided into two groups with regard to the EPPO significantly increases the importance of the role Eurojust should play in terms of ensuring coordination, cooperation, and facilitation of the necessary international cooperation, both intra- and extra-EU.[9] It will also change fundamentally the practical arrangements of a relationship which in principle was supposed to take place between two bodies that would share a seat, sharing premises or being at least very close to each other. Now it will be have to be taken into account that relations between Eurojust and EPPO imply in practical terms having to deal with the distance between The Hague and Luxembourg.

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[5] On the relationship between the EPPO and Eurojust under Draft Regulation of 2013, see Deboyser (2015), pp. 79–97.

[6] In the same sense, Weyembergh et al. (2014), pp. 43–48, p. 44, accessible at http://www.europarl.europa.eu/RegData/etudes/STUD/2014/510000/IPOL_STU(2014)510000_EN.pdf.

[7] The fact that we routinely speak about Eurojust cases (in the sense they are registered files in the Eurojust CMS) should not lead us to the confusion of forgetting the actual cases are always owned by national investigating and prosecuting authorities. Eurojust is not an EU-wide jurisdiction but a body established to help national authorities with the coordination and cooperation needed at their cases. I will come back to this later on under point 4.

[8] The situation at the moment of writing these lines is an EPPO of 22 Member States (excluding only United Kingdom, Ireland, Denmark, Poland, Hungary and Sweden, once The Netherlands and Malta have finally expressed their intention to join the EPPO). On the enhanced cooperation in the context of the EPPO, see Di Francesco Maesa (2017), pp. 156–160.

[9] In the same sense, Venegoni (2017), pp. 193–196, p. 195.

In any case, what always appeared inevitable was the need to establish a sound and strong relationship between EPPO and Eurojust, which, getting now more deeply into the details of the concrete topic I will be addressing in this brief contribution, could be divided into different categories: institutional, operational, administrative and managerial.

## 2 Institutional Viewpoint

From the institutional perspective, we can point out several aspects where this relationship is already evident in the existing documents (EPPOPr, EPPOReg and EJReg). For instance, it is important to stress that Article 3(3) EPPOPr included an obligation for the EPPO to cooperate with Eurojust (which, surprisingly did not have a correlative provision in the General Approach of EJReg, although this has been finally corrected in the final text of EJReg under article 4.(1)) as well as to rely on Eurojust administrative support (which is an obligation properly mirrored under Article 41(6) EJReg, establishing Eurojust shall support the functioning of EPPO since the latter “may rely on the support and resources of the administration of Eurojust”).[10]

In general terms, EPPOReg indicates a close relationship should be established between Eurojust and EPPO, as stems from the fact the latter should be established from the former (as mentioned in Article 86 TFEU, and recital 10 of EPPOReg). However, it is not clear—as we will mention later on—if this is a meaningful expression at all. According to the EPPOReg, a very unclear scenario is presented, using the term “close cooperation based on mutual cooperation” when referring to Eurojust (Article 100), “close cooperation” when referring to Europol and OLAF (Articles 101 and 102),[11] and “cooperative relationship” when mentioning a wide variety of entities such as the Commission, EU agencies and bodies, national authorities from non-participating countries, third countries and international organisations (Articles 99 and 103). It is not clear at all if this entails any sort of internal hierarchy with regard to the privileged relationships with EPPO.

With regard to the selection process of the European Chief Prosecutor, a number of different possible links between the EPPO and Eurojust have also been explored. While Article 8(3) EPPOPr included the President of Eurojust as an observer in the panel selecting the Prosecutor, Article 14(3) EPPOReg opts for including former National Members in the selection panel.[12]

[10] See Deboyser (2015), pp. 79–97.

[11] On the inter-institutional relationship of Eurojust, EPPO and OLAF, see Klement (2017), pp. 196 ff.; Covolo (2012), p. 86; Marletta (2016), p. 144; Inghelram (2011), p. 278.

[12] Quite interestingly, some old versions of the text foresaw a role for representatives of the Consultative Forum of Prosecutors General, thus including a role for national prosecution services, which would be very interesting. As mentioned, this possibility has disappeared from the final version of the Regulation.

Logically, the texts include a series of situations where the European Chief Prosecutor interacts with Eurojust, including a right to participate (without voting rights) in certain meetings of the Eurojust College and Executive Board (Articles 12(3) and 16(7) EJReg), and the need to hold regular meetings between the European Chief Prosecutor and the President of Eurojust (Article 41(1) EJReg which has been mirrored by Article 100(1) of EPPOReg, even though surprisingly it had been omitted by EPPOPr).

Finally, to conclude with the institutional perspective, I think it is worth mentioning that, as part of the necessary relationship that has to be established, it would be worth exploring the possibility of clearly defining a role for Eurojust as a liason to national prosecution services. From the perspective of complementarity, this would be an adequate connection with the EPPO (which will have to maintain continuous relations with these national services—even more so under the model being negotiated in the Council where connections with the national level of Member States are constant). This role of liason should cover not only single acts (as for example under Article 105(2) EPPOReg when allowing the appointment of persons to act as points of contact within the EPPO for non-participating Member States[13]) but could also encompass a more general approach, perhaps through the Consultative Forum of Prosecutors General.[14]

## 3 Practical Aspects

Another important area where the relationship between both actors will need to be properly established is operations, where Articles 57 EPPOPr and 41 EJReg have gone into more detail, reflected also in Article 100 EPPOReg. In general, it is acknowledged the need for a special relationship which should develop through the existence of a "close cooperation based on mutual cooperation" and the development of operational, administrative, and managerial links.

[13] It is interesting to see that the European Parliament has suggested that in those non-participating Member States a specifically appointed National Correspondent for the EPPO should be included in the existing Eurojust National Coordination Systems (ENCS). This would help fulfil the possibility broached by Article 105(3) while at the same time ensuring the best possible coordination with Eurojust.

[14] The Consultative Forum of Prosecutor's General was established in Madrid in 2010 during the Spanish Presidency of the Council of the EU, and brings together all chief Prosecutors General and Directors of the public prosecution services of the European Union's Member States. Its purpose is to reinforce the judicial dimension of the EU strategy for internal security; to share experiences and best practices primarily in the areas of serious and organised crime; in the use of procedures and investigation techniques, including rules on evidence; and in the use of judicial cooperation tools and instruments; as well as to contribute to legislative initiatives taken or to be taken at the EU level. It meets in The Hague at least once a year, convened by the General Prosecutors of the corresponding EU Presidencies, with the logistical support of Eurojust.

### 3.1 Administrative and Managerial Links

These particular links can be found, among others, in Article 57(6) EPPOPr and 41(6) EJReg. Both this article and article 100(4) EPPOReg include a specific mention to the possibility (not the obligation) of the EPPO to "rely[ing] on the support and resources of the administration of Eurojust" and of Eurojust "provid[ing] services of common interest to the EPPO". The EPPOPr contemplated such aspects as budget preparation, staff recruitment and career management, security, IT, financial management, accounting, and auditing. It was also envisaged by Article 52 EPPOPr that the Eurojust accounting officer would also be the EPPO's. Most of these detailed provisions have disappeared from the final text of the EPPOReg, and perhaps for good reasons.

There is no doubt that these are aspects where clear links must be established, but at the same time we shouldn't forget a crucial point: having Eurojust provide this type of support to the EPPO may be necessary, but at the same time it may pose a threat to the independence of the EPPO.[15] This is probably the reason behind one of the most important developments during the negotiations in 2016: the independence of the EPPO in budgetary terms has been reinforced (Articles 90 to 95 EPPOReg) and particularly by establishing the position of the EPPO's Administrative Director (Articles 18 and 19 EPPOReg).

Independence is a crucial feature of the EPPO and it has been acknowledged regardless of the model being defended (EPPOPr or Collegial model).[16] And it is not very difficult to imagine situations where this independence may be in danger if for such key questions as the elaboration of the budget, recruitment and management of careers, etc., the EPPO relied on an already existing structure such as Eurojust, with expertise in these fields but also potentially with a tendency to consider the EPPO's needs as subordinate to those of its own.[17] This is why I believe the new approach implanted in the final text of the Regulation is to be welcomed.

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[15] This concern was already voiced in the conclusions of one of the workshops at the Eurojust Seminar on the new draft Regulation on Eurojust: "An improvement in the fight against cross-border crime?", held in The Hague on 14–15 October 2013. One conclusion read "The participants felt that the current text (in particular Articles 52(1) and 57(6) of the EPPO Proposal) with its strong budgetary links might jeopardize the independence of the EPPO (…). Therefore, they suggested that the introduction of a separate budget and a separate accounting officer for the EPPO might be considered".

[16] See Martínez Santos, in this volume. See also Symeonidou Kastanidou (2015), pp. 255–278.

[17] It would be a mistake to consider the relationship in terms of subordination of one body to the other. As explained above, both must coexist and both have a very different nature and scope. Subordination has never been considered when contemplating the relationship between Eurojust and national prosecuting authorities, and I do not see why it should be different in the case of the EPPO.

## *3.2 Operational Links*

By far this is the aspect where the most particular care should be used in order to establish a structure of relations which actually helps the EPPO and extracts all the added value that Eurojust could have given its expertise and experience. Articles 41 *EJReg* and 100 EPPOReg (and Article 57 EPPOPr before) have paid attention to this issue and the basic principles can be summarised as follows.

The EPPO may (it is important the fact that it is a mere possibility to be assessed by EPPO and not an obligation):

- share information with Eurojust concerning EPPO's investigations in cross-border cases (the reference made by Article 57(2)(a) EPPOPr to the existence of elements falling outside the material or territorial competence of the EPPO has now disappeared).
- invite Eurojust to provide support for the transmission and execution of cooperation instruments and requests addressed to non-participating Member States and third countries.

It may be worth noting that, in addition to the one just mentioned in the first bullet point above, some provisions contained in EPPOPr have now disappeared such as the possibility:

- Of sharing information with Eurojust concerning prosecution, dismissal or transactions decisions, when Eurojust has been previously involved in the case and its competences may be affected (Article 57(2)(e) EPPOPr).
- Of requesting Eurojust or National Members (if the case falls beyond the material or territorial competence of the EPPO)
  - participate in coordination of specific acts of investigation falling (Article 57(2)(b) EPPOPr), or
  - use the powers attributed to Eurojust (or National Members) by the EU or national legislation (Article 57(2)(d) EPPOPr).

In other words, it seems clear to me that the intention of the legislator has been to establish a situation whereby the EPPO is, as regards Eurojust, at least in the same position that any national prosecuting authority would be under the ordinary legal framework regulating the mission, powers and functions of Eurojust. This is a principle, however, that was not clearly established in an autonomous way in the EPPOPr, although we can find something very much along these lines in the EJReg where Article 41(2) states that Eurojust will deal with the EPPO's requests "as if they had been received from a national authority competent for judicial cooperation".[18]

The EPPOReg has indeed evolved towards a clearer situation in this regard, as it contains a specific Recital (69) indicating the need for all national authorities and

[18] This is line with the evolution of the text during negotiations, as already mentioned above.

bodies of the EU to "actively support the investigations and prosecutions of the EPPO, as well as cooperate with it"; while a different one (102) mentions that the EPPO and Eurojust "should become partners and cooperate on operational matters according to their respective mandates". This is clearly a very positive approach from the legislative viewpoint.[19]

However, the national element appears—perhaps unnecessarily—in this Recital 102 EPPOReg when it indicates the EPPO's requests should be addressed to the National Member of the State where the handling European Delegated Prosecutor (EDP hereinafter) is dealing with the case.[20] Since there will be many cases where the assistance sought from Eurojust will concern a different national desk, this provision limits unnecessarily the possibility of the EPPO addressing Eurojust in a more general way, not necessarily linked to the national desk of the EDP, and it is a lost opportunity to emphasize the European dimension of the EPPO as such, as well as the added value of the European perspective Eurojust can bring.

The EPPO will therefore be not only a partner, but a privileged partner,[21] as can be easily seen by the possibility of having indirect access to Eurojust's CMS on a hit/no-hit basis, so that every match produced between data introduced by the EPPO in Eurojust's CMS will have to be communicated to Eurojust, the EPPO, and the MS which provided the data to Eurojust.[22] This access is also regulated by EJReg in article 41(5) from the perspective of Eurojust's access to the EPPO CMS.

A few words can be added about a concrete topic on which the EPPOPr envisaged a certain role for Eurojust, but on which the final EPPOReg has decided to remain silent: Ancillary competence. Much has been written about this,[23] but as regards the very specific aspects that concern us now, Article 57(2)(c) EPPOPr (in view of the provisions of Article 13) envisaged a system whereby Eurojust was to be associated to the EPPO in order to facilitate a decision by the national judicial authority taking the final decision on ancillary competence. This role of Eurojust has been totally removed from EPPOReg.

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[19] It is worth noting the EU legislator is more and more inclined to use recitals to define solutions that should clearly be part of the provisions. This is visible in the high number of Recitals of the latest instruments when compared with their numbers in early instruments. In the case of the EPPOReg the number of Recitals reaches 121 (while there are only 120 articles).

[20] The situation becomes more complicated when the request does not concern any Member State but a third country, where no rules are given as to whom the EPPO should address.

[21] Partnership does not mean absorption, as can be seen by the latest developments in the EPPOReg where it is envisaged that the EPPO will develop its own CMS rather than using Eurojust's. Adding this to the already mentioned establishment of an EPPO Administrative Director shows clearly how ties with Eurojust have not been reinforced by the Council when compared with the original idea of the Commission in the EPPOPr.

[22] I will not comment on issues connected to exchange of information between both bodies or access to the Eurojust Case Management System. On the CMS and the exchange of information see extensively Pérez Enciso, in this volume. I will only mention here the inaccuracy in Article 100(3) EPPOReg when indicating matches in CMS should be communicated also to "the Member State of the European Union which provided the data to Eurojust" as data are not provided by Member States but by judicial authorities. I assume this will be the correct interpretation to be made in practice.

[23] See, for example, Nieto Martín and Muñoz Morales (2015), pp. 120–155.

And there may be a good reason for that, because the question being discussed here would be whether the competence should be in the hands of the EPPO (if there is a inextricable link and preponderance of the PIF element) or if it should move to the national authority (as for a single case including PIF if there is the inextricability required, or only including the connected elements if that is not the case).[24] But in any case it is a debate where, given its nature, the added value of Eurojust's expertise might not be particularly important, as if there is a related offence or not is an issue to be assessed according to national rules. In addition to all this, it will be a national authority that has the final decision on the matter,[25] without prejudice of the possibility of having the CJEU delivering a preliminary ruling (Article 42(2)(c) EPPOReg).

Finally, there is another interesting situation, which is reflected in Article 25(2) EPPOReg, where the intervention of Eurojust could be welcome. This is the scenario of defining the exercise of competence of the EPPO, when the criminal offence caused or is likely to cause damage to the Union's financial interests of less than 10,000 euros; one of the following conditions must occur for the EPPO being able to exercise its competence:

a) The case has repercussions at Union level requiring the EPPO to carry out an investigation, or
b) Officials or other EU servants or members of its institutions are suspects.

If these conditions are met, the Regulation expressly envisages that the EPPO shall consult, in order to establish whether the criteria defined in the items above are met, competent national authorities or Union bodies.[26] The provision does not refer to Eurojust as such but it is clear it cannot be excluded either, in particular when it comes to determining whether a given case has "repercussions at Union level" because this fact can only be established by resorting to a general vantage point above the ordinary perception that national authorities can have of certain cases. Therefore, the role to be played by Eurojust is very clear, at least as regards the condition set under a) above.[27]

[24] See also Vilas Álvarez, in this volume.

[25] On the authority issuing the final decision, Article 25(6) EPPOReg (following the lines of EPPOPr) opts for "the national authorities competent to decide on the attribution of competences concerning prosecution at national level". Therefore, the position of the European Parliament has not been followed: Resolution of the European Parliament of 29 April 2015 (P8_TA-PROV (2015)0173) concluded that "in case of disagreement between the EPPO and the national prosecution authorities over the exercise of the competence, the EPPO should decide, at central level, who will investigate and prosecute" and that this determination of competence "should always be subject to judicial review."

[26] If these conditions are not met, then EPPO is not competent and Eurojust would play its normal role.

[27] Certainly, it is much harder to find the added value that Eurojust (or any other national authority or Union body) could have in helping the EPPO determine when we are facing cases involving EU officials or servants or members of its institutions, since this is a very factual situation which in principle should be easily established.

## 4 Other Possible Ways to Establish Links

As is not difficult to imagine, the areas where relations between both bodies can be established are more numerous than the ones mentioned above. One of the reasons to justify the absence of reference to these possible areas may be the fact that such details are not for an instrument such as a Regulation to address and will have to be left to future agreements.[28]

However, some proposals can be made with regard to certain aspects that could be worth mentioning. To begin with, the role of Eurojust as facilitator between the EPPO and non-participating Member States must be included and properly emphasized. For reasons already analysed (apparently, for political or diplomatic reasons it didn't seem correct for the Commission to assume the EPPO would be built on enhanced cooperation—even though this is a possibility expressly indicated in the Treaty and I would dare to say that it is precisely this provision that made the EPPO a feasible option), the EPPOPr was based on an all-inclusive EPPO. Now that it is clear this will not be the case (not only because of the UK, Denmark, and Ireland, but also because the EPPOReg has been achieved through enhanced cooperation and therefore only encompasses 22 Member States[29]) the role of Eurojust in order to bring together the EPPO and non-EPPO Member States has become much more prominent, since the need for cooperation, coordination, facilitation and support will continue to exist as regards transnational PIF cases concerning this second group of Member States.

As the first consequence of the above, the final wording of Article 3 *EJReg* has correctly evolved from the original exclusion of the competence of Eurojust for PIF crimes (which was very misleading) to an indication of the details to be taken into account given the fact that not all Member States will participate in the EPPO, thus excluding the role of Eurojust only for those cases developing entirely within the EPPO participating Member States. The previous statement indicating the competence of Eurojust "shall not include the crimes for which the EPPO is competent" has correctly been modified during the course of negotiations,[30] as it made no sense to exclude the competence of Eurojust, not only because of the enhanced cooperation scenario, but primarily because it would reflect a mistaken understanding of the type of impact that the competence of EPPO and Eurojust have on a given case (investigating and prosecuting, in the case of EPPO, and providing support and coordination as far as Eurojust is concerned). Although this wording has been revised and corrected in the final text of EJReg. I believe a problematic understanding of what the competence of Eurojust and the EPPO really mean still remains. It is important to exclude any indications that might give the wrong impression that both bodies carry out similar tasks, as if they were rivalling with each other, when

[28] Such arrangements are mentioned—for a number of purposes—on Recital 100 and Articles 20, 98, 99, 104, 105, 106, 107 and 110 *EPPOReg*.

[29] See footnote No. 8.

[30] This seem to be the approach followed during the negotiations—ongoing at the moment of writing these lines.

in my view it is very clear that it is complementarity, as I have explained before, the key word in this relationship.

Also, there are no convincing reasons to exclude the use of instruments where Eurojust has shown its added value, like the Joint Investigation Teams (JITs), which could theoretically be created involving the EPPO, non-participating Member States, and even third countries' authorities.[31] The current wording of Article 4(1)(e) *EJReg* ("Eurojust shall provide operational, technical and financial support (…), including joint investigation teams") could be enough to offer the necessary legal framework for this, but it would need a slight rewording since this task is referred to "Member States cross-border operations and investigations". A reference to the EPPO would have been convenient, although perhaps the generic mention under article 4(1)(e) EJReg to cooperation with Union Agencies, bodies and networks might provide sufficient legal basis in case this option wants to be explored in the future.

And following a logical path of the interests and situations where a close relationship could be of use for both bodies, we must mention the possibility of a conflict of jurisdictions, which would be excluded only as long as participating Member States are involved, but would continue to loom over the horizon whenever the jurisdiction of a non-participating Member State is involved. The currently existing mechanisms are not devised for a body such as the EPPO, but one could imagine Recommendations from Eurojust[32] could also be addressed to this Union body, or to national authorities in cases where the conflict arises between them and the EPPO.

But even in those cases where only Member States participating in EPPO are involved, the role of Eurojust can be crucial in terms of bringing together and possibly coordinating the EPPO and national prosecuting authorities. As I mentioned above, the EPPOReg has in my view shifted the role of being a privileged partner of the EPPO from Eurojust to the national prosecution authorities (who will be taking decisions as regards the exercise of competence, ancillary competence, etc.), but this should not lead to the incorrect impression that Eurojust's role disappears. Quite the opposite: this situation opens new areas where the facilitation role of Eurojust can have added value.

Member States authorities may be interested in getting a wider view on a certain case before deciding on issues such as the exercise of competence or the existing links defining a possible ancillary competence case. And, in my view, it makes much more sense if it is Eurojust and not the EPPO that provides assistance in this matter, given that the latter may have a clear bias with regard to how the case can be presented.

Along the same lines just mentioned, and given the tighter relationship that the EPPO will have to build with national prosecuting authorities, while also keeping in mind the possibility of double-hatted European Delegated Prosecutors (EDPs)

[31] The EPPO is by definition one step beyond JITs (and ideally would render them unnecessary) but only as far as participating Member States are concerned, because we cannot exclude the possibility of prosecution where parallel investigations may be needed in non-participating Member States or third countries, and which would require the use of such mechanisms, until a final decision on the jurisdiction is made when the state of play of the case so allows.

[32] According to Articles 6 and 7 of the Eurojust Decision or Articles 4 and 5 of *EJReg*.

provided for by Article 13(3) EPPOReg, it may be worth exploring the possibilities of including them in the Eurojust National Coordination System (ENCS).[33] This coordination system is currently described in the 2009 Decision (Article 12) and has been kept in Article 20 EJReg. As a matter of fact, the legal basis for such inclusion of EDPs in the ENCS could be found Article 20(2) EJReg stating that they should ensure coordination of the work carried out by any other relevant judicial authority. For the reasons stated above, it wouldn't be very difficult to understand that EDPs can be included in this category, in particular because the current text does not specifically mention a "national" judicial authority and therefore a "European" judicial authority such as the EDP could be deemed to be included. Ideally, however, point 5 of Article 20, where the facilitation to be offered by ENCS members is specified, should include a mention of the EPPO.

It would also be desirable, if only to complement the above, and despite the fact that the issue has not been regulated in detail so far, to foresee the inclusion of the EPPO in ordinary mechanisms regularly used by Eurojust, such as Coordination Meetings (currently only mentioned in Article 4(3)(b) EJReg) or Coordination Centres.

Finally, another area which has been totally neglected in the relevant texts is the possibility of attributing a certain role to Eurojust as regards the follow up of the final (conviction) decisions derived from an EPPO case. In order to justify this role we must keep in mind that the scope the Treaty envisages for the EPPO includes "investigating, prosecuting and bringing to judgment" (Article 86(2) TFEU) and therefore any follow up after the conviction is final would be out of the legal umbrella provided by the Treaty. However, in view of the current scenario where mutual recognition instruments include post-conviction areas, it is easy to think of opportunities to use them in cases brought to justice by the EPPO where, paradoxically, the EPPO as such would not be legally able to intervene, while national prosecuting authorities may lack the wider perspective which might be required for such a European case. Of course, this does not mean Eurojust would be able to substitute the EPPO or to be considered as a prosecuting authority in itself, but its services could be used in order to follow up on the way in which the execution of cases is being carried out whenever legal instruments of cooperation are used. This could be a completely new function for Eurojust and, therefore, should have been included in the text of the EJReg.

## 5 Final Remarks

Article 86 TFEU, when regulating the possibility of establishing an EPPO, has closed some debates and has settled some issues. On the other hand, it has left a considerable number of other questions open to discussion. But it is interesting to note that the expression "from Eurojust" belongs to this second group rather than to the first, because in practice it has not been followed by the Commission or the

[33] This would be a complement to the use of ENCS that non-participating Member States could make, if the proposal of the European Parliament mentioned on footnote No. 9 is accepted.

Council. None of the texts produced (or being produced) establish an EPPO from Eurojust, but instead opt to create it and then rely on a special relationship with Eurojust for institutional, bureaucratic and operational issues.[34]

My opinion is that in any case not much would have changed even if these words had not been in Article 86: Eurojust would still be immensely important to the EPPO.

And the reason why Eurojust is pivotal comes from the options taken by the Treaty makers, not just by including the "from Eurojust" words, but by designing a system which continues to rely on national jurisdictions for the final adjudication of cases. This defines a model in which transnational investigations and prosecutions must be in accordance with certain rules (some would be common and established by the Regulation, others would be the national ones), keeping in mind that the cases will ultimately be brought before the competent courts in the Member States. This is precisely why the experience and expertise Eurojust has been accumulating during all these years cannot be neglected. Just like no one would think of an EPPO not taking advantage of the accumulated experience of OLAF, equally unthinkable would be a system where Eurojust did not play a crucial role, even more given the particular structures EPPOReg has established, and the situation of having a group of Member States outside the EPPO.

The importance of a sound institutional relationship between Eurojust and the EPPO is clear and could be visualised in an ample variety of sectors and moments, as it has been mentioned above, and is based on the undeniable fact that Articles 85 and 86 regulate different situations, based on different needs, and refer to bodies of different nature and capable of different responses. I have always been of the opinion that "from Eurojust" may not have a clear unequivocal meaning, and certainly does not mean *within* Eurojust, but it is equally clear to me that it obviously cannot mean either *without* Eurojust.

To be fair, we must acknowledge that neither the EPPOReg (not even the previous EPPOPr) nor the EJReg have opted for truly and meaningfully building an EPPO "from Eurojust", as the Treaty seemed to demand. Each text has followed a different model, but certainly not being at all limited by this mandate of setting it up from Eurojust. But I must add that, despite the criticisms that could be made from a strictly literal interpretation of the Treaty, this is the most reasonable thing to do, taking into account the huge differences between the EPPO and Eurojust in terms of functions, mission, nature, etc. This is probably why both documents (EPPOReg and EJReg) have simply ended up referring to a "close relationship" which will clearly be needed but which will equally need to be defined and clarified in order to make it something meaningful.

Another point I would like to stress is that, during the negotiations leading to the EPPOReg, I have had the impression that the overall approach was somewhat misguided. Instead of focusing on what the needs of the EPPO will be, what the best

[34] It has also been pointed out repeatedly in different fora that the drafters of the Treaty were purposefully ambiguous when choosing this wording. If calculated ambiguity was the aim of the authors, they certainly deserve to be praised for their skill.

structure and model could be, what the procedural rules should look like, and then assess what changes, if any, were required at national level in order to make it possible, much of what has been discussed seemed to derive from the particular position of Member States who had a tendency to accept those parts of the text which fit into their existing procedural structures (and, perhaps also in their own mindset), and reject any provisions that would require them to introduce reforms into their national systems.[35]

And this situation is also applicable to the relationship that must be defined between the EPPO and other existing bodies and agencies (Eurojust among them). John Rawls used in his *A Theory of Justice* a concept that may be applied here, *mutatis mutandis*: the so-called "veil of ignorance": when individuals discuss and decide about the best model to organise a fair and just society, it is crucial to put them behind this "veil of ignorance", so that their decisions are rationally driven and not influenced or biased by the possible gains they could obtain for their particular position.

Similarly—and I am ready to accept that this is a generalisation which could be deemed as unfair by those many who have been discussing and working on the EPPO with impartiality—I have the impression that the various actors involved have been at times thinking more on how they would be influenced or affected by the establishment of the EPPO, and how they could reinforce their status or competence, rather than focusing more on the EPPO itself.

In my opinion, only by approaching this topic from this generous perspective we will manage to define in practice a profile for the EPPO which is apt to provide the EU with the tools to fight in an efficient and coherent manner a type of crime that so clearly affects our shared common interest: the protection of the financial interests of the Union. The text is ready. Now comes the crucial period of putting it into practice.

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[35] This was pointed out by the General Prosecutor of Spain, Eduardo Torres-Dulce, during his intervention at the VII Meeting of the Network of Public Prosecutors or Equivalent Institutions at the Supreme Judicial Courts of the Member States, which took place in Trier, Germany on 24th October 2014. He stressed that "some*times one has the impression that some Member States are busier trying to oppose any provision not exactly matching their national procedural systems than trying to define and devise structures and procedures which would make the EPPO an efficient substitute of the currently existing systems*".

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# The Decision to Drop the Case: *Res Iudicata* or Transfer of Competence?

**Michele Caianiello**

**Abstract** The aim of this article is to examine one of the most crucial choices the EPPO is required to adopt, which is the decision to drop a case, either deferring it to national jurisdiction, or to OLAF, or closing the case. This decision is of utmost importance and is closely related to the powers of the EPPO, as a decision not to prosecute, which constitutes the main task of the EPPO, might have an impact at the national level.

In this context, the Regulation seeks to pursue two goals. On the one hand, the EPPO should enjoy a margin of discretion when deciding whether to drop a case. However, the margin of discretion the EPPO is granted is not unlimited. On the contrary, it needs to be subject to scrutiny, in order to avoid the risk of arbitrary decisions, or decisions based purely on the principle of opportunity. The dismissal proceedings established by the EPPO Regulation represents an acceptable compromise between different legal traditions, the ones inspired by the strict legality principle, such as Italy, Portugal and Germany, and the ones inspired by the principle of opportunity, such as, for example, France or England and Wales. It seems also in line with the emerging principles of international criminal law, where the international institution shares the efforts and tasks of prosecuting crimes with national agencies, and where the international or supranational institution should to deal only with the most serious criminal cases.

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L. Bachmaier Winter (ed.), *The European Public Prosecutor's Office*,
Legal Studies in International, European and Comparative Criminal Law 1,
https://doi.org/10.1007/978-3-319-93916-2_6

## 1 Preliminary Considerations

In the European Public Prosecutor's Office (EPPO) system, the provisions concerning the decision to drop a case have not considerably changed from the original proposal of the Commission,[1] while the same does not hold true for the decision to leave the case to national authorities. In other words, the legal provisions concerning the dismissal of a case are very similar, both in the Council's and in the approved Regulation, while the provisions concerning the transfer of the competence to national prosecutors have changed rather significantly.

In general terms, it seems that the regulation–in its subsequent approved versions–seeks to pursue two goals. On the one side, the EPPO should enjoy a margin of discretion when deciding whether to drop a case (and also to transfer the competence to the national authorities). In other words, the legislator refused a model inspired by a strict principle of legality with regard to the decision on whether to prosecute or not (and how–and where–to prosecute), according to which any case that constitutes a crime under the jurisdiction of the prosecutor need to be prosecuted, apart from strict exceptions. Yet the margin of discretion the EPPO is granted is not unlimited. On the contrary, it needs to be subject to scrutiny in order to avoid the risk of arbitrary decisions, or of decisions based purely on the principle of opportunity. Additionally, another basic guideline is that the EPPO needs to focus only on serious cases, leaving the other ones to national jurisdictions (assuming that they want to prosecute the case) or to other EU authorities (such as OLAF, for example).

This solution can be considered an acceptable compromise between different legal traditions, the ones inspired by the strict legality principle, such as Italy, Portugal and, though defined in different terms, Germany, and the ones inspired by the principle of opportunity, such as, for example, France and England and Wales.[2] It seems also in line with the emerging principles of international criminal law, where the international institution shares the efforts and labour with national agencies, and where the international forum is used only to try grave crimes for serious cases.[3]

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[1] For a general overview on the various projects on the EPPO that were drafted since the end of the last Century, see Hamran and Szabova (2013), pp. 40–58. See also Zwiers (2011). See also, with regard to the other projects on the EPPO, Klip (2012b), pp. 367–376.

See also on the EPPO White (2013), p. 22 ff.; Hamran and Szabova (2013), p. 40 ff.

[2] See on the matter the book edited by Luna and Wade (2012).

[3] As the former President of the International Criminal Court Philip Kirsch said "[t]he Court itself is the judicial pillar…The other pillar of the ICC Statute–the enforcement pillar–has been reserved to states and, by extension, to international organizations". See Philip Kirsch, Address to the United Nations General Assembly, 1 November 2007, available at: https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2007/Pages/icc%20president%20%20judge%20philippe%20kirsch%20%20addresses%20united%20nations%20general%20assembly.aspx.

See also Schabas (2009), p. 229.

Furthermore, the decision not to prosecute at the EPPO level is influenced by a cost/benefit assessment, and is open to some form of bargaining. In particular, the EPPO is allowed to close the case without prosecuting the suspect when a simplified procedure is possible, and is compatible with the applicable national law.[4] Eventually, the decision to drop the case gives rise to limited estoppel, preventing further prosecution unless new evidence or new facts justify an additional action by the prosecutor. However, there are some cases in which the closing of the investigations can bar further subsequent prosecution because of *ne bis in idem* (such as, for example, when the case is closed with a plea agreement).

Here, I will focus firstly on the conditions provided by the law concerning the deferral of the case to national prosecution authorities and the dismissal of the case. Secondly, I will examine how far the decision to drop the case prevents the EPPO itself or national prosecutors from reopening the case. In particular, I will try to analyse how far the principle of *ne bis in idem* applies in such cases. Before dealing with these core issues, I will devote some preliminary considerations on the new structure of the EPPO, as amended in the approved version of the Regulation after the presentation of the Commission's Proposal in July 2013.

## 2 The Commission's Proposal v. the Council's Proposal: Two Very Different Structures

The rules of the 2013 Commission's Regulation Proposal[5] depicted a simpler framework than the finally adopted text in the EPPO Regulation.[6] First of all, the EPPO in the Commission's Proposal represented a vertical cost-efficient structure.[7] It was decentralised, indeed, because most operative powers on the field were given to the European Delegated Prosecutors (EDP/EDPs); however, the EDPs would have acted under the exclusive authority of the European Public Prosecutor (EPP) and were obliged to follow only its instructions, guidelines, and decisions while carrying out the investigations and prosecutions assigned to them. Moreover, looking at the functioning of the central office, the Deputies were required to operate under the direction and supervision of the EPP, who could also opt for exercising her/his authority directly (art. 6(4)). Furthermore, when operating as national prosecutors,

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4 Panzavolta (2012), pp 143 ff.

5 See Commission Document 2013/0255, *Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office*.

The text of the proposal can be found at the website http://ec.europa.eu/justice/newsroom/criminal/news/130717_en.htm.

See on the Commission's Proposal Bachmaier Winter (2015), pp. 121–144.

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

7 See Caianiello (2013), pp. 115–125. See also Ligeti and Simonato (2013), p. 13 ff. and note 21.

With regard to the prospective models for the EPPO, see Ligeti (2011), p. 62.

the EPP could instruct the EDP to give priority to their functions deriving from the EPPO regulation. Finally, the EPP could reallocate the case to another EDP or undertake directly the investigation and prosecution (art. 18(5) and (6)).

The provisions concerning the appointment and dismissal of the members of the EPPO confirmed the vertical relationship between the central office and the EDPs. While the EPP and the Deputies were elected with a procedure giving them a strong political mandate (the appointment was issued by the Council with the consent of the European Parliament), the EDPs were appointed directly by the EPP from a list of three candidates submitted by the Member State concerned. Besides, the EPP might dismiss an EDP if s/he considered they did not any longer fulfil the requirements provided for their appointment.[8]

In conclusion, all the mentioned provisions seemed to give rise to a rather a vertical structure, and not to a collegial one.

The opposite holds true for the finally adopted structure, as resulted from the negotiations that occurred since the Commission's Proposal was presented, until the final text of the Regulation was adopted last October 2017. Here the EPPO becomes a collegial structure (art. 8(2)), strongly decentralised (art. 8(1)), where not only the operative powers on the field, but also many of the discretional choices are taken—at least at first—at the national level, that is by the Supervising European Prosecutor (SEP) and the EDP, both selected, although with different procedures, from the Member State where the investigations take place.

## 3 The Provisions Concerning the Deferral of the Case to National Prosecutors

The provisions regarding the referring of the case to the national prosecutors were very simple in the Commission's Proposal, and much more complex in the EPPO Regulation. This is probably due to the different structures of the Office in each. In the Commission Proposal, the case was referred to national prosecutors when the offence was minor.[9] The only case of deferral expressly provided for—though vaguely defined—is the one of offences of a minor entity: however, as pointed out, the regulation's proposal did not define in any way what a minor entity offence should mean, leaving it to the discretion of the judiciary (or to further subsequent legislative integration). The decision to defer the case to the national prosecutors, moreover, did not trigger any preclusive or barring effect on national prosecution. On the contrary, the case was referred to the national level precisely for being investigated and prosecuted properly in that context. The provisions concerning the evo-

[8] Caianiello (2013), pp. 115–125.

[9] The concept of minor offence should be provided in the national law implementing the Directive on the fight against fraud to the Union's financial interests by means of criminal law that is meant to replace the 1995 PFI Convention.

cation of the case by the EPPO, both when the investigations started at national level and when they were deferred to national prosecutors, were rather vague, and apparently left to the EPPO a rather broad discretion.[10]

Things become much more complicated in the EPPO Regulation. Firstly, as with all the crucial choices adopted concerning prosecution, the decision to leave the case to national authorities is taken by a newly conceived collegial body, the Permanent Chamber. Secondly, the law provides for more fully articulated provisions with regard to this matter. In fact, when it comes to the competence of the EPPO, according to Article 22, the Regulation provides that it will not be exercised if the harm caused to the financial interests of the Union is lower than 10,000€ (Article 25(2).[11] An exception to this provision operates when the case has repercussions at the Union level, which requires an investigation to be conducted by the EPPO, or when officials or other servants of the European Union, or members of the Institutions could be suspected of having committed the offence. Moreover, according to Article 25(3), after consultation with national authorities, the EPPO shall refrain from exercising its competence if:

> (a) the maximum sanction provided for by national law for an offence falling within the scope of Article 22(1) is equal to or less severe than the maximum sanction for an inextricably linked offence as referred to in Article 22(3) unless the latter offence has been instrumental to commit the offence falling within the scope of Article 22(1); or
> (b) there is a reason to assume that the damage caused or likely to be caused, to the Union's financial interests by an offence as referred to in Article 22 does not exceed the damage caused, or likely to be caused to another victim.

Another very complex provision can be found at Article 27(8) of the Regulation. According to it, when an offence has caused or is likely to cause damage to the Union's financial interests for less than EUR 100,000€, the College may consider that, with reference to the degree of seriousness of the offence or the complexity of the proceedings in the individual case, there is no need to investigate or to prosecute at the Union level. In such a case, it shall issue general guidelines allowing the EDPs to decide, independently and without undue delay, not to evoke the case.

The guidelines must define with all the necessary precision the cases to which they apply, establishing clear criteria, taking specifically into account the nature of the offence, the urgency of the situation and the commitment of the competent national authorities to take all necessary measures in order to allow a full recovery of the damage to the Union's financial interests.

The aforementioned provisions of the EPPO Regulation clearly give rise to a very complicated framework, in which a case could be considered, during the investigations, both firstly not serious enough to trigger the action of the EPPO, and then sufficiently grave to justify its evocation of the case. What if, for example, a crime affecting the financial interests of the EU seems to have caused a harm inferior than 100,000€ and, after more thorough investigations, it comes out that the harm is higher? The same could happen, even it is definitely less probable, if at first sight the

[10] See Caianiello (2013), p. 121, on the criterion of crimes "inextricably linked".

[11] On the material competence, see Vilas Álvarez in this same volumen.

harm caused at the financial interests of the EU seems—according to the evidence gathered in the first stages of the investigation—inferior than 10,000€, and subsequently ends up to be far higher. Of course, similar problems could arise in the reverse hypotheses (crimes seeming to have caused a certain harm to the EU financial interests, and lately revealing to be far less serious that they appeared at the beginning).

In all these circumstances, there is room for uncertainty, which possibly allows for a case to remain disputed between the national and the EU level for the entire period of the investigation. The EPPO could create a problem by taking a first decision, for example to defer the case to national authorities, and then being in the position to reconsider its first option, wanting the case back. It is true that the decision to evoke the case can be taken only as long as the national investigation has not already been finalised and that an indictment has not been submitted to and received by a court (art. 27(7)). However, such a potential prolonged state of uncertainty–because of the aforementioned provisions–does not seem suitable for the best functioning of the system. Moreover, there is room for positive or negative conflicts of jurisdiction,[12] with the EPPO claiming that the crimes committed are not sufficiently serious to justify its action and national law enforcement agencies affirming the opposite (and of course *vice versa*).

The problem of the objective financial harm caused to the financial interests of the EU, by the way, does not represent the main reason for this complexity. The most troublesome provision, under this aspect, seems to be Article 25(3), that provides for discretional criteria, or in any case for criteria open to a broad margin of consideration. For example, it might not be easy to establish what is the more or the less severe sanction for a crime: should the interpreter take into consideration only the main punishment (let's assume it is imprisonment), or also other forms of punishment, that often can be applied together with punishment in case of conviction? What if, for example, at EU level the imprisonment provision is slightly higher (let's say, 1 year more at maximum), but at national level the judge can impose, together with the imprisonment, severe fines not provided for at EU level, or other forms of sanctions, such as disqualification, prohibition to exercise certain professions, ineligibility for certain public charges, etc.?

In any case, the criterion of the most severe punishment is the least problematic of the three dictated by Article 25(3)(a). Much more complicated seem to be the other two. What should be considered "instrumental", according to Article 25(3)(a)? And what about the criterion provided for at Article 25(3)(b), that, if possible, appears to open the path to continuous procedural exceptions by the parties? There is room to wonder if these criteria are compatible with Article 47 of the Charter of

[12] Conflicts of jurisdiction represent a constant problem of the multilevel EU criminal justice system. However, if it is tolerated that conflicts arise in transnational cases involving national authorities (horizontal cooperation), that seems to be far less acceptable in a hierarchical federalized model, as the EPPO should be.

See, on the matter of conflict of jurisdiction, Böse (2012), p. 73; Herrnfeld (2012), p. 185; Thorhauer (2015), p. 78; Coffey (2013), p. 59 ff.

Fundamental Rights of the EU (CFR), which requires, at para. 2, that the defendant be informed in advance in which jurisdiction s/he is meant to be tried ("an independent and impartial tribunal previously established by the law").[13] The criteria laid down in the EPPO Council's Proposal do not seem clear enough to satisfy the principle expressed in the CFR.

## 4 Provisions Concerning the Dismissal of the Case

According to the initial Commission's Proposal, a case could be closed without prosecution, when it was not left to national authorities, in two different sets of circumstances: one concerning a number of cases where, in general terms, it could be said that there was not sufficient grounds to initiate the prosecution; the other regarding the closing of the case because of the reaching a plea agreement in form of a transaction or any other "simplified procedure" provided in the relevant national law.

With regard to the first set of cases, Article 39 provides now in the approved regulation that dismissal is permitted when the suspect has died, or the conduct subject to investigation does not amount to a criminal offence. Again prosecution is prevented when amnesty or immunity was granted to the suspect, or when the national statutory limitation terms to prosecute have expired. Furthermore, prosecution is barred in cases of *ne bis in idem*, that is when the suspected person has already been finally acquitted or convicted of the same facts within the Union, or the case has been dealt with via a plea agreement (the so called "simplified procedures"), in accordance with Article 40. Finally, the case can be dismissed when the offence is minor, as previously said, or when the evidence gathered during investigations is not sufficient to justify further action by the EPPO.

It must be considered, however, that the Regulation provides for a hierarchical scrutiny over the dismissal decision. In fact, neither the European Supervising Prosecutor nor the EDP are allowed to make that decision, the power being attributed to the competent Permanent Chamber. This solution implies a more thoughtful decision than that provided by the initial Commission's Proposal, where the dismissal was decided on by the EPPO. The simple referral, in Article 28, to the EPPO as such, in the Commission's text, sufficed to assume that the actual decision relied on the EDP and was simply validated by the central office. The attribution of the decision to the Permanent Chambers (Article 10(3)(c), in the Regulation, means that an individual prosecutor is prevented from making such a decision, because the choice to drop a case requires a debate among three justices. The EPPO Regulation, furthermore, implies in practice a stricter control over the decision to dismiss. As such, the new dismissal procedure reminds one more of systems inspired by the legality principle than those characterised by the opportunity principle in the matter

[13] See on the matter Panzavolta (2012), p. 143.

of prosecution. This is not to say that the EPPO Regulation is committed to the model of mandatory prosecution. The criteria provided by the law in fact are broad, and leave room for discretional choices. However, in the Regulation, the decision not to prosecute does not remain uncontrolled, because it is submitted to the debate of the three prosecutors seated in the competent Permanent Chamber.

The only shared decisions between the Permanent Chamber and the EDP concern the evocation of the case, as a general rule attributed to the single prosecutor, but open to the intervention of the panel. In fact, according to Article 27(6)(II):

> Where a European Delegated Prosecutor, who has received the information in accordance with Article 24(2), considers not to exercise the right of evocation, he/she shall inform the competent Permanent Chamber through the European Prosecutor of his/her Member State with a view to enabling the Permanent Chamber to take a decision in accordance with Article 10(4).

Finally, the Regulation provides more specific rules for reopening of the case after its previous dismissal. The decision to drop the case does not prevent further investigations. However, to reopen the case it is necessary that new facts must exist, which were not known to the EPPO at the time of the decision, and which become known thereafter. The reopening of the investigations is issued by the competent Permanent Chamber. This again makes clear that the destiny of the investigations, their initiation, their closure (both in case of prosecution and dismissal), and their reopening are all under the control of the Permanent Chamber.

## 5 *Res Iudicata*?

The decision to drop the case under the EPPO's provisions does not entail an absolute prohibition on reopening the case. In other terms, a dismissal does not trigger the protection of *ne bis in idem*, apart from a certain number of specific cases. However, the dropping of the investigations to a certain extent precludes further investigations: in other words, the decision to reopen the case is not left purely to the uncontrolled discretion of an individual prosecutor.[14]

Article 39(2) provides states:

> A decision in accordance with paragraph 1 shall not bar further investigations on the basis of new facts which were not known to the EPPO at the time of the decision and which become known after the decision. The decision to reopen investigations on the basis of such new facts shall be taken by the competent Permanent Chamber.

Apart from the control exercised by the Permanent Chambers (see supra, § 4), this provision prevents the EPPO from investigating (and prosecuting) unless new facts, made known after dropping the investigation, call for further action. This

[14] It needs to be noted that the regulation on the reopening of the case was introduced only in the Council's Proposal, while in the Commission's proposal there is no provision prohibiting the Prosecutor from reopening the case once it has been dismissed.

means that, although not equivalent to the *ne bis in idem* effect, some provisional estoppel is triggered by the decision to dismiss the investigations.

There are three questions arising from the mentioned provision. The first concerns the quality of the new facts required by the law. How persuasive must such new facts be to permit the reopening of the case?

The second question regards how the EPPO can become aware of the new facts: what if, in particular, the prosecutor continues to investigate in violation of the prohibition of the law, and ends up finding new facts? Could such facts, illegally discovered, be used to start a new investigation (or to justify the decision to prosecute)? The third question concerns the limits of the prohibition: Does the prohibition apply just to investigations or also to prosecutions? In other words, even admitting that, without authorisation by the Permanent Chamber, the EPPO is prevented from investigating on a case previously dismissed, could he legally prosecute a case that has been dropped in the absence of new facts, thus on the basis of the same facts that led to the case being dropped?

With regard to the quality of the new facts, it seems reasonable to assume that they need to have some *prima facie* evidentiary value. If, according to Article 39, the dismissal is permitted when the prosecution of the case "has become impossible" because of lack of relevant evidence, then the new facts that allow the reopening of the case must be of such value to make the prosecution "possible". The problem is that no substantial criterion is provided for the decision to investigate or prosecute. This is probably due to the fact that prosecution will be exercised before national jurisdictions, and each jurisdiction may have its own specific criterion provided by its national law (probable cause, reasonable suspicion, reasonable grounds to believe, etc.). In any case, the most reasonable interpretation seems that, if the case was dropped for lack of sufficient evidence, the new facts need to be of sufficient relevance to meet the criteria provided by the national legislation to justify prosecutorial action. To put it another way, the new facts need to *potentially* justify a prosecution according to the national provisions. The authorisation by the Permanent Chamber concerns in fact the reopening of the investigations: this means that what the EPPO is required to show is the potentiality of the reopened investigation meeting the threshold provided by the law.

With regard to the second problem, the answer is implicit in the provision of the law. Without proper authorisation by the Permanent Chambers, no investigation of the case that has been dismissed is possible. This means that information or evidence collected in violation of the prohibition to investigate cannot be used to justify the reopening of the case. From the above consideration it follows, furthermore, that new facts sufficient to cause the reopening of the case must become known to the EPPO from other "independent" sources, which are not ruled out by the law: For example, from an OLAF investigation, or from the investigations of national prosecutors not involved in the dismissed case; again, from the EPPO itself, if it was investigating a different case.

Implicitly, this consideration leads to the conclusion that the prohibition of further investigations—stemming from dropping the case—has a limited effect. It simply prevents the EPPO from reinvestigating the same persons for the same facts. Yet

it does not apply to other EPPO investigations focused on different cases, nor does it apply to national authorities or EU authorities investigating different facts. If, by chance, in the course of these different cases new facts are discovered that might justify the reopening of the dropped investigation, they can be legally used before the Permanent Chamber to obtain the authorisation to investigate anew. In short, the new facts must be discovered independently, in the course of a different case–either at national of at European level–from that closed with the dismissal.

Finally, with regard to the scope of such limitation—if it applies only to new investigations and not also to prosecutions–, it seems reasonable to take the view that both options are barred without the authorisation of the Permanent Chamber. If only investigations were prevented, it would be easy to circumvent the prohibition for the Prosecutor: he could directly prosecute, and subsequently collect evidence relating to new facts. It is more appropriate to conclude that prosecution also cannot be exercised without the Permanent Chamber's permission.

If dismissal for the lack of sufficient evidence hinders further investigations or prosecutions in only a limited way, one might wonder when the *ne bis in idem* bar operates fully. The main provision under which the *ne bis in idem* effect is triggered regards the dismissal of the case on the grounds of a simplified procedure according to Article 40. In such circumstances, the jurisprudence of the EU Court of Justice shall apply plainly. As it was decided in the case *Gözütok and Brügge* (Case C-187/01)[15]:

> The *ne bis in idem* principle, laid down in Article 54 of the Convention implementing the Schengen Agreement[…]also applies to procedures whereby further prosecution is barred, such as the procedures at issue in the main actions, by which the Public Prosecutor of a Member State discontinues criminal proceedings brought in that State, without the involvement of a court, once the accused has fulfilled certain obligations and, in particular, has paid a certain sum of money determined by the Public Prosecutor.

In that judgment the Court in fact observed that:

> the objective of which is to ensure that no one is prosecuted on the same facts in several Member States on account of his having exercised his right to freedom of movement, cannot play a useful role in bringing about the full attainment of that objective unless it also applies to decisions definitively discontinuing prosecutions in a Member State, even where such decisions are adopted without the involvement of a court and do not take the form of a judicial decision.

It goes without saying that the same reasoning should be valid for the transaction before the EPPO, for which, therefore, the whole rationale of the case *Gözütok and Brügge* will apply, without restriction or distinction.

Another case in which the *ne bis in idem* should operate when the case has been dismissed because of the expiration of the national statutory limitation for prosecution. Under such circumstances, the rationale of *Gasparini* (Case C-467/04) should be applicable, according to which *ne bis in idem* operates "in respect of a decision

[15] See Vervaele (2005), p. 100. More in general on the *ne bis in idem* principle see Bockel (2010), p. 29 ff.; Van den Wyngaert and Stessens (1999), pp. 779–804; Vervaele (2013), p. 211.

of a court of a Contracting State, made after criminal proceedings have been brought, by which the accused is acquitted finally because prosecution of the offence is time-barred."[16]

The same fate should be shared by the dismissal on the grounds that the case has already been finally disposed of in relation to the acts, and also the ones concerning amnesty and immunity (the latter, however, only unless immunity has been lifted subsequently).

The sole remaining option for which the other criterion (new facts) shall operate concerns the "insanity of the suspect or accused person": this legal provision represents after all a case of lack of evidence, although with regards to certain specific aspects of the prosecution's case. If new facts come out supporting the hypothesis that the defendant did not have any diminished mental capacity at the moment when the crime was committed, the Permanent Chamber should authorise further action.

## 6 Conclusions

The provisions concerning the dropping of the case and the transfer of the proceedings from the EPPO to national prosecution authorities have significantly changed since the first Proposal of 2013.

With regard to the transfer of the proceedings to national prosecutors, the rules set out in the EPPO Regulation have increased in complexity and are more open to discretionary choices and potentially able to bring about cases of conflicts of jurisdictions. In this field, a Court of last instance at the EU level–that is, the EU Court of Justice–will in time produce appropriate case law to define the rules in such a way to reduce the margin of uncertainty (and potential of arbitrariness) arising from the poor quality of the provisions. Under this aspect, the current means provided by the Treaties and the Regulation to apply to the EU Court of Justice have the potential hopefully to lead to an acceptable level of predictability in the system, in accordance with the principle of judge pre-established by the law enshrined in Article 47 of the CFR.[17]

As far as dropping a case is concerned, the EPPO Regulation depicts a tempered discretionary system, in which the margin of consideration left to the EPPO is rather broad, even though it is subject to the oversight of a collegial body, the Permanent Chambers. The effects triggered by the dismissal can be twofold, depending on the reason for which the latter was decided. If the dismissal is caused by the lack of sufficient evidence, the barring effect is limited, and can be removed by an authorisation of the Permanent Chamber, on the condition that new facts are discovered. The most appropriate interpretation of such provision leads to the conclusion that

[16] See on the *Gasparini* case Klip (2012a), p. 297.

[17] Luchtmann (2012), p. 3; Vervaele (2012), p. 167.

the new facts must be discovered after the dismissal, and in the course of an independent investigation.

If the case ends up with a sort of plea agreement with the suspect, assuming that Article 40 is applicable, then *ne bis in idem* fully operates. The same holds true for other forms of dismissal, such as those linked to the expiration of statutory limitation periods and immunities.

In a comparative perspective, one might observe that the effort of the EU Legislator in introducing a tempered discretionary system recalls the institutional framework provided for by the International Criminal Court Statute. In that context, the decision to drop an investigation is regulated by flexible criteria, leaving a relevant margin of consideration to the Prosecutor, though submitted to judicial oversight by the Pre-Trial Chamber. There are, however, two main differences. The first concerns the body called upon to exercise control over the dismissal, that is a panel of judges at the ICC, while said body in the EPPO system consists of three prosecutors. The ICC system's scrutiny over a dismissal decision is–at least from an institutional perspective–more impartial that the EPPO's control over the decision not to prosecute (that is, it is more hierarchical). This is due to the limits of the EPPO itself, merely a prosecutorial office which does not provide for a common EU criminal jurisdiction.

The barring effects caused by the investigations' drop are perhaps better regulated in the EPPO's provisions that specifically distinguish between the reasons of dismissal with final effects due to *ne bis in idem* from other reasons of dismissal; the latter bears a more limited and provisional preclusive effect, which can be subsequently removed by the authorisation of the Permanent Chamber. In the ICC system, the Prosecutor is free to reopen the case if new facts or new information are available, and does not need to ask for any authorisation (art. 53(4) Statute of the ICC).

In conclusion, the EPPO Regulation seems to envisage a rather balanced system, merging rules stemming from different legal traditions in a quite original way. As with many other aspects, the structural shortcoming of the system seems to be caused mainly by the lack of a common judicial authority, at least of last resort, capable of ensuring a certain level of uniformity in the system. In the long run, this seems to be a limit that needs to be overcome if the ultimate goal is to have an effective common criminal justice system for the protection of the financial interests of the EU.

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# Cross-Border Investigations Under the EPPO Proceedings and the Quest for Balance

**Lorena Bachmaier Winter**

**Abstract** The European Public Prosecutor's Office Regulation provides for a system of cooperation in cross-border evidence gathering based on the assignment of investigative measures to the assisting European Delegated Prosecutor. This will undoubtedly facilitate the obtaining and transmission of cross-border evidence in EPPO proceedings, although this system will have to be complemented with the other instruments of judicial cooperation in criminal matters as not all Member States will participate in the EPPO system. The aim of this contribution is to address some of the pending challenges in these cross-border investigations. First, I will discuss the rules provided in the EPPO Regulation and analyse them *vis a vis* the legal framework provided by the Directive on the European Investigation Order. And secondly, I will address the protection of the right to legal assistance in transnational criminal proceedings of the EPPO. While procedural safeguards are not regulated in the EPPO Regulation (it merely refers to the applicable EU Directives), I will argue that the minimum rights granted under the Directive on Access to a Lawyer cannot be deemed sufficient to ensure the position of the defence in EPPO proceedings in view of the principle of equality of arms.

## 1 Introduction

Although judicial cooperation and mutual assistance in criminal matters in the EU operate far more efficiently at present than they have in previous years and remarkably better than cooperation with non-EU countries, the delay in executing requests

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L. Bachmaier Winter (ed.), *The European Public Prosecutor's Office*,
Legal Studies in International, European and Comparative Criminal Law 1,
https://doi.org/10.1007/978-3-319-93916-2_7

is still a problem.[1] This delay is due to several factors, but primarily due to the fact that the judicial authorities tend to give priority to national investigations, and only give secondary importance to the requests for assistance coming from a foreign authority.[2] It has been claimed for decades that a more efficient system of cooperation, together with improved coordination of transnational investigations,[3] is necessary to fight effectively fraud against the financial interests of the EU (hereinafter PIF).[4]

The European Public Prosecutor's structure with a supranational centralisation—with a decentralised structure (Article 8 REPPO)—acting through decentralised delegates is meant to make the coordination of transnational inquiries of offences detrimental to the EU financial interests easier and swifter.[5] At the domestic level centralised units for the prosecution of serious forms of economic crime—that already exist in some countries as for example in Spain—have proved to be a very beneficial development. Following the positive experience with national centralised units, it can be assumed that a supra-national specialised EPPO will clearly be more effective in the investigation and prosecution of fraud against the EU, especially those with a cross-border dimension.[6]

Against the establishment of an EPPO, it was repeatedly argued that Eurojust already fulfils the function of coordination of transnational investigations, however up to now this horizontal coordination has not proved to be enough in combatting PIF crimes.[7] Even if Eurojust plays an essential role in facilitating and speeding up judicial cooperation in criminal matters between the member states, and solving issues of jurisdiction, undoubtedly a prosecutorial office in the form of an EPPO

[1] See the results of the project "Euroneeds: Evaluating the need for and the needs of a European Criminal Justice System", of the Max Planck Institute for Foreign and International Criminal Law, accessible at http://www.mpicc.de/shared/data/pdf/euroneeds_report_jan_2011.pdf. On the same see extensively Wade (2013), pp. 439–486. Although recent cases on the EAW—dealing with political crimes—have shown that not only delays may become a problem in cooperation among the EU Member States, the delays are still by far the more salient problem in the enforcement of EAWs.

[2] See Bachmaier Winter (2012), p. 1213; Rheinbay (2014), pp. 60 ff.

[3] For a detailed and comprehensive study on the principles and problems of to cross-border evidence, see Gless (2007).

[4] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, OJ L 198, 28.7.2017. For a short summary on the evolution of the EPPO project from the Corpus Iuris to the present Regulation, see e.g. Kuhl (2017), pp. 135–143. On the extension of the EPPO's competence to related offences, see Nieto & Morales (2015), pp. 122 ff.

[5] On the different possible models of the structure of the EPPO see, among others, Vervaele (2010), pp. 171–200; Zwiers (2011), pp. 355 ff.; Ligeti and Simonato (2013), pp. 15 ff.; White (2013), pp. 22–39; Csuri (2012), pp. 79–83. The different models are subject to a detailed cost-benefit assessment in the Commission Staff Working Document "Impact Assessment", accompanying the PR EPPO, pp. 30 ff., and in the Annex 4 of that document.

[6] Already stated by Bachmaier Winter (2015a), pp. 127 and 131. Although it has to be recalled that many of the PIF offences present an exclusively national dimension.

[7] As stated by Ligeti and Weyembergh (2015), pp. 74–75.

with delegated prosecutors dedicated only to EU financial offences, will render the transnational prosecution of these kind of offences far more effective.[8] It is still to be seen if this is true for a EPPO established via enhanced cooperation, where not all Member States participate,[9] especially when several of the countries who have decided not to join the EPPO themselves present special problems with EU fraud and lack of efficient prosecution.[10] On the other hand, the loss of uniformity and the consequent legal fragmentation in international cooperation instruments due to the absence of unanimity in adopting the EPPO will not have a positive impact.[11] The enhanced cooperation is not ideal; however at the political level, the better option is not always possible.[12]

The "integrated model" adopted by Regulation 2017/1939 of 12 October,[13] with a central unit deciding and coordinating, acting mainly through European Delegated Prosecutors (EDP), is perhaps the most suitable structure to improve coordination without losing necessary integration into national legal systems.[14] However, this model may not be compatible with the principles governing national prosecution systems. If the European Delegated Prosecutor is to be dependent upon the EPPO and not subject to instructions from any other institution or body other than the EPPO, this model may conflict with the hierarchical dependency of members of the prosecution service in certain countries. But more importantly, in those countries where the prosecution service is constitutionally structured as a fully independent body, it may be difficult to make this principle compatible with the hierarchical structure envisaged in the REPPO of 2017.[15] But this issue lies beyond the scope of this contribution, which aims at analysing the mechanisms of cooperation in obtaining cross-border evidence in EPPO proceedings.

[8] In this sense Morán Martínez (2009), pp. 6 ff., opting clearly for the model that has now been adopted in the PR EPPO of July 2013. Contrary, Nieto et al. (2013), p. 800, who consider that "the hierarchy does not always imply greater efficiency insofar as it can generate numerous tensions".

[9] For a critical approach towards the establishment of an EPPO via enhanced cooperation, see, Satzger (2015), p. 78. In any event, the non-participating Member States shall apply the EIO Directive and follow the principles of loyal cooperation and solidarity enshrined in Articles 4(3) and 3(3) TEU.

[10] See Di Francesco (2017), pp. 156–160, p. 157.

[11] In addition the substantive law on PIF offences is neither uniform, as it depends on how the EU Directive is implemented in the Member States. On the need for approximation, see also Kaiafa-Gbandi (2013), pp. 87 ff.

[12] Csonka et al. (2017), p. 125 on the difficulties of the EPPO negotiations. See also Zwiers (2011), p. 245. Additionally to the legal consequences, the enhanced cooperation has also budgetary and administrative implications, as pointed out by Schutte (2015), pp. 205–206.

[13] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), OJ L 283, 31.10.2017.

[14] See already Bachmaier Winter (2015a), p. 133. For Negri (2017), p. 151, this system might entail excessive complexity for the EPPO to achieve its objectives.

[15] Despite efforts to keep the "double hat" model and maintain the position of the European Public Prosecutor alongside the national prosecutor, compatibility between the two may be sometimes difficult to implement in practice. In the same sense, for example, Ligeti and Simonato (2013), p. 15.

One of the major debates related to the establishment of a single European area of justice, and also in relation to the EPPO, is the need to find an adequate balance between prosecution and defence.[16] The risks of an imbalance between a powerful EPPO with the power to act in any Member State of the Union, through effective cooperation mechanisms based on the principle of mutual recognition, have already been pointed out frequently. Without intending here to review all the criticisms expressed against the future European Public Prosecutor's Office because of this possible lack of balance between accusing and accused parties, it is worth highlighting here the extent to which the Regulation has addressed this issue.

The aim of this contribution is to revise some of the pending challenges in cross-border investigations under the EPPO system. First, I will discuss the rules provided in the EPPO Regulation and analyse them *vis a vis* the legal framework provided by the Directive on the European Investigation Order (DEIO). And secondly, I will discuss the right to legal assistance in transnational criminal proceedings of the EPPO. While procedural safeguards are not regulated in the EPPO Regulation (it merely refers to the applicable EU Directives), I will argue that the minimum rights granted under the Directive on Access to a Lawyer[17] cannot be deemed sufficient to ensure the position of the defence in EPPO proceedings in view of the principle of equality of arms.

## 2 Cross-Border Investigations

Among the reasons used to justify the need to establish an EPPO was that the EPPO would contribute to a more effective coordination of transnational investigations, as well as facilitate cooperation in obtaining evidence.[18] The extensive Article 31 provides for rules related to cross-border investigations, rules that are to be completed with the brief Article 32 on enforcement of assigned measures. For the arrest and surrender of a suspect, the EPPO Regulation refers to the Framework Decision 2002/584/JHA on the EAW.

The content of Article 31 of the EPPO Regulation shall be analysed next taking into account its relationship with the provisions of the Directive concerning the European Investigation Order (DEIO). This will allow us to assess whether the

[16] See, for example, Nestler (2006), pp. 415 ff.; Gless (2013), pp. 91 ff.; Allegrezza (2013), p. 8; Rafaraci (2013), pp. 331–343; Buric (2016), pp. 63–90.

[17] Directive 2013/48/EU of the European Parliament and of the Council, of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ 6.11.2013, L294/1.

[18] As explained by Vervaele (2013), pp. 25–27, in PIF investigations and in general in economic and financial crimes, there is often a previous administrative investigation by diverse authorities, usually gathering accounting and fiscal data. And as stated by Negri (2017), pp. 161 ff., the criminal investigations rely greatly on how the information gathered in such administrative proceedings is transferred to the EPPO. In the same sense, Kuhl (2017), p. 141.

EPPO and the rules included in the Regulation 2017/1939 are adequate to respond to the problems and difficulties detected in the fight against fraud against the financial interests of the European Union, specifically in the field of cross-border evidence gathering.[19]

### *2.1 Cross-Border Evidence Gathering in the EPPO Regulation: The Assignment System*

The EPPO will be an indivisible Union body operating as one single Office as established in Article 8.1 of the Regulation. But for the purpose of obtaining evidence, it continues to operate on the basis of the principle of national territoriality, applying the national law of the place of execution to investigative measures.[20] With regard to cooperation in cross-border investigations, the first thing that the Regulation emphasizes is that the European Delegated Prosecutors (EDP) "shall act in close cooperation by assisting and regularly consulting each other in cross-border cases" (Article 31.1 Regulation). This is the basic premise that any system of international judicial cooperation should comply with, despite the fact that the EPPO cannot be classified exactly as a model of inter-state cooperation, since the authorities that request and provide the cooperation are integrated into the same supranational structure. Once the EDPs are appointed by the European Public Prosecutor's Office, even though they keep their powers and functions as national prosecutors, they become part of the supranational structure at the decentralized level.

Since there will be at least two EDPs in each Member State, the Regulation provides for cross-border cooperation to be carried out between them through the assignment system: the handling EDP assigns the needed measure to one of the EDPs of the state where it has to be carried out (Article 31.1). It is not indicated which of the EDPs in the state of execution will be assigned to undertake the investigative measure, an issue that will be regulated either by each of the Member States according to rules on the allocation of cases, or by the rules on the internal functioning of the EPPO to be adopted by the College.[21]

While assigning one or several measures to the same or different EDPs, if the execution is to be carried out in different states, the handling EDP will notify his or

[19] I fully agree with Ruggeri (2014), pp. 221–225, when he states that the problems in cross-border investigations cannot be addressed separately from the issue of the choice of forum. Nevertheless in this chapter I focus only on cross-border evidence gathering, without addressing the broader discussion of models of cooperation and the choice of forum. On the choice of forum, see extensively Panzavolta in this volume.

[20] As Ligeti (2013), p. 19, put it, albeit regarding the Proposal for a Regulation of 2013, the Regulation makes the EPPO "prisoner of national laws" See also Zerbes (2015), p. 219; Kuhl (2017), p. 139. On the negotiations regarding cross-border investigation of the EPPO and the assignment system, although with regard to the text before the adoption of the EPPO Regulation, see Herrnfeld (2017), pp. 382–412, pp. 402 ff.

[21] Article 9 EPPO Regulation.

her supervising European Prosecutor (Article 31.2). The measures that may be assigned are those listed in Article 30 of the Regulation, which are measures restrictive of fundamental rights that every Member State must make available for these investigations, for cases where the offence has at least a maximum penalty of 4 years (Article 30.1)[22] and all other measures, which in principle are available according to national laws (Article 30.4).

The system of cross-border cooperation adopted in the Regulation seems to go one step further in the implementation of the principle of mutual recognition in the execution of cross-border evidence gathering: a request or an order will no longer be sent, but rather the handling EDP will simply assign the investigative measure. The "assignment" is not subject to any type of recognition procedure nor subject to conditions. Intentionally, the term "recognition" is ignored, most probably to make it clear that the authority providing the assistance does not carry out any oversight of the need, adequacy, or proportionality of the measure, nor of the *ne bis in idem* principle or any other formality.[23] Whilst the enforcement of the request moves towards a swifter mutual recognition, the gathering of evidence, the circulation of evidence and the admissibility of evidence, still resemble more the mutual legal assistance principles.[24]

The Regulation also does not include grounds for refusal to execute the assignment. Any circumstance that might appear to affect the execution of the measure

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[22] Article 30.1 EPPO Regulation: "1. At least in cases where the offence subject to the investigation is punishable by a maximum penalty of at least 4 years of imprisonment, Member States shall ensure that the European Delegated Prosecutors are entitled to order or request the following investigation measures:

(a) search any premises, land, means of transport, private home, clothes and any other personal property or computer system, and take any conservatory measures necessary to preserve their integrity or to avoid the loss or contamination of evidence;
(b) obtain the production of any relevant object or document either in its original form or in some other specified form;
(c) obtain the production of stored computer data, encrypted or decrypted, either in their original form or in some other specified form, including banking account data and traffic data with the exception of data specifically retained in accordance with national law pursuant to the second sentence of Article 15(1) of Directive 2002/58/EC of the European Parliament and of the Council ([1]);
(d) freeze instrumentalities or proceeds of crime, including assets, that are expected to be subject to confiscation by the trial court, where there is reason to believe that the owner, possessor or controller of those instrumentalities or proceeds will seek to frustrate the judgement ordering confiscation.
(e) intercept electronic communications to and from the suspect or accused person, over any electronic communication means that the suspect or accused person is using;
(f) track and trace an object by technical means, including controlled deliveries of goods."

On the rules on these measures in the EPPO Regulation Proposal of 2013, see Moreno Catena (2014), pp. 76–84.

[23] Csonka et al. (2017), p. 129, call this as a *sui generis* system, away from the mutual legal assistance regime, as it entails the obligation to execute the assigned measure.

[24] For this, see Alegrezza and Mosna, in this volume.

shall be communicated by the assisting EDP to his or her supervisor and to the handling EDP. In particular, if he or she considers that:

> (a) the assignment is incomplete or contains a manifest relevant error;
> (b) the measure cannot be undertaken within the time limit set out in the assignment for justified and objective reasons;
> (c) an alternative but less intrusive measure would achieve the same results as the measure assigned; or.
> (d) the assigned measure does not exist or would not be available in a similar domestic case under the law of his/her Member State (Article 31.5).

The approach is very clear: any problem arising with regard to the execution of the required (assigned) measure, shall be dealt with by both EDPs involved in order to try to find a solution by way of bilateral communication and together with the European Supervisory Prosecutor. In case a solution is not found within a period of 7 days "the matter will be referred to the competent Permanent Chamber" who will decide "in accordance with applicable national law as well as this Regulation" (Article 31.7 and 8).

### *2.2 Relationship with Other Mutual Recognition Instruments*

Regarding cross-border evidence, the relationship between the provisions of the EPPO Regulation and the provisions of other "legal instruments of mutual recognition", in particular the European Investigation Order (EIO), is contemplated under Recital (73) in the following terms:

> The possibility foreseen in this Regulation to have recourse to legal instruments on mutual recognition or cross-border cooperation should not replace the specific rules on cross-border investigations under this Regulation. It should rather supplement them to ensure that, where a measure is necessary in a cross-border investigation but is not available in national law for a purely domestic situation, it can be used in accordance with national law implementing the relevant instrument, when conducting the investigation or prosecution.

I will now analyse the meaning of this Recital with regard to the EIO.[25] The European legislator clarifies that the rules on the assignment of cross-border investigative measures and the channels of communication foreseen in the EPPO are to be applied with preference to other mutual recognition instruments. Such clarification is positive, although the second part of this Recital is difficult to understand.

As under Article 31.6 of the Regulation, it is stated that the instruments of mutual recognition will supplement the rules of this Regulation, in particular, with respect to measures not provided for in the national legislation of the assisting State for a purely domestic situation, but only for transnational proceedings. I understand that if such a measure has been foreseen in the executing (assigned) State for transnational criminal proceedings according to the "national law implementing the

[25] There is an abundant literature on the EIO. See, for example, Bachmaier Winter (2015b), pp. 47–59; Ruggeri (2014).

relevant instrument", this measure is also accessible for the EPPO investigations. Being regulated at the national level, I do not understand how important it is that the measure is not accessible for exclusively national processes, taking into account that the competence of the EPPO will be exercised mainly in cases that present transnational elements (Article 23). In short, I consider that this rule is confusing; however it might not be worthwhile to continue delving into its possible meaning here.

On the other hand, the Regulation does not regulate EPPO cross-border investigations that will have to be carried out in a Member State not participating in the enhanced cooperation,[26] or in a third State. Obviously in such cases the assignment system will not be applicable and the handling EDP will have to resort either to the rules of the EIO Directive or to international instruments of mutual legal assistance in criminal matters. In such cases the handling EDP shall act as the issuing or requesting authority of international assistance, if this is in compliance with the applicable international convention. The grounds for refusal will be those provided in such instruments.[27]

## *2.3 Article 31.5 of the EPPO Regulation on the Assigned Investigative Measure*

Article 31.5 Regulation sets out how an EDP should act when dealing with the assignment of an investigative measure, in case problems arise. As stated earlier, any circumstance should lead to consultations between the interested EDPs in order to reach a solution while informing the supervisor and, where appropriate, with intervention of the Permanent Chamber. Before going through these circumstances, it should be recalled that in some cases investigation in the *forum delicti commissi* State might not be carried out by the EDP, but directly by the supervising European Prosecutor "where this appears to be indispensable in the interest of the efficiency to the investigation or prosecution". Article 28.4 EPPO lists the criteria to be taken into account to make such a decision.[28]

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[26] See Salazar (2017), p. 330; Di Francesco (2017), pp. 157 and 159.

[27] On the grounds for refusal under the EIO system see extensively, Bachmaier Winter (2014a; b), pp. 71 ff.; Mangiaracina (2014), p. 116 ff.

[28] Article 28.4.: "In exceptional cases, after having obtained the approval of the competent Permanent Chamber, the supervising European Prosecutor may take a reasoned decision to conduct the investigation personally, either by undertaking personally the investigation measures and other measures or by instructing the competent authorities in his/her Member State, where this appears to be indispensable in the interest of the efficiency to the investigation or prosecution by reasons of one or more of the following criteria:

(a) the seriousness of the offence, in particular in view of its possible repercussions at Union level; (b) when the investigation concerns officials or other servants of the Union or members of the institutions of the Union; (c) in the event of failure of the reallocation mechanism provided for in paragraph 3.

If the supervising European Public Prosecutor assigns an investigative measure to the EDP of the executing State, although in a hierarchical order he might be superior to an EDP—and therefore the assistant EDP should follow his instructions—I understand that when an European Public Prosecutor undertakes personally the investigations, he or she occupies a position equivalent to the EDP whose functions they assume. When assigning a measure to an EDP of another Member State the handling European Public Prosecutor does not act as a hierarchical superior. Therefore, the rules envisaged in Article 31 Regulation should be followed also under this circumstance.

Specifically, Article 31.5 contemplates circumstances that either prevent the enforcement of the assigned measure or prevent it from being executed within the requested period.

*Delays in execution*. If this occurs, after informing the handling EDP and the supervising European Public Prosecutor of the reasons for the delay, the prosecutors involved will try to find a proper solution. If they fail to resolve the situation within 7 days, the Permanent Chamber must be informed (Article 31.7). The Permanent Chamber will hear both EDPs, if necessary, and establish by what deadline the measure is to be enforced (Article 31.8). This mechanism can be considered adequate to prevent unjustified delays in the execution of the assigned measures by the EDPs. However, if the delay comes not primarily from the unwillingness to cooperate, but from the lack of resources allocated by the Member State to such investigations, or from the unit that must carry out the measure being overloaded, or for any other justified reasons, the fact that the Permanent Chamber fixes a deadline will hardly solve the problem. Whilst this provision is adequate, if the delays have their origin in structural deficiencies in the State of execution, I do not see how this mechanism will overcome those shortcomings and expedite the enforcement of the assigned measure.

Regarding economic and tax crimes, if, for example, an EDP is asked for an audit report or data related to the taxation of a holding of a company, these actions are often delayed in practice, not so much because of lack of will, but due to lack of economic or human resources to carry them out. Furthermore, if documents need to be translated, the delays might be even longer.

Unless a sufficiently well-equipped and specialized research unit is established in the Member States, it is possible that, even if the assistant EDPs wish to give priority to the enforcement of the assigned investigative measures, it might not be possible to comply with it in a swift way. The fact that the Permanent Chamber establishes a deadline in such cases will be of little help to solve the issue. Of course, the EPPO, through the European Chief Prosecutor, the College, and the

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In such exceptional circumstances Member States shall ensure that the European Prosecutor is entitled to order or request investigative measures and other measures and that he/she has all the powers, responsibilities and obligations of a European Delegated Prosecutor in accordance with this Regulation and national law.

The competent national authorities and the European Delegated Prosecutors concerned by the case shall be informed without undue delay of the decision taken under this paragraph."

supervising European Prosecutor, can exercise some pressure upon those Member States that do not allocate sufficient resources for investigating crimes under the EPPO, but this does not mean that an immediate solution can be provided.

Finally, it has to be asked what the consequences shall be for not complying with the timeframe set out by the Permanent Chamber for enforcing the assigned measure. It can not be ruled out that, if repeated breaches take place, an infringement procedure before the CJEU might be triggered, although such a drastic measure, due to their political implications, should only be considered as a last resort. However, the Regulation does not contemplate any type of consequences for a State that does not execute the assigned measures within the established period or within a reasonable timeframe.

In fact, the Regulation does not include maximum timeframes for the enforcement of assigned measures. It is to be assumed that the deadline is to be indicated by the handling EDP, and that, in any event, the assistance must be provided without delay. The deadlines for the execution of an IEO are not applicable here by analogy, but the general rule should be "without delay". It will have to be ensured that, in practice, the EDPs are not subject to being excessively overburdened with too many national cases that will need to be handled together with the EPPO cases.

*Existence of the assigned measure, but there is another less intrusive one*. Article 31.5 c) Regulation, in terms almost identical to Article 10.3 EIO Directive, allows the assisting EDP to adapt the assignment to the proportionality principle: if the same results can be obtained through another less intrusive measure, he or she shall contact the handling EDP to resolve the matter bilaterally, while informing the supervising European Prosecutor. If there is no agreement, the Permanent Chamber will decide whether the assisting EDP shall carry out the assigned measure or substitute it (Article 31.8).

The way to proceed in these cases is more appropriate than under Article 10.3 of the EIO Directive, which only provides for informing the requesting party and, in view of the notification on the substitution of the measure, deciding to withdraw the EIO. There is nothing to object to in the system envisaged in the EPPO Regulation to comply with the principle of proportionality in the intrusion of fundamental rights, and it seems adequate that if the concerned EDPs do not come to an agreed solution, the Permanent Chamber decides.

This scheme is theoretically irreproachable. However, in practice it might not be very practical or problem-solving. For example, consider a situation where the handling EDP requests certain electronic data which require ordering the search of computers located in the premises of several companies in the executing State, and thus require a search and seizure judicial warrant. If the assisting EDP considers that those data could also be obtained by way of a production order (Article 30.1 b) of the Regulation), and the handling EDP does not agree with the substitution in 7 days, the Permanent Chamber comes into play. Apart from the fact that the elapsed time may mean that the data have been deleted, there is the issue of whether the Permanent Chamber is really in a better position to decide on the substitution of the assigned measure.

The Permanent Chamber is made of three members of the centralized structure of the EPPO: the European Chief Prosecutor or one of his deputies or a European Prosecutor who will preside, plus two more European Prosecutors (Article 10.1). The setting up and distribution of cases among the Permanent Chambers will be determined by the rules of internal operation, and thus currently it is not known how they will be formed. It may well happen that the members of the Chamber called to decide on the substitution of an assigned measure are familiar neither with the applicable laws of the relevant State, nor with the case under investigation. In such circumstances I do not see how they are in a position to decide on the assigned investigative measures. As this does not seem to be a very practical or expeditious system, these situations should be taken into account in the Internal Rules of Procedure of the EPPO, and it should be made clear that the EDPs shall make all possible efforts to come to a solution bilaterally.

*The assigned measure does not exist*. If the assigned measure does not exist in the executing State or would not be available "in a similar domestic case" under the *lex loci*, the procedure to be followed is the same as in the previous cases: consultations with the handling EDP and notification of the supervising European Prosecutor. This provision is analogous to the one set out in Article 10.5 DEIO. However, the Regulation on this point is rather confusing. First, because according to Article 31.2 the measures that any EDP can "assign" are those listed in Article 30 EPPO Regulation, so I do not see how there can be a problem due to the non-existence of the measure. And second, in the event that an assigned measure did not exist in the executing State, the provisions of Article 31.6 EPPO Regulation would be applicable. As its meaning is not easy to grasp, I reproduce it here:

> 6."If the assigned measure does not exist in a purely domestic situation, but would be available in a cross-border situation covered by legal instruments on mutual recognition or cross-border cooperation, the European Delegated Prosecutors concerned may, in agreement with the supervising European Prosecutors concerned, have recourse to such instruments."

Recital (73) of the Regulation does not explain clearly how to interpret the aforementioned Article 31.6. It follows that the assignment system provided for in the EPPO Regulation prevails over the rules of the EIO. This is logical in so far as the EPPO assignment system is more direct, simple, and effective.

The EIO Directive foresees that if the measure does not exist in the executing State or would not be applicable in a similar domestic case, it could be substituted by another measure that could achieve the same results, and if this is not possible, then the EIO should be refused (Article 10.1 and 5 DEIO). It is difficult to understand what the cases are that this section 6 of Article 31 of the Regulation contemplates.

## *2.4 The Requirement of Judicial Authorization*

Although at first glance Article 31.3 EPPO Regulation appears to be unproblematic, it raises questions about the scope of the principle of mutual recognition. Specifically, this provision states:

> 3. "If judicial authorisation for the measure is required under the law of the Member State of the assisting European Delegated Prosecutor, the assisting European Delegated Prosecutor shall obtain that authorisation in accordance with the law of that Member State.
>
> If judicial authorisation for the assigned measure is refused, the handling European Delegated Prosecutor shall withdraw the assignment.
>
> However, where the law of the Member State of the assisting European Delegated Prosecutor does not require such a judicial authorisation, but the law of the Member State of the handling European Delegated Prosecutor requires it, the authorisation shall be obtained by the latter European Delegated Prosecutor and submitted together with the assignment."

This provision clearly states that when the assigned measure requires judicial authorisation in the issuing State, the EDP assigning the measure shall accompany the judicial warrant. And if it is not required in the issuing State, but only in the executing State according to the *lex loci,* the assisting EDP shall obtain such authorisation. This is consistent also with the approach followed in the EIO Directive, as the principle of mutual recognition does not allow skipping judicial authorisation if it is needed under the laws of the issuing or executing State. This is completely appropriate as it ensures the application of the highest standard of protection regarding judicial authorization.[29] However, the rules under the EPPO Regulation and the EIO differ and following question arises: shall the validating procedure provided under Article 2.d) DEIO also be applied to investigative measures assigned under the EPPO Regulation?

The system envisaged in the EIO Directive, provides for the executing authority, in order not to violate the legal principles and constitutional requirements of its national law, to subject the requested measure to prior judicial validation, if the issuing authority was not a judge, and such warrant is needed under the *lex loci*. According to the DEIO it is not clearly defined what shall be the function of the national judge in this "validation" procedure: if it is only a formality, or if a court has to thoroughly check that the requested measure complies with the rules and principles of the state of execution. Under the EIO it appears that the Commission considers such "validation" a "pro forma" requirement, without the national judge of the executing state being able to revise the grounds for issuing the EIO nor the proportionality of the measure requested. A broad judicial review in the executing State would run counter the principle of mutual recognition, but not hecking the grounds for ordering an investigative measure, might also run counter the constitutional principles of the executing State. This point needs to be clarified as the interplay between the respect for the mutual recognition principle and the primacy of EU law, and the national constitutional core elements of national law, might often enter into conflict.

[29] In the same sense, Herrnfeld (2017), p. 406.

In this regard, the EPPO Regulation does not refer to a "validation", and envisages the possibility that the "judicial authorisation for the assigned measure is refused". This would lead to a certainly contradictory situation: the mechanism of the EIO would be more favourable to the principle of mutual recognition than the one provided for under the EPPO for cross-border investigations. As such interpretation would be illogical, it is necessary that the meaning of "validation" within Article 2.d) EIO and the scope of the judicial authorisation under Article 31.3 EPPO Regulation are clarified and interpreted in a consistent way.

Under a strict application of the mutual recognition principle, the executing authority should not check the proportionality and necessity of the measure requested or assigned, and therefore, the justification of why such measure is needed and proportional for the investigation should not be subject to review by the judicial authority in the executing State.[30]

If Article 31.3 is not interpreted in this way, it could happen that, according to the EPPO Regulation, the judicial authorisation for an assigned measure would be denied—in which case the EPPO Regulation only foresees that the handling EDP "shall withdraw the assignment"—while the same measure requested by way of an EIO could be validated, applying the principle of mutual recognition. The scope of the validation decisions in the executing State, will need to be further clarified.

## 2.5 Enforcement of Assigned Measures

Once an investigative measure has been assigned and, where appropriate judicially authorized, it will be undertaken by the assisting EDP or he/she will instruct the competent national authority to do so (Article 31.4). As under the Directive on the European Investigation Order (Article 9.2 DOEI) and Article 4 of the European Mutual Assistance Agreement in criminal matters of May 29, 2000, in the proceedings of the EPPO, the investigative measure will be carried out in accordance with the *lex loci*, but respecting "the formalities and procedures expressly indicated by the handling EDP in charge" unless they are "contrary to the fundamental principles of law of the Member State of the assisting Delegated Prosecutor" (Article 32).[31]

It is not specified how the assisting EDP should proceed in the event that the required formalities are contrary to the legal principles of the executing State, but I understand that, in line with the close cooperation under which the EDPs have to act—in particular with regard to cross-border evidence-gathering—they shall inform the handling EDP of such circumstances. Here again it is necessary to insist that the EU should continue striving to advance towards greater harmonization of

[30] See also, Herrnfeld (2017), p. 404.

[31] It has to be underlined that the Regulation has avoided to use the term "executing State" and has chosen to refer to the "Member State of the assisting EDP", perhaps to emphasize that this cooperation mechanism is different from the one envisaged in the EIO. Be that as it may, as this is the State where the measure is executed, I do not think it is incorrect to call it a State of execution.

criminal evidence, so that the regulations on the conditions required in each of the Member States would gradually converge.

Another important issue that has to be faced in the context of transnational evidence is the rules on casual findings. If, during the enforcement of an investigative measure assigned by the handling EDP, there are indications or evidence related to another crime, it seems that the rules applicable to casual findings should be the ones set out in the national laws of the assisting Member State. But, I understand that the assisting EDP must communicate this circumstance to the handling EDP specifically if it is a crime that presents inextricably connected elements to the one being investigated by the EPPO, or it falls within the competence of the State that assigned the investigative measure.

Since remote searches of computers and the interception of telecommunications can be applied to the investigations carried out by the EPPO due to the seriousness of the crime investigated, the incidence of casual findings is gaining more and more significance and, therefore, certain harmonization of such rules would also be advisable.[32]

At this point, I think it is worthwhile to analyse some of the problems that may arise in the cross-border investigations of the European Public Prosecutor's Office, specifically when the investigative measure assigned is the interception of telecommunications.[33]

## *2.6 Cross-Border Investigations by the EPPO and Rules Under the EIO: The Case of the Interception of Communications*

The rules on cross-border investigation in the EPPO Regulation are very scant, so they will have to be supplemented, as expressed under Recital 73, with the instruments on mutual recognition and, where applicable, also with MLA Convention rules.

In the context of the interception of telecommunications, as such measures, save the remote search of computers, exist in all EU Member States, the problem of substitution based on the non-existence of such a measure should never appear. Moreover, Article 30.1 EPPO Regulation requires such a measure to be available in all EPPO proceedings where the penalty foreseen for the PIF crime is of at least 4 years imprisonment. Despite this rule, that already ensures a certain degree of harmonisation in the threshold for granting certain investigative measures (the ones listed under Article 30.1 Regulation),[34] it may still occur that the measure of inter-

[32] See Bachmaier Winter (2017a), pp. 1–27.

[33] On this subject, see Bachmaier Winter (2017b), pp. 313–336.

[34] This minimal harmonization will also be limited, as it will not affect the Member States not participating in the enhanced cooperation. At the moment of writing this chapter five Member States (Hungary, Malta, Poland, Sweden and the Netherlands) are not participating on the EPPO. However The Netherlands has already expressed its intention to join the enhanced cooperation during the Informal meeting of the JHA Council held in Sofia on 25–26 January 2018.

ception assigned by the handling EDP would not be allowed for investigating a similar domestic case in the State providing assistance (Article 31.2). In such cases, the executing authority shall notify the requesting authority that such assistance cannot be provided and inform the EDP handling the case of the possibility of adopting a substitute measure that could serve for achieving, if not the same, at least similar results. The Regulation provides for consultations between both EDPs and if no solution can be found, the decision shall be taken by the Permanent Chamber, as explained above (Article 31.5. c) and 31.8).

The same steps shall be taken if the EDP who has to provide the assistance considers that the information needed could be obtained through less intrusive means than the interception of communications. Cooperation in the gathering of evidence under the EPPO Regulation shall be based on close cooperation and fluent communication between the relevant EDPs, the European Public Prosecutor supervising, and the Permanent Chamber. It goes without saying that establishing a swift and reliable channel of consultations and reciprocal information is the best way to find the most appropriate solution in the process of cross-border evidence gathering.

Several questions arise with regard to the execution of the measure of interception of communications within the EPPO cross-border investigations. First, the EPPO Regulation does not contain any specific rule on how this measure shall be executed in the assisting State. Following Recital 73, other instruments of mutual recognition and judicial cooperation in criminal matters shall supplement the system of cross-border investigations set out in the EPPO Regulation. Therefore, I consider that the rules on the execution of an EIO regarding the interception of communications would be applicable to the cross-border investigations of the EPPO proceedings. In this context, Article 30.6 DEIO states that a request for an interception of telecommunications:

> may be executed by: (a) transmitting telecommunications immediately to the issuing State

This Article follows almost exactly Article 18.1 of the EU MLA Convention, where the immediate transmission of the intercepted telecommunications and the recording and subsequent transmission are also foreseen as possible means of executing the MLA request.

Where the Member States have the technical means and the adequate legal framework for allowing the direct transmission of the communications intercepted, the assisting EDP should provide for it and ensure that the handling EDP is provided with such direct access to the communications.

The direct access to the communications by the handling EDP would ensure the control of the execution of the interception under the rules of the State of the handling EDP. By applying its own legal framework on immunities and privileges, and also on the storage of the communications intercepted, the admissibility of this cross-border evidence would be much better ensured. Moreover, the decision on the prolongation of the interception would be clearly facilitated if the immediate transmission of the intercepted communications is provided. This method of transferring the evidence—either directly or once recorded as foreseen under Article 30(6)

DEIO—will also have an impact on the filtering of the communications and thus on the admissibility of the evidence collected abroad.[35]

There is, finally, the question related to the interception of telecommunications which does not require the technical assistance of the foreign State. According Article 31.1 DEIO the main obligation for the 'intercepting' state is to notify the authority of the State where the intercepted communications took place.[36] Such notification shall be done either prior to the interception, if the location of the subject is known, or during or after the interception, when the authority issuing the interception order did not previously know of it.

This provision is almost identical to Article 20 EU MLA Convention, also establishing the obligation to notify the relevant state and the possibility of the latter to require the termination of such interception if it would not be allowed in a similar domestic case. Furthermore, the notified Member State can also 'where necessary' communicate to the 'intercepting State' that the intercepted material cannot be used or be used only under certain conditions (Article 31(2) DEIO and Article 20(4) EU MLA Convention).

With regard to the EPPO proceedings, it appears that the handling EDP should notify the EDP where the interception will take place, if this is known beforehand. In accordance with Article 30.3 DEIO, the 'notified State' can prohibit the interception where the 'interception would not be authorised in a similar domestic case'. In the context of the EPPO proceedings it is unclear whether the EDP of the 'notified' State could also prohibit the use of the materials intercepted remotely. In any event, before taking any decision, I think the channel of information and consultation provided under Article 31 EPPO Regulation should be followed. And perhaps Article 31.6 might be applicable in these cases of access of telecommunications without the technical assistance of another Member State. These issues should be clarified in due time.

## 3 Cross-Border Investigations Under the EPPO Regulation and the Right to Legal Assistance

We still have to consider how the right to legal assistance in transnational investigations under the EPPO is ensured. I will not refer here to the procedural safeguards of suspects and accused in general (under Article 41 REPPO), which is the topic of other chapters.[37]

[35] Bachmaier Winter (2017b), pp. 330–334.

[36] Article 31.1 DEIO: "Where, for the purpose of carrying out an investigative measure, the interception of telecommunications is authorised by the competent authority of one Member State (the 'intercepting Member State') and the communication address of the subject of the interception specified in the interception order is being used on the territory of another Member State (the 'notified Member State') from which no technical assistance is needed to carry out the interception, the intercepting Member State shall notify the competent authority of the notified Member State of the interception."

[37] For a critical analysis on the protection of fundamental rights in the EPPO proceedings see Illuminati in this volume; and also Ruggeri. On the fundamental rights of suspects and accused in

Nevertheless, the study of the cross-border investigations of the EPPO cannot be limited to the prosecution's perspective and needs also to be assessed from the viewpoint of the defendant.[38] In this vein, I will point out some of the shortcomings that might be found when ensuring the right to legal assistance of defendants in cross-border criminal investigations. Article 41 of the Regulation stipulates that any defendant shall at a minimum be provided with the rights guaranteed in the European Directives for suspects and accused,[39] and paragraph 2, letter c) mentions specifically the right of access to a lawyer "as provided for in Directive 2013/48/EU".

Let us consider what this referral implies in the realm of cross-border investigations in general and what it's meaning may be for the future EPPO's proceedings.

## 3.1 Access to a Lawyer in the Collecting of Cross-Border Evidence

When assessing the extent to which the Directive on Access to a Lawyer (DAL)[40] ensures also the right to defence in transnational criminal proceedings when evidence is collected in another Member State, it should be noted that the DAL does not expressly provide for this. However, in the light of the specific evidentiary measures for which the right to access a lawyer is specifically guaranteed, it might be questioned whether it also covers cases where evidence has to collected abroad. The three investigative measures for which the DAL specifically requires ensuring the right to be assisted by lawyer are identity parades, confrontations, and reconstructions of the scene of a crime, although only when those investigative or evidence-gathering acts "are provided for under national law and if the suspect or accused person is required or permitted to attend the act concerned (Article 3.3 c) DAL).

In principle, if these measures are foreseen both in the issuing and executing State and in both States the accused is allowed or required to be present, when one of these three measures are assigned by an EDP or are requested via an EIO—which will not be frequent—it could be concluded that the DAL would also ensure that the defendant may be assisted by lawyer in the executing State.

However, with regard to any other investigative measure—leaving aside the questioning of the suspect or accused—the DAL does not provide anything, neither for domestic nor for the transnational proceedings, but simply refers to the national

criminal proceedings in the EU and the long way until the approval of the Directives in this field, see, among others, Cape et al. (2007), pp. 23 ff.; Bachmaier Winter (2007), pp. 41–69; Arangüena (2007); Hoyos Sancho (2008), pp. 42–78.

[38] See Costa (2016), pp. 398 ff.

[39] For the relationship of the content of this Directives and the rights recognised under the ECHR and the case law of the ECtHR see specifically, Wahl (2017), pp. 311–333.

[40] On the legislative process and the content of this Directive, see, Anagnostopoulos (2014), p. 3 ff.; Bachmaier Winter (2015c), pp. 111–131; Durdevic (2016), pp. 9–23, p. 18 ff.; Moreno Catena (2014), pp. 102–108.

laws of each Member State. While this solution might be acceptable with respect to domestic proceedings, in transnational proceedings the consequence will be that the level of protection of the defendant's rights will not be uniform.

For instance, the DAL does not provide for the possibility of the accused appointing a lawyer to attend or assist while an investigative measure is carried out in another Member State. Thus it can be seen that in the case of cross-border evidence, the approach is very different from the one provided in EAW, where the possibility of having legal assistance in both States is foreseen.

Finally, with regard to the persons who lack sufficient economic resources, it must be recalled that many Member States only grant the right to free access to a lawyer when "the interests of justice so require".[41] Bearing in mind that a process in which evidence is to be obtained in another Member State can be described as complex in itself, it would have been desirable that the Directive on Legal Aid[42] would have also included, among those cases that justify the granting of free legal aid, transnational proceedings where evidence gathering is carried out in another Member State.

In short, the Legal Aid Directive does not grant any specific or additional protection in proceedings with a transnational element. This directive does not address the right to a lawyer in the procedure of evidence gathering nor in the assessment of the necessity and proportionality of the measure assigned to an EDP, and the validity of the evidence obtained by an EDP in another Member State.

Although the ECtHR has repeatedly stressed the importance of the investigative or pre-trial phase for the development and outcome of the criminal proceedings,[43] for the Court it is crucial to determine whether, despite the violations that occurred during the pre-trial stage, the proceedings can be considered fair as a whole. This does not allow us to extract conclusions from the ECtHR approach, because it does not tackle the issue of the effectiveness of legal assistance in the context of cross-border evidence; regarding the question of when the right to a lawyer should be granted in cross-border evidence-gathering acts, nothing is said in the DAL.

In the context of transnational proceedings the protection granted by the Directive appears to be clearly insufficient. By not taking into account the additional difficulties involved in a process with transnational evidence,[44] it does not give a proper answer to what is an essential demand in building a single European area of justice: the protection of fundamental rights in transnational proceedings throughout the territory of the EU has to be equivalent to the protection granted in non-transnational proceedings at the domestic level. Granting the right to be assisted by lawyer only

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[41] On the criteria for identifying when there is an "interest of justice" in granting the right to free legal assistance see the ECtHR judgment *Quaranta v. Switzerland,* of 24 May 1991, Appl. No. 12744/87.

[42] Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, OJ L 297, 4.11.2016.

[43] See, *Imbroscia v. Switzerland*, of 24 November 1993, Appl. No. 13972/88.

[44] On transnational evidence and the rights to defence, see, for example, Gless (2013), pp. 94 ff.

for the three investigative measures under Article 3.3 c) DAL seems to be clearly insufficient.

Therefore, from this perspective the following conclusion can be drawn: the Legal Aid Directive does not contribute to the proper protection of the right to an effective defence in proceedings involving transnational evidence gathering.

With regard to the future EPPO's criminal proceedings, the question that needs to be addressed is: to what extent does the Legal Aid Directive contribute in improving the transnational defence of an accused facing a cross-border investigation by the EPPO?[45] Does the DAL contain any provision that ensures a minimum balance between the positions of the defence and the supranational prosecutor's office?

It has to be stated that the DAL is meant to guarantee minimum standards of the right to legal assistance in criminal proceedings in all Member States, and it was not conceived to specifically ensure defence rights within the EPPO criminal proceedings.[46]

Nevertheless, since the proceedings of the EPPO investigating and prosecuting PIF offences will be mainly carried out by the EDPs on the basis of the national procedural rules of the relevant State, any improvement of the right to lawyer and legal aid achieved at the national level will reflect upon the EPPO proceedings.

In conclusion, although the DAL does not ensure the right to legal assistance in transnational proceedings, where the accused needs to act also before the jurisdictions of different Member States, insofar as it improves the standard of protection at the national level, it already represents progress, and therefore merits a positive assessment. However, it still does not address the protection of the rights of the accused in European transnational proceedings. The imbalance between the defendant's rights—relying exclusively on national rules mainly foreseen for domestic proceedings—confronted with the powers of a supranational EPPO, in my opinion is not counterbalanced by specific provisions regarding the right to lawyer and the right to free legal assistance.

Until the rights of the suspects and accused are adequately granted at the European level, the establishment of the EPPO will still be viewed with certain distrust. An unequal fight at the transnational level led by the EPPO could undermine the right to a fair trial recognized in article 47 of the Charter of Fundamental Rights of the European Union and in Article 6 of the European Convention on Human Rights.[47]

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[45] For a critical view on this, see Bachmaier Winter (2014a), pp. 505–531.

[46] The perspective of the DAL differs in this sense from the proposal of the *EU Model Rules*, developed within a research project of the University of Luxembourg, which do contain specific rules on the right of access to lawyer in the EPPO proceedings and pay particular attention in ensuring this right also during the pre-trial phase, in particular the rules 12, 14 and 61. See Ligeti (2012).

[47] The principle of equality of arms, although not expressly mentioned in the European Convention on Human Rights, is a long-standing principle recognised with the right to a fair trial of Article 6 ECHR. According to the interpretation of the ECtHR, the right to a fair trial implies that the defendant has reasonable opportunity to defend his case under conditions that do not entail a substantial disadvantage with respect to his opponent. See., e.g. judgment *Dombo Beheer v. The Netherlands*, of 27 October 1993, Appl. No. 14448/88.

## 4 Concluding Remarks

The system of cooperation between EDPs through the mechanism of assigning cross-border investigation measures to the executing-assisting EDP will undoubtedly facilitate the obtaining and transmission of cross-border evidence in EPPO proceedings. Although this system will have to be complemented with the other instruments of judicial cooperation in criminal matters—the EIO with those Member States that do not participate in the EPPO and through the MLA Conventions with the other non-member States—it undoubtedly represents a major step forward in facilitating and expediting the process for obtaining cross-border evidence.

But, as has been emphasized, there is still the need to address the problems regarding the admissibility of evidence obtained abroad, as well as to ensure the adequate protection of the rights of defendants in transnational proceedings where much more can be done and needs to be done, if the EU is to advance towards a single space of justice.

For the time being, however, it must be welcomed that the long negotiations on the EPPO have ended up with an agreement, albeit through enhanced cooperation, to establish a supranational institution to protect citizens from fraud against the financial interests of the European Union. The EPPO shall ensure an efficient prosecution of these offences so that the rights of every European taxpayer as victims are adequately protected. The expectations placed on the EPPO are very high and therefore the response in defending the EU taxpayers as victims in an independent and effective manner cannot fail. For the moment the rules on cross-border evidence seem to provide for the needed framework to investigate transnational PIF offences in a more effective way.

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# Cross-Border Criminal Evidence and the Future European Public Prosecutor. One Step Back on Mutual Recognition?

**Silvia Allegrezza and Anna Mosna**

**Abstract** In October 2017 the Council Regulation establishing the European Public Prosecutor's Office was adopted through enhanced cooperation. In its final version, the new Union body has lost many of the traits originally envisaged by the Commission in its 2013 Proposal. This contribution analyses the transformation of the EPPO system with regard to both its structure and investigation powers. Thereby, particular attention will be paid to cross-border investigations and to the applicable rules on evidence gathering and evidence admissibility. In order to assess the functionality of the future EPPO, parallels will be drawn to mutual recognition and, more specifically, the European Investigation Order. Along with the evaluation of the effectiveness of the EPPO's powers, the protection of the principles of fair trial and equality of arms will be considered by taking account of the procedural safeguards granted to suspects and accused persons in proceedings of the EPPO, especially those with cross-border elements.

## 1 Introduction

It might seem inconsistent to talk about admissibility of cross-border evidence in the context of proceedings of the European Public Prosecutor's Office (EPPO), as the original idea of a "single office" operating in a "single legal area" would seem to exclude a cross-border dimension of its functions. However, the metamorphosis of that idea—from how it was originally reflected in the 2013 Commission's

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The present paper is the result of a joint discussion. However, Paragraphs 1, 3, 4 and 8 must be attributed to Silvia Allegrezza and Paragraphs 2, 5, 6 and 7 to Anna Mosna.

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L. Bachmaier Winter (ed.), *The European Public Prosecutor's Office*,
Legal Studies in International, European and Comparative Criminal Law 1,
https://doi.org/10.1007/978-3-319-93916-2_8

Proposal for a Regulation on the establishment of an EPPO (the EPPO Proposal)[1] to how it has was transposed, in 2017, into the adopted Council Regulation (the EPPO Regulation)[2]—reveals that the concept of cross-border investigations has asserted itself in EPPO proceedings. Thus, the issue of evidence gathering and evidence admissibility, especially with regard to proceedings with cross-border elements, deserves particular attention.

In an attempt to draw a comprehensive picture of evidence admissibility in the EPPO's cross-border proceedings, this contribution describes, first, the system foreseen by the EPPO Proposal and, in a second step, the admissibility of cross-border evidence under the as-adopted EPPO Regulation. The differences between the two versions will be analysed against the backdrop of the evolution of basic concepts such as "single legal area" and the EPPO as a "single office". The functionality of this new Union body will also be examined by reference to a recently introduced instrument of cooperation in criminal matters: the European Investigation Order (EIO).[3] Further, the extent to which the provisions of the EPPO Regulation effectively guarantee fundamental defence rights will be assessed. The inherently weaker position of the accused is particularly sensitive in cross-border proceedings, as the disadvantage compared to the prosecution is even more accentuated with regard to information and available means, especially when it comes to evidence gathering. An appropriate consideration for the rights of the defence is essential in view of the growth of a common European culture of procedural rights, where the homogeneous protection of defence rights is guaranteed.[4]

## 2 Admissibility of Cross-Border Evidence Under the System Envisaged by the EPPO Proposal

The 2013 EPPO Proposal did not address the issue of cross-border investigations by a dedicated provision. That might have been due to the fact that, following the path of the *Corpus Juris*, the central idea underlying the EPPO Proposal was a vision of the Union as one area, in which the new Union body would operate as a single office to fight fraud affecting the European budget.[5]

Accordingly, the EPPO Proposal envisaged a vertical model, with a European Public Prosecutor, his Deputies and the supporting staff at the core of the Office and European Delegated Prosecutors (EDPs) in the Member States. The EDPs were

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[1] Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM(2013)534 final, of 17 July 2013.

[2] Council Regulation (EU) 1939/2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ("the EPPO"), of 12 October 2017.

[3] Directive 2014/41/EU of the European Parliament and of the Council regarding the European Investigation Order in criminal matters, of 3 April 2014.

[4] Recchione (2014), p. 21.

[5] Delmas-Marty and Vervaele (2000), p. 40.

supposed to work under a "double-hat" as part of both their national judicial system and the EPPO, being linked to the latter by a strong hierarchical relationship. The EPPO Proposal's light, central structure and short lines of communication, together with the power of the head office to give instructions in individual cases, was thought to be the ideal setting for effectively fighting fraud against the Union's financial interests.[6]

On the basis of the concept of a "single judicial area", expressed in Article 18(1) of the *Corpus Juris*,[7] Article 25(1) of the EPPO Proposal stated that "[f]or the purpose of investigations and prosecutions conducted by the European Public Prosecutor's Office, the territory of the Union's Member States shall be considered a single legal area in which the European Public Prosecutor's Office may exercise its competence." Because it would operate in a single legal area, the EPPO would not need assistance requests and judicial decisions for execution from "assisting" prosecutors in cases with cross-border elements. In fact, its Article 25(2) foresaw the necessity to seek assistance to obtain cooperation only with regard to third countries.[8] Cross-border investigations within the EPPO area were meant to be conducted with very few formalities. According to the EPPO Proposal's Article 18(2), the EDP-in-charge was to act in close consultation with the EDP located in the Member State of interest, without even having to resort to instruments of mutual recognition.[9]

The reference to a single legal area was welcomed as an important achievement, as it seemed, for the first time, to translate the programmatic statement, contained in Article 67 TFEU, regarding an area of freedom, security and justice into a legislative act of the EU dealing with criminal investigations.[10] However, the EPPO Proposal did not provide its single legal area with a miniature subsystem of procedural rules to be applied in proceedings, for which the EPPO would have subject-matter competence. Although one might consider such unification to be a requirement of Article 86(3) TFEU,[11] the Commission's choice to follow a more cautious path of approximation and integration appeared to respond to a certain *Realpolitik,* taking account of the Member States' resistance and concerns over the forfeiture of their sovereignty[12] and the consequent tendency to invoke the principle of proportionality

[6] Kuhl (2017), p. 137; Mitsilegas and Giuffrida (2017), p. 8.

[7] Delmas-Marty and Vervaele (2000), p. 311.

[8] Kuhl (2017), p. 137.

[9] Weyemberg and Brière (2016), p. 31; Giuffrida (2017), p. 21; Mitsilegas and Giuffrida (2018), p. 88.

[10] Venegoni (2013), p. 6; along these lines see also Sicurella (2013), p. 2.

[11] "The regulations referred to in paragraph 1 shall determine the general rules applicable to the European Public Prosecutor's Office, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions".

[12] Giuffrida (2017), p. 3.

enshrined in Article 5(4) TEU.[13] Thus, the concept of a single legal area must be understood mainly with regard to the geographical extension of the competence of the EPPO, but not as a space in which the exercise of such competence and the corresponding defence rights would be governed by just one set of rules. The EPPO Proposal, indeed, did not aim to establish a self-sufficient system; rather, it drew up a model that relied on the constant integration of a minimum set of European rules and national criminal-procedure laws.[14] In that sense, Article 26(1) of the EPPO Proposal implied just a minimum harmonisation of investigative measures by proposing a list of measures that would be at the disposal of the European investigators, obliging the Member States to make them available.[15] At the same time, the EPPO Proposal provided in Article 26(4) that some investigatory measures that would

[13] Recital n. 19 EPPO Proposal; along these lines see Caianiello (2013a), p. 122; Goehler (2015), p. 196; Venegoni (2013), p. 8; Ligeti and Marletta (2016), p. 60.

[14] Allegrezza (2013), pp. 5–7.

[15] The list contained in Article 26(1) EPPO Proposal mentioned the following measures: (a) search any premises, land, means of transport, private home, clothes and any other personal property or computer system; (b) obtain the production of any relevant object or document, or of stored computer data, including traffic data and banking account data, encrypted or decrypted, either in original or in some other specified form; (c) seal premises and means of transport and freezing of data, in order to preserve their integrity, to avoid the loss or contamination of evidence or to secure the possibility of confiscation; (d) freeze instrumentalities or proceeds of crime, including freezing of assets, if they are expected to be subject to confiscation by the trial court and there is reason to believe that the owner, possessor or controller will seek to frustrate the judgement ordering confiscation; (e) intercept telecommunications, including e-mails, to and from the suspected person, on any telecommunication connection that the suspected person is using; (f) undertake real-time surveillance of telecommunications by ordering instant transmission of telecommunications traffic data to locate the suspected person and to identify the persons who have been in contact with him at a specific moment in time; (g) monitor financial transactions, by ordering any financial or credit institution to inform the European Public Prosecutor's Office in real time of any financial transaction carried out through any specific account held or controlled by the suspected person or any other accounts which are reasonably believed to be used in connection with the offence; (h) freeze future financial transactions, by ordering any financial or credit institution to refrain from carrying out any financial transaction involving any specified account or accounts held or controlled by the suspected person; (i) undertake surveillance measures in non-public places, by ordering the covert video and audio surveillance of non-public places, excluded video surveillance of private homes, and the recording of its results; (j) undertake covert investigations, by ordering an officer to act covertly or under a false identity; (k) summon suspected persons and witnesses, where there are reasonable grounds to believe that they might provide information useful to the investigation; (l) undertake identification measures, by ordering the taking of photos, visual recording of persons and the recording of a person's biometric features; (m) seize objects which are needed as evidence; (n) access premises and take samples of goods; (o) inspect means of transport, where reasonable grounds exist to believe that goods related to the investigation are being transported; (p) undertake measures to track and control persons, in order to establish the whereabouts of a person; (q) track and trace any object by technical means, including controlled deliveries of goods and controlled financial transactions; (r) undertake targeted surveillance in public places of the suspected and third persons; (s) obtain access to national or European public registers and registers kept by private entities in a public interest; (t) question the suspected person and witnesses; (u) appoint experts, ex officio or at the request of the suspected person, where specialised knowledge is required.

affect an individual's fundamental rights would be subject to judicial authorisation, regardless of any corresponding provisions in the different national legal frameworks.[16]

Apart from this, however, the EPPO Proposal confirmed that the *locus regit actum* principle would be the only criterion used to identify the applicable law[17]: only the evidentiary results were supposed to circulate, not the rules on how to obtain such results.[18] The *locus regit actum* strongly protects national sovereignty during the execution of any investigatory act and represents a traditional approach to mutual legal assistance. Once the idea of a unified set of procedural rules for the cases, for which the EPPO would be competent, was shelved, it represented the only option left to the European legislator. In fact, the opposite principle—*forum regit actum*—recently favoured in other instruments, such as the EIO Directive, was found to be unsuitable for EPPO proceedings, as the future *forum* State is frequently unclear at the time the investigative measure is carried out and a formal designation occurs, according to Article 27(2) of the EPPO Proposal, only "[w]hen the competent European Delegated Prosecutor considers the investigation to be completed".[19]

Especially in cases with a cross-border dimension, the *locus regit actum* principle is likely to result in a complicated interaction between European and national rules deriving from different legal orders. When the EPPO Proposal was originally published, scholars[20] pointed out the problems that could arise due to the need to apply rules from different national frameworks. For instance, one need only think about the uncertainty of the EPPO's competence *ratione materiae* that would have been caused by heterogeneous crime definitions or about the negative effects on the right to a concrete and effective defence because of diverging levels of procedural guarantees and differing procedural rules on the execution of investigatory measures or the collection of evidence.[21] The difficulties for the defence were not only seen in the general fact that, with every change of reference system, there would be a need to have information and instruction upon the rights that could be exercised. More concretely and specifically, the accused would have hardly been able to effectively contrast the possible application of coercive measures according to the applicable national-procedural law. The combination of rules from various legal orders in cross-border cases represented a potential disadvantage for the defendant: not only would he be subject to a foreign legal system, but he might also "slip through the net" of safeguards of the system of the Member State in which the trial would be conducted. In fact, evidence is not an EU-wide standard product; evidentiary

[16] Article 26(4) EPPO Proposal stated that "Member States shall ensure that the investigative measures referred to in points (a)–(j) of paragraph 1 are subject to authorisation by the competent judicial authority of the Member State where they are to be carried out".

[17] Article 11(3) EPPO Proposal.

[18] Allegrezza (2013), p. 7.

[19] Helenius (2015), pp. 192–193; Zerbes (2015), pp. 216–217.

[20] Monar (2013), p. 352; Allegrezza (2013), p. 7; Recchione (2014), p. 22.

[21] On this issue, in relation to the final EPPO Regulation, see Mitsilegas and Giuffrida (2017), pp. 8–9 and 11.

outcomes are the result of a specific (national) procedure. If one can agree that national procedural rules are part of different overall systems, each representing a delicate balance of conflicting interests, one can equally agree that provisions on evidence are an expression of a peculiar balance that aims not only to protect human rights, but also to lay down a specific understanding of the quality of information, which, again, is strictly linked to compliance with the procedural rules relating to the acquisition of that information.[22] Safeguards for the protection of an accused are not only differently conceived by the various Member States, but also built in at different stages of said procedure in their respective legal orders. There is a risk that, by applying only part of the rules belonging to a particular system, a provisional sacrifice or compression of a defence right will turn into a definitive one, because the counterbalance foreseen by the original legal order would not come into play, as the reference system would have changed in the meantime. Any "combination" of systems, therefore, could result in a lack of transparency, which could harm the fairness of the trial, especially, the equality of arms. If we look at the EPPO Proposal's rules dedicated to defence rights,[23] a rather minimalistic approach emerges, which does not foster the impression that the proceeding will necessarily respect the equality of arms. That principle already appeared intrinsically challenged by the creation of a European body with such extensive investigation powers.[24]

Furthermore, the system, as designed in 2013, strongly reshaped the power for the trial court to assess evidence in cross-border cases. The evaluation of evidence collected according to procedural rules of different national legal orders, by a court of probably yet another national system, implied more than one problematic aspect. First, it was unclear what the concrete objective of the admissibility-control should be. Should the trial court verify that the procedures for obtaining evidence are in accordance with the law of the State of execution or that the law of the executing State is compliant with the principles and fundamental rights, referred to in Article 30 of the EPPO Proposal?[25] The resulting uncertainty relating to the applicable (procedural) law would have likely also had adverse repercussions on trial fairness and the rights of the defence.

[22] Gless (2013), p. 575, where the collection of the evidence in compliance with the procedural rules of the specific legal order they are gathered in is denominated "Rechtskonnotation" of the evidence; see also Allegrezza (2010), p. 573.

[23] In this regard, it suffices to note how the EPPO Proposal limited itself to reiterating, in its Article 32(1), the necessary "compliance with the rights of suspected persons enshrined in the Charter of Fundamental Rights of the European Union, including the right to a fair trial and the rights of defence" and to listing, in Article 32(2), the rights contemplated in the directives adopted as part of the Roadmap attached to the 2009 Stockholm Programme, such as the right to interpretation and translation, the right to information and access to case materials and the right of access to a lawyer and the right to communicate with and have third persons informed in case of detention (a–c); further the right to remain silent and the right to be presumed innocent (d); the right to legal aid (e); and the right to present evidence, appoint experts and hear witnesses (f).

[24] Allegrezza (2013), p. 8.

[25] Flore (2014), p. 789.

Second, the EPPO Proposal's Article 30 would have established a flexible admissibility assessment model based on compliance with fundamental rights that rejected any additional screening of said evidence.[26] According to its Article 30(1),[27] the admission of evidence was to be provided "in the trial without any validation or similar legal process even if the national law of the Member State where the court is located provides for different rules on the collection or presentation of such evidence". This provision implicitly excludes that any rules on evidentiary corroboration could apply, even if national rules would require it for the same evidence.[28] Such full recognition was only limited in cases, in which the court would have had reason to believe that the fairness of the procedure or the rights of the defence as established in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union (CFR) would be adversely affected by the admission of the evidence in question.[29] In that regard, it was considered that the broad spectrum of interpretation of the rights enshrined in those CFR Articles would have given the trial judge a wide margin of discretion in evaluating the admissibility of any evidence gathered abroad. In fact, according to Article 52(3) CFR, Articles 47 and 48 CFR embrace the rules set forth in the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the relevant case-law of the European Court of Human Rights (ECtHR). In addition, neither the CFR nor the ECHR together with the case-law of the ECtHR, lay down any general rules on evidence admissibility.[30] Both instruments contain a catalogue of various defence rights in connection with the principle of fair trial, but they cannot be considered a broader, exhaustive code of defence rights. Rather, the CFR and the ECHR only set out the minimum standards for the proclaimed rights. Accordingly, the ECtHR

[26] A similar model was already hypothesized in the Tampere Conclusions, in which it was stated that evidence lawfully gathered by the authorities of one Member State should be admissible before the court of another Member State, after taking account of the standards that apply there: European Council of 15–16 October 1999, Conclusions of the Presidency, SN 200/1/99 REV 1, point 36; see also Gless (2009), p. 159; Helenius (2015), pp. 180, 190–191; Allegrezza (2010), p. 569.

[27] See also Recital n. 32 EPPO Proposal.

[28] Recchione (2014), p. 25; Caianiello (2013a), p. 122.

[29] The disposition of the EPPO Proposal's Article 30(2) on the integrity of the power of national courts to freely assess the evidence presented by the EPPO is rather curious. Not only does it state the obvious, since the principle of free evaluation of evidence and, hence, the principle of the judge's *intime conviction* belong to the core principles in the European traditions of criminal procedure, but it also goes further than what is envisaged by Article 86 TFEU. Article 86(3) TFEU refers only to "the rules of procedure […] governing the admissibility of evidence", while the content of the EPPO Regulation also incorporates rules on the activity of the judge "[o]nce the evidence is admitted".

[30] European Commission of Human Rights, 11 October 1988, Wischnewski v. Federal Republic of Germany, Application No. 12505/86,: "Article 6, para. 1 (Art. 6-1) of the Convention […] does not lay down rules as to the evidence as such, and, in particular, as to its admissibility, these questions being essentially dependent on domestic legislation"; see also ECtHR, 12 July 1988, Schenk v. Switzerland, Application No. 10862/84, §§ 46–49; 9 June 1998, Texeira de Castro v. Portugal, Application No. 25829/94, § 34; 1 March 2007, Heglas v. Czech Republic, Application No. 5935/02, § 84; 1 June 2010, Gäfgen v. Germany, Application No. 22978/05, § 162.

case-law evaluates procedural fairness by reviewing, case-by-case, the relevant proceeding as a whole and limiting its attention to particularly severe violations of fundamental rights.[31] The ECtHR has made clear that it is not its obligation or function to address errors of fact or of law allegedly committed by a national court unless such errors may have infringed rights and freedoms protected by the ECHR.[32] With regard to the provision of Article 30 of the EPPO Proposal, this would have meant that a breach of a procedural rule, which would not result in a particularly flagrant violation of a fundamental right enshrined in Articles 47 and 48 CFR, would be irrelevant in any admissibility assessment the trial court would have to exercise.[33] It suffices to acknowledge that, according to the ECtHR, the use of unlawfully obtained evidence is not *per se* excluded. Only if the acquisition procedure has as a consequence that the trial, as a whole, is to be qualified as unfair, can the ECtHR find a breach of Article 6 ECHR.[34] The ECtHR's position and, by reference, the one of the EPPO Proposal are in stark contrast to the formal approach to violations of procedural rules adopted in the various Member States, particularly those of adversarial systems. In these procedural orders, sanction mechanisms are expected to support compliance with the formal requirements set out by procedural rules, regardless of any concrete detriment to the rights of one of the parties. It is questionable whether an approach that envisages procedural sanctions only in cases, in which a violation of procedural rules is proven to have materially affected fundamental rights, could have secured the protection of defence rights and trial fairness by the rules on the admission, acquisition and assessment of evidence.[35]

Furthermore, additional issues could have arisen under the EPPO Proposal. First, the absence of an effective and common set of rules in the EPPO Proposal might have represented a basis for some sort of "forum shopping" on the part of the prosecution. Situations of "evidence shopping" or "evidence laundering" could not be excluded.[36] Second, the fact that the EPPO Proposal did not provide guidance on the admissibility of evidence introduced by the defence could have been criticised. The

[31] Helenius (2015), p. 224.

[32] ECtHR, Gäfgen v. Germany (footnote 31) § 162.

[33] Helenius (2015), p. 203; Gless (2013), p. 603.

[34] Bachmaier Winter (2013), p. 130; European Commission of Human Rights, Wischnewski v. Federal Republic of Germany (footnote 31): "none of the Convention's provisions expressly requires that evidence obtained illegally under national law should not be admitted. The Convention organs therefore cannot exclude as a matter of principle and in the abstract that evidence obtained unlawfully under domestic law may be admissible, but must ascertain in the specific case whether, having regard to its particular circumstances of the case in question, the trail – taken as a whole – was fair within the meaning of Art. 6, para. 1 (Art. 6-1) of the Convention"; ECtHR, Schenk v. Switzerland (footnote 31) §§ 46-49; 12 May 2000, Khan v. the United Kingdom, Application No. 35394/97, § 34; 25 September 2001, P.G. and J.H. v. the United Kingdom, Application No. 44787/98, § 76; 5 November 2002, Allan v. the United Kingdom, Application No. 48539/99, § 42; Gäfgen v. Germany (footnote 31) § 163.

[35] Voena (2014), p. 289.

[36] Helenius (2015), p. 217; Gless (2008), p. 319; Gless (2013), p. 580; Nieto Martín et al. (2013), p. 781.

exclusion of such a provision could, however, be explained with the fact that the right for the defence to collect evidence is rather controversial at the EU level and different approaches have been taken within inquisitorial and adversarial systems.[37] Indeed, Article 30 explicitly referred only to "[e]vidence presented by the European Public Prosecutor's Office to the trial court". This imbalance was not neutralised by Article 35 on the rights concerning evidence. That provision simply entitled the accused—not even as a general rule, but only "in accordance with national law"—to present evidence for the consideration of the EPPO or to request the latter to gather evidence relevant to the investigation. The ability of the defence to channel evidence through the prosecutor could have been seen, at best, as an *indirect* right to participate in the investigation, not an entirely satisfactory result for the defence, especially when the investigation is cross-border in nature. The traditional secrecy during the investigatory phase, the physiological imbalance of means and information available to the two main actors in the proceeding, and the absence of a defence-lawyers network even slightly comparable to the EPPO network, all make clear that defence rights appear more hypothetical rather than simply *indirect.* The idea that channelling evidence through the prosecutor could respect equality of arms and the grant of a fair trial seems, therefore, rather farfetched.[38]

In sum, the combination of the *locus regit actum* principle and the free circulation of evidence, as set forth in the EPPO Proposal, represented an everything but ideal setting for both the admissibility-control of said evidence and trial fairness, especially with regard to the exercise of defence rights. However, the EPPO Proposal gave, at least, some substance to the concept of the "area of freedom, security and justice" by proposing some elements of a "single legal area" in the delicate field of evidence law.

## 3 Regulation 1939/2017: A Flattened Structure for the EPPO

Four years after the EPPO Proposal was submitted to the Council, the Council finally adopted the EPPO Regulation with enhanced cooperation among 20 Member States. Over those years, the EPPO Proposal was substantially changed. Already in 2015, the Presidency presented a consolidated version of Articles 1 to 35 of the draft Regulation,[39] which incorporated profound changes in relation to the structure and functioning of the EPPO. In fact, after the EPPO Proposal was initially published, negotiations led to significant amendments under each of the successive Presidencies of Greece, Italy, Latvia, and Luxembourg, which demonstrated a much more pragmatic and, perhaps, a more disillusioned approach. The EPPO Proposal was revised to include a far less-hierarchically organised structure, which may remind one of an

[37] Mitsilegas and Giuffrida (2018), p. 75.

[38] *Contra* Recchione (2014), p. 25.

[39] Council of the European Union, 22 December 2015, Doc. 9372/1/15 REV 1, 12621/15, 14718/15.

intergovernmental model, following the blueprint of Eurojust.[40] The light structure at the central level was replaced by a more articulated construct,[41] when the Greek Presidency[42] decided to introduce collegial organs in the EPPO structure—an amendment, which the following Presidencies retained.[43]

The College of the EPPO is conceived as an organ consisting of the European Chief Prosecutor (the referral to the European *Chief* Prosecutor and not anymore to *the* European Prosecutor already indicates the change of perspective) and one European Prosecutor per Member State.[44] Its main function is general oversight of the activities of the EPPO. Further, it shall take decisions relating to strategic matters and general issues arising from individual cases, but it must refrain from making operational decisions in individual cases.[45] For operational decisions in individual cases, the College is obliged to set up Permanent Chambers.[46] The composition of each such Permanent Chamber is laid out as follows: it must be chaired by the European Chief Prosecutor, one of the Deputy European Chief Prosecutors or a European Prosecutor appointed as Chair, and it must have two additional, permanent Members.[47] The operational decision-making power of a Permanent Chamber consists of the task—generally expected to be delegated to one designated Member—of monitoring and directing the investigations and prosecutions conducted by the EDPs, as well as coordinating the investigations and prosecutions in cross-border cases and implementing the general and strategic decisions taken by the College.[48]

If the initial model proposed by the EPPO Proposal recalled the structure of Eurojust,[49] the EPPO Regulation's final structure is even closer thereto. Repeated interventions and amendments during the negotiations have, in fact, spread its powers and tasks over a system of a College of European Prosecutors and different Permanent Chambers.[50] The original EPPO concept moved toward a decentralised model composed by nation-based investigative authorities. The EPPO's resulting heavy structure raises questions as to whether the provisions of the EPPO Regulation

[40] Mitsilegas and Giuffrida (2017), p. 7.

[41] Csonka et al. (2017), p. 125.

[42] Council of the European Union, 21 May 2014, Doc. 9834/1/14 REV 1.

[43] Council of the European Union, 28 November 2014, Doc. 15862/1/14 REV 1, (A).

[44] Article 9(1) EPPO Regulation. On the structure of the EPPO see A. Martínez Santos in this volume.

[45] Article 9(2) EPPO Regulation.

[46] Article 9(3) EPPO Regulation.

[47] Article 10(1) EPPO Regulation.

[48] Article 10(2) EPPO Regulation.

[49] Caianiello (2013a), pp. 123–124: "[i]n the end, the EPPO's proposal looks more like an enhanced coordination and cooperation office than the first institution of a unified federal criminal justice system, as Article 86 TFEU would have allowed. It looks more like a 'reinforced Eurojust' than an European Public Prosecutor Office, that is, an organ empowered to give orders to the judicial authorities of the Member States rather than intervene directly in the field".

[50] Ligeti and Marletta (2016), p. 58.

are in line with the Commission's original intent of reducing complexity, with respect to both institutional complexity and normative source complexity.[51] In that regard, the final EPPO structure poses a risk of generating cumbersome, dysfunctional interactions between the Permanent Chambers, the supervising European Prosecutor, and EDPs: that potentiality puts accountability for decision-making,[52] as well as the overall efficiency and utility of a Union body with these characteristics, in doubt.[53] Moreover, the continuing reference to applicable national law indicates a general failure to reduce the system's complexity. The "quasi-intergovernmental" structure of the Office is the tangible outcome of the Member States' overall reluctance to abdicate segments of their sovereignty in favour of a truly European body. This augmented normative complexity risks resulting in the fragmentation[54] of investigative powers.

## 4 A Flat Organizational Structure Functions Horizontally: One (?) Step Backwards

Along with diluted power and excessive complexity, the EPPO Regulation also incorporated an even weaker set of investigative powers. Its divergence from the already timid[55] system envisaged by EPPO Proposal is evident both in its programmatic-ideological statement and at the level of its normative content.

First, the EPPO Proposal's provision entitled "The European Public Prosecutor's Office's authority to investigate", contained in its Article 25, was completely eliminated. With it went the programmatic reference to a "single legal area" that should have been, at the very minimum, a symbol for the EPPO's unified action. Even though the original concept of "single legal area" was mostly limited to its geographical aspects, the final EPPO Regulation completely eliminated those features. Instead, the corresponding section in the EPPO Regulation opens with Article 30,[56] which, on a closer look, reflects an understated programmatic-ideological statement. While Article 26 of the EPPO Proposal identified the EPPO as a centralised EU prosecution service with the power to conduct investigations, Article 30 of the

[51] Caianiello (2013a), pp. 116–118.

[52] Ligeti and Marletta (2016), p. 60.

[53] Which, again, is inconsistent with the objectives that inspired the Commission: Recital n. 8 EPPO Proposal stated that "[t]he organisational structure of the European Public Prosecutor's Office should also allow quick and efficient decision-making in the conduct of criminal investigations and prosecutions, whether they involve one or several Member States".

[54] Which could, in turn, lead to an intrinsic contradiction, since the institution of the EPPO was specifically intended to avoid, with regard to crimes affecting the financial interests of the Union, the problems, disadvantages and limits arising from the fragmentation of national prosecutions: see Recital n. 5 EPPO Proposal.

[55] Ligeti and Marletta (2016), p. 61.

[56] On "Investigation measures and other measures".

EPPO Regulation refers to the multitude of EDPs, underscoring the collegial nature and structure of the new body. While it might appear to only be a terminological difference, the fact that the EPPO Regulation mentions the EDPs rather than the Office, as such, suggests a lack of central authority and of coherent action to be taken by this body.

Second, with regard to the normative content of the EPPO Regulation's Article 30, a quick glance at the investigation measures to be made available in every Member State—hence, the object of minimum harmonisation—suffices to clarify the Council's restrictive approach in a twofold manner. The first thereof reflects the general restriction introduced by a rather cryptic expression in Article 30: "[a]t least in cases where the offence subject to investigation is punishable by a maximum penalty of at least four years of imprisonment". This limitation implies that Member States need only make the listed investigation measures available for such offences, leaving to national discretion to contemplate the same possibility for proceedings relating to other crimes within the competence *ratione materiae* of the EPPO. Arguably, that reading of the language will prove problematic in terms of the systemic coherence and concrete application of the EPPO Regulation. Moreover, the EPPO Regulation limits the number of minimum investigation measures themselves: it cut them down from originally proposed twenty-one to just six.[57] In essence, that equals an abdication of any attempt to create the minimum harmonisation necessary for even a basic European-level function. As a consequence, the narrowed area of harmonisation, together with the EPPO Regulation's increased reference to national law, indicates a fragmented approach that has little in common with the EPPO Proposal's original concept of a "single legal area". The EPPO Regulation's Article 31, relating to cross-border investigations, confirms that change in approach.

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[57] Article 30 of the EPPO Regulation refers to the following investigation measures: (a) search any premises, land, means of transport, private home, clothes and any other personal property or computer system, and take any conservatory measures necessary to preserve their integrity or to avoid the loss or contamination of evidence; (b) obtain the production of any relevant object or document either in original or in some other specified form; (c) obtain the production of stored computer data, encrypted or decrypted, either in original form or in some other specified form, including banking account data and traffic data with the exception of data specifically retained in accordance with national law pursuant to the second sentence of Article 15(1) of the Directive 2002/58/EC of the European Parliament and of the Council; (d) freeze instrumentalities or proceeds of crime, including assets, that are expected to be subject to confiscation by the trial court, where there is reason to believe that the owner, possessor or controller of those instrumentalities or proceeds will seek to frustrate the judgement ordering confiscation; (e) intercept electronic communications to and from the suspected or accused person, over any electronic communication means that the suspected or accused person is using; (f) track and trace an object by technical means, including controlled deliveries of goods. The number of available investigation measures has also been smaller in past versions of the draft Regulation. The measure under (f) was not present in Article 25(1) Council Doc. 9372/1/15 REV 1, 12621/15, 14718/15. The restriction from twenty-one to five measures had been preceded by a first "cut" operated in the proposal submitted by the Italian Presidency in 2014, Doc. 15862/1/14 REV 1 (Article 26).

## 5 Cross-Border Investigations: Back to the Model of Legal Assistance

Article 31 of the EPPO Regulation establishes a system of cooperation between the EDPs of the different Member States in proceedings in which cross-border investigations need to be carried out.[58] The EPPO Proposal did not explicitly regulate this issue, but amendments proposed by the Italian Presidency clearly envisaged a specific provision on cross-border investigations,[59] which all subsequent drafts of the EPPO Regulation maintained. In its final version, Article 31 recalls even by its terminology a system of mutual legal assistance: references to the "handling European Delegated Prosecutor", the "assisting European Delegated Prosecutor" and their obligation to "act in close cooperation", indicate a system, which is incompatible with the EPPO Proposal's original concept of a single office for a single legal area.[60] Also, the collection and admission of cross-border evidence, itself, appears to function according to rules reminiscent of such a system. In fact, the principle of free circulation of evidence contemplated by the EPPO Proposal has been visibly undermined with regard to both rules relating to evidence-gathering and rules on evidence admissibility.

In a nutshell, the EPPO Regulation establishes that, in cross-border cases, the handling EDP might need to undertake an investigatory measure in a different country. In such a case, the handling EDP must decide on the necessity of the measure according to his own law, but then refer the matter to the national EDP of the country where the measure needs to be carried out.

While the EPPO Proposal based its proposed rules on evidence collection on the *locus regit actum* principle, the EPPO Regulation adopted a different and, again, more complex system. A combined reading of its Articles 31 and 32 suggests that the choice of an investigation measure and the way in which it is to be carried out must comply with both the procedural rules of the Member State of the handling EDP and the national law of the assisting EDP. In practice, that will normally result in the duty to respect both the rules of the *lex fori* and the *lex loci*.

In fact, Article 31(2) states: "[t]he justification and adoption of such measures shall be governed by the law of the Member States' of the handling European Delegated Prosecutor" and Article 32, which establishes rules for the enforcement of the assigned measures, provides that "[t]he assigned measures shall be carried out in accordance with this Regulation and the law of the Member State of the assisting European Delegated Prosecutor".

The obligation to simultaneously consider the law of both Member States involved also emerges with regard to the need for judicial authorisation. Article 31(3) establishes that "[i]f judicial authorisation for the measure is required under the law of the Member State of the assisting European Delegated Prosecutor, the

[58] See also L. Bachmaier in this volume.

[59] Doc. 15862/1/14 REV 1, Article 26(a).

[60] Ligeti and Marletta (2016), p. 61.

assisting European Delegated Prosecutor shall obtain that authorisation in accordance with the law of that Member State. […] However, where the law of the Member State of the assisting European Delegated Prosecutor does not require such a judicial authorisation, but the law of the Member State of the handling European Delegated Prosecutor requires it, the authorisation shall be obtained by the latter European Delegated Prosecutor and submitted together with the assignment".[61]

Moreover, according to the EPPO Regulation's Recital 72, if judicial authorisation is required in both Member States involved, it must be clearly specified in which Member State such authorisation must be obtained, it being understood that there must only be one authorisation. In the absence of harmonising rules on the matter, national law will determine whether, and under which modalities, such judicial authorisation is necessary for the execution of the assigned investigation measure. The scope of judicial scrutiny, therefore, is likely to vary according to the national legal frameworks involved. As there is no explicit time limit for obtaining such authorisation or executing the assigned measure contemplated in the EPPO Regulation, cross-border investigations could be significantly delayed. Under Article 31(7), recourse is available to the relevant Permanent Chamber, if the assigned measure is not undertaken within the time limit set out in the assignment or within a reasonable time. Concrete deadlines are, however, not foreseen on a general basis.[62]

The complexity of cross-border investigations is further enhanced by the fact that, once the decision of adopting a measure in a Member State other than the handling EDP's Member State has been taken, the assisting EDP is entitled to evaluate its form and content. Should the assisting EDP have doubts in that regard, he must not execute the measure. Rather, according to Article 31(5), he must inform his supervising European Prosecutor and consult with the handling EDP in order to resolve the matter bilaterally, when he "considers that: a) the assignment is incomplete or contains a manifest relevant error, b) the measure cannot be undertaken within the time limit set out in the assignment for justified and objective reasons, c) an alternative but less intrusive measure would achieve the same results as the measure assigned, or d) the assigned measure does not exist or would not be available in a similar domestic case under the law of his/her Member State". Looking at the potential situations that might lead to such bilateral consultations, it is evident that the broad and imprecise formulation, particularly in subparagraph a), is likely to give rise to an unlimited range of cases in which the assignment, if not outright refused, could be put on hold by the assisting EDP. Such a mechanism not only appears antithetical to the EPPO Proposal's original objectives—such as "[t]o ensure a more efficient and effective investigation and prosecution of offences affecting the EU's financial interests"[63]—but also seems inconsistent with, and to

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[61] This differentiated (and thus more complex) regulation of the different stages of an investigative measure dates back to the Proposal of the Italian Presidency, Doc. 15862/1/14 REV 1.

[62] Weyemberg and Brière (2016), p. 32.

[63] See para. 3.3 of the Explanatory Memorandum to the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, EPPO Proposal.

contradict, what ought to be the general trend in EU legislation: simplifying and accelerating cooperation in cross-border criminal matters.

## 6 Mutual Legal Assistance: Ahead to the Past? A Comparative Look at the EIO

The EPPO Regulation's shortcomings with respect to simplifying and accelerating judicial cooperation in criminal matters are even clearer when compared with the provisions of Directive 2014/41/EU on the EIO (EIO Directive).

Arguably, by introducing a unified regime for cross-border evidence-gathering,[64] the EIO Directive is the most advanced set of rules on this matter ever adopted by the European legislator.[65] The considerable achievement of the EIO Directive lies in its simplification and acceleration of judicial cooperation in criminal matters; exactly what seems to be lacking in the EPPO Regulation. The EIO Directive presents itself as a universal tool for the execution of any kind of investigative measures abroad and it also provides for direct contact among the competent authorities, which enables them to have a much more effective and efficient cooperation.[66]

Even more importantly, the EIO Directive allows, on an optional basis, the principle of *forum regit actum*. In fact, its Article 9(2) states that the authorities of the issuing Member State can indicate the formalities and procedures applicable to the investigation to be executed. The fact that rules on both the gathering and admittance of evidence results from one legal order (instead of from a "patchwork proceeding") does not only facilitate the actual admission and use of the evidence in question, but also reduces the risk of shortcomings relating to procedural safeguards.[67]

Based on the principle of mutual recognition (of the investigation order),[68] as laid down in its Article 1(2), the EIO Directive not only improves judicial cooperation, but also represents an important step forward in the development of an area of freedom, security and justice.[69] In fact, according to its Article 9(1), the EIO Directive

[64] Recital n. 24 EIO Directive.

[65] Allegrezza et al. (2016), p. 186; Daniele (2015), p. 87; see also Communication from the Commission to the European Parliament and the Council: An area of freedom, security and justice serving the citizen, 10 June 2009, COM(2009)262 final, point 4.2.2.; Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility, 11 November 2009, COM(2009)624 final, point. 4.1.

[66] Böse (2014), p. 163; Bachmaier Winter (2010), p. 583.

[67] Zerbes (2015), p. 590.

[68] In this regard, actually, a distinction must be made. While the principle of mutual recognition, to the extent and within in the boundaries defined by the EIO Directive, applies for non-coercive investigation measures, for measures that imply coercive acts the EIO Directive foresees a procedure that resembles more traditional forms of mutual legal assistance; see also Caianiello (2015), p. 3.

[69] Bachmaier Winter (2015), pp. 47, 56–58; Allegrezza et al. (2016), pp. 186–187; Camaldo and Cerqua (2014), p. 3512.

generally obliges the executing authority to recognise investigation orders without further formalities and to execute them in the same way and under the same modalities as if the investigative measure concerned had been ordered by an authority of the executing State. Exceptions to the principle of mutual recognition may only be made in those cases, in which the executing authority decides to invoke one of the enumerated grounds for non-recognition or non-execution[70] or for postponement[71] provided for in the EIO Directive.

In that regard, the EIO Directive's Article 11 contemplates a specific ground for non-recognition or non-execution in cases, in which the executing authority has substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the CFR.[72] Although the refusal clauses in the EIO Directive were criticised by scholars, at least in part because they are a remnant of the model of mutual legal assistance,[73] it must be acknowledged that the system provided by the EIO Directive, with its more realistic approach to the principle of mutual recognition[74] that allows for some sort of flexibility and thought-through safety-valves, has great potential for becoming an effective tool for horizontal cooperation among different national authorities.[75] Conversely, the limitations of the obligation[76] to execute the assigned investigation measure set forth in the EPPO Regulation, which might well turn out to be even more severe than the ones laid down by the EIO Directive, in connection with the need for bilateral consultations and the resulting increased complexity and ponderousness of the procedure, do not seem justified when it comes to requests circulated within what is supposed to be one and the same office.

Moreover, Article 12 of the EIO Directive sets specific time limits for the recognition and execution of the measure to be executed. Apart from requiring that any judicial decision on the recognition and execution of the measure must be taken with the same celerity and priority as would apply for a similar domestic case, said Article 12 sets a general deadline of 30 days for such decision to be made.[77] The EIO Directive's maximum delay of 30 days for a judicial decision on the recognition and order of execution of the measure, plus an additional period of up to 90 days for

[70] Article 11 EIO Directive.

[71] Article 15 EIO Directive.

[72] Article 11(1)(f) EIO Directive.

[73] Caianiello (2015), p. 8: this is true especially with regard to the case of non-execution linked to territoriality, such as the one mentioned under (e), because they contradict the idea of a "single legal area" that inspires European legislation in criminal matters as a whole.

[74] Bachmaier Winter (2010), p. 586; Bachmaier Winter (2015), p. 51, where the more mitigated approach to the application of the principle of mutual recognition is explained as a reaction to "[t]he experience with the EAW and its 'disproportionate' use"; along these lines see also Allegrezza et al. (2016), p. 190; Peers (2016), p. 107.

[75] Bachmaier Winter (2015), p. 56.

[76] Csonka et al. (2017), p. 129.

[77] Article 12(3) EPPO Regulation.

the actual execution of the measure could, perhaps, be considered too generous. The introduction of a specific deadline, applicable to executing authorities of all Member States, together with a harmonised set of grounds for refusal of the recognition and execution, however, seems to ensure better and more efficient cooperation among the competent authorities of different Member States than the system envisaged under the EPPO Regulation.

Against this EIO background, a question arises as to why the EPPO does not incorporate a similar mechanism. Interestingly, a suggested alignment between the EPPO regime on cross-border investigations and the EIO system was specifically rejected on the basis of the *sui generis* nature of the EPPO.[78] Rather, it was argued, the EPPO's ability to employ legal instruments on mutual recognition or cross-border cooperation should only be used in situations in which a necessary measure would not be available for purely domestic situations, but would be available in cross-border situations covered by such a legal instrument.[79]

This position is understandable with regard to the structure of the EPPO as originally conceived in the EPPO Proposal. A true "single office", indeed, would not have needed to resort to mutual recognition instruments, as its particular structure would have allowed it to operate in cross-border cases even more efficiently than offered by such instruments. However, it is more difficult to accept that argument in relation to the final, approved EPPO structure; its virtually intergovernmental model lacks the slim and centralized orientation of the Union body originally contemplated in the EPPO Proposal. Thus, insistence on the *sui generis* nature of the EPPO and on specific rules for cross-border investigations (which, in the end, are reminiscent of the old mutual legal assistance provisions) put the potential of the EPPO in doubt, at least in terms of its efficiency. It remains to be seen whether the final version of the EPPO will be able to achieve more effective means of investigation and prosecution in cross-border cases than would be available through an EIO.[80]

## 7 Admissibility of Cross-Border Evidence Under the EPPO Regulation

The fragmented structure and the overcomplicated functioning of the future EPPO affect also the rule on evidence admissibility, set forth in Article 37 of the EPPO Regulation. Said provision introduced two main amendments to the provision on evidence admissibility enshrined in the EPPO Proposal.

The first novelty is the explicit reference to evidence presented by the defence, contained in Article 37(1) of the EPPO Regulation. Unlike the EPPO Proposal, the EPPO Regulation contemplates that evidence presented by the defence will be subject

[78] Weyemberg and Brière (2016), p. 31; Giuffrida (2017), p. 22.

[79] Article 31(6) and Recital 73 EPPO Regulation.

[80] Kuhl (2017), p. 139.

to the same conditions of admissibility as evidence presented by the prosecution. This innovation is very welcome. However, the natural imbalance between the prosecution and the defence, especially in cases of cross-border investigations—where the inequality of arms is even more accentuated—makes the effectiveness of this novel provision depend on the actual ability of the defence to concretely gather useful evidence abroad. The simple referral, in Article 41 of the EPPO Regulation, to general principles and fundamental rights as enshrined in the CFR, to a plain catalogue of defence rights and to the applicable national law, without contemplating any additional harmonisation of defence rights, might not effectively guarantee a homogeneous protection standard throughout the Member States participating in the establishment of the EPPO. In fact, Article 41(1) refers to the rights of suspects and accused persons under the CFR, such as the right to a fair trial and the rights of the defence, while Article 41(2) establishes the right of suspects and accused persons to have at a minimum the procedural rights provided for in Union law, including directives on procedural rights, as implemented by national law. Thereby, a list of minimum rights is explicitly mentioned: the right to interpretation and translation (Directive 2010/64/EU); the right to information and access to the case materials (Directive 2012/13/EU); the right of access to a lawyer and the right to communicate with and have third persons informed in the event of detention (Directive 2013/48/EU); the right to remain silent and the right to be presumed innocent (Directive 2016/343/EU) and the right to legal aid (Directive 2016/1919/EU).[81]

Furthermore, the EPPO Regulation provides, under Article 41(3), that suspects and accused persons must be given all of the procedural rights available under the applicable national law, such as the ability to present evidence, to request the appointment of experts or to have an expert examination and hearing of witnesses, and to request that the EPPO obtains such measures on behalf of the defence. Nor establishes said Article 41 additional provisions protecting the position of the suspect or the accused person in front of a particularly powerful counterpart. The EPPO Regulation's rule on defence rights risks, therefore, to provide only limited protection for suspects and accused persons.[82] To ensure that Article 37's obligations do not become dead letter mandates, such defence rights must be complemented by specific additional guarantees related to evidence. A crucial step in this regard would be the establishment of an adequate network among defence lawyers, at the European level. The lack of standardisation and specific strengthening of the position of the suspect or the accused person under the EPPO Regulation could be criticised not only with regard to the principle trial fairness and of equality of arms, but also with regard to potential difficulties in the assessment of the legality of the evidence collected abroad.

The second innovation concerns exactly this latter aspect, representing a profound—and questionable—change of perspective with regard to cross-border evidence admissibility. Indeed, Article 37(1) of the EPPO Regulation seems to

[81] The abovementioned catalogue does not include procedural safeguards for children who are suspects or accused persons in criminal proceedings, provided by Directive (EU) 2016/800.

[82] Mitsilegas and Giuffrida (2017), pp. 11–12.

reflect—if not an out-and-out reversal—at least a substantial diminishment of the presumption of admissibility of evidence gathered according to the national law of a Member State other than the one in which the trial is conducted. At the outset, Article 30 of the EPPO Proposal explicitly stated the general admissibility of evidence presented by the EPPO. While the EPPO Proposal considered a declaration of non-admissibility to be an exception to the rule, in Article 37(1) of the EPPO Regulation such a decision appears to be a standard option, to which the European legislator simply placed certain restrictions. In fact, the latter Article only states that such evidence "shall not be denied admission on the mere ground that the evidence was gathered in another Member State or in accordance with the law of another Member State". In other words, the potential to deny admission of evidence on the ground that it was gathered abroad exists, as long as there is at least one "additional" reason to do so, besides its foreign origin.

The Article 37 rule shows how the EU legislator purposefully refrained from introducing concrete admissibility criteria to be applied to evidence presented in EPPO proceedings. This cautious approach might be understood, by considering that any international—or supra-national—criminal system, which relies on the cooperation of national authorities, is in principle reluctant to elaborate strict exclusionary rules on evidence, as this could undermine both the efficacy of the cooperation system as well as the effectiveness of action of the international, or supra-national, institution itself.[83]

Moreover, contrary to the provisions of the EPPO Proposal, the enacting terms of the EPPO Regulation do not even include any general catalogue of principles or rights that could form the basis for the exclusion of cross-border evidence. Instead, the EPPO Regulation's Article 37 introduced a simple non-discrimination clause. Thereby, the European legislator left the issue of evidence admissibility almost completely in the hands of national courts.[84] Under the EPPO Regulation, the latter seem to have an even broader margin of discretion, than what they would have, if the provisions of the EPPO Proposal would have entered into force unchanged. Their power to freely assess evidence, established in the EPPO Regulation's Article 37(2), together with the lack of any indication, in its Article 37(1), for the identification of the grounds for excluding evidence derived from cross-border investigations points to the possibility to invoke a very broad range of fundamental principles and laws deriving from both the national and supra-national level to this aim.[85]

An interpretation guideline can be found in the Preamble of the EPPO Regulation. Its Recital 80 suggests that evidence admission must respect the fairness of the procedure and the suspects and accused person's rights under the CFR. Thereby, it identifies a range of rights which, in case of breach, could form the basis for the additional reasons implied by Article 37. By referring to the CFR, as a whole, and explicitly mentioning the respect of fundamental rights under the ECHR, the

[83] Caianiello (2013a), p. 122; Caianiello (2013b), pp. 120–121.

[84] Mitsilegas and Giuffrida (2018), p. 77.

[85] Weyemberg and Brière (2016), p. 33; Mitsilegas and Giuffrida (2018), p. 77.

recital's catalogue of principles and rights seems even broader than the one contemplated in the EPPO Proposal.[86] Before being moved to the Preamble of the draft Regulation and, later, of the adopted EPPO Regulation, the extension of the EPPO Proposal's catalogue of principles and rights was introduced into the main text of the draft Regulation submitted by the Italian Presidency with the Orientation Debate 2014.[87] In doing so, the Council reacted to concerns regarding the too weak and too sparse protections of procedural safeguards in the evidence admission procedure.

Such concerns were raised, for example, by the European Parliament, which stated in its Resolution of 12 March 2014, that "the admissibility of evidence and its assessment in accordance with Article 30 are key elements in the criminal investigation; the relevant rules must therefore be clear and uniform throughout the area covered by the European Public Prosecutor's Office, and should fully comply with procedural safeguards; to ensure such compliance, the conditions for admissibility of evidence should be such as to respect all rights guaranteed by the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights, and the European Court of Human Rights case law".[88] However, as was already pointed out in connection with the EPPO Proposal, simply referring to the entire list of rights contained in the CFR and the ECHR as guideline for decisions on the admissibility of evidence would still not adequately guarantee the procedural rights of the defendant. As noted above, the CFR and the ECHR only protect minimum standards of these fundamental rights and are, therefore, not well suited to achieve the same protection effect as standard rules on the inadmissibility of evidence could.[89]

Finally, it can be observed that, while the rule on evidence admissibility included in the EPPO Regulation cannot lead to stronger protection of procedural rights, it can considerably increase the complexity and uncertainty of the evidence admission procedure. The absence of EU-wide criteria on evidence admissibility, together with the very broad range of potential exclusion grounds and the likelihood of evidence gathered according to foreign law actually infringing the *forum* law, will combine to make the non-admission of cross-border evidence a highly probable result. Inevitably, that result would compromise the functionality as a whole of the new Union body.

[86] Article 31, par. 1, second part Council Doc. 9372/1/15 REV 1, 12621/15, 14718/15 stated that "[w]here the law of the Member State of the trial Court requires that the latter examines the admissibility of evidence, it shall ensure it is satisfied that its admission would not be incompatible with Member States obligations to respect the fairness of the procedure, the rights of defence, or other rights as enshrined in the Charter, in accordance with Article 6 TEU".

[87] Article 30, par. 1 Council Doc. 15862/1/14 REV 1.

[88] European Parliament, Resolution of 12 March 2014 on the proposal for a Council regulation on the establishment of the European Public Prosecutor's Office (COM(2013)0534 – 2013/0255(APP)), (5)(vi); Helenius (2015), p. 199.

[89] Zerbes (2015), p. 228.

## 8 Concluding Remarks

The foregoing analysis demonstrates how the final, approved EPPO structure and functioning actually represent a devolution, rather than an evolution, of the original concept of this institution, at least with respect to cross-border evidence. Provided that the driving force behind the plan to create an EPPO was the efficient and effective protection of the financial interests of the EU,[90] the organisational structure of the EPPO was aimed at allowing efficient decision-making in the conduct of criminal investigations and prosecutions involving one or more Member States.[91] The new Union body was supposed to be equipped with a central structure "where decisions are taken by the European Public Prosecutor" in order to ensure central coordination and steering of all investigations and prosecutions, leading to more consistent action for the protection of the EU budget.[92] In this respect, it was originally recognised that it was essential for the EPPO to be able to gather evidence throughout the Union, which was to be viewed as a "single legal area".[93] The EPPO Proposal translated, for the first time, the concept of an "area of freedom, security and justice" into a concrete legislative proposal concerning criminal investigation, and thus laying the foundations for the most ambitious product of the Treaty of Lisbon in criminal matters.[94]

To be sure, the EPPO Proposal presented by the Commission had some weak points. However, the adopted EPPO Regulation reveals (most tellingly by the need to resort to the enhanced cooperation mechanism to get it adopted!) how political unwillingness to pursue the goal set by the Commission had an even more criticisable result. That becomes all the more clear if one looks back at the statement of the Commission,[95] in relation to its initial EPPO Proposal, on the advantages of setting up the EPPO. There, the Commission argued against the doubts expressed by a number of national Parliaments on the effective added-value of the proposal on the establishment of the EPPO, which implied a potential incompatibility with the principle of subsidiarity set out in Article 5(3) TEU. The Commission believed that, by adopting a common Union-level prosecution policy, significant added-value in the fight against Union fraud could be achieved through: prevention of forum shopping;

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[90] Wade (2013), p. 441, where the EPPO Proposal is considered to be "the logical conclusion of discussions which began with the famous Greek Maize case", since it was in this judgement that the European Court of Justice first articulated the obligation for Member States to protect the interests of the European Communities by equivalent means to those they use to protect their own respective interests.

[91] Recital n. 8 EPPO Proposal.

[92] Recital n. 12 EPPO Proposal.

[93] Recital n. 28 EPPO Proposal.

[94] Caianiello (2013a), p. 125.

[95] Communication from the Commission to the European Parliament, the Council and the national Parliaments on the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office with regard to the principle of subsidiarity, in accordance with Protocol No 2, COM(2013)851 final, of 27 November 2013, point 4.1.

stronger deterrence of perpetrators due to increased risk of detection, investigation and prosecution throughout the Union; stronger means to detect cross-border links among Union fraud offences because of the EPPO's "monopoly" of competence relating to this category of crimes; simplified procedures ("since all European Delegated Prosecutors would work within the same structure, in most cases a simple contact with a colleague would suffice") for cross-border evidence gathering; and, finally, strengthened procedural safeguards by providing a Union catalogue of procedural rights.

Turning to the adopted Regulation, however, one is confronted with an entirely different framework. Little of the "Union-level concept" survived the negotiations. The introduction of collegial organs at the core of the EPPO and the revival of specific rules on cross-border investigations as consequences of the evocation of national sovereignty and of the principle of subsidiarity when it comes to criminal proceedings, are among the most visible results of this significant change in perspective. What remains is an EPPO with a (overly) complicated structure and, therefore, a burdensome, less efficient, and ineffective functioning.

One need only look the rules concerning the gathering and admissibility of cross-border evidence, as formulated in EPPO Regulation, to realise that its decentralised structure and its constant reference to the "applicable national law" generate a quasi-intergovernmental cooperation system that is not only diametrically opposed to the concept that originally inspired the EPPO Proposal, but is also woefully inadequate for the purpose of protecting the Union's financial interests, especially when one considers the level of potential cooperation by national authorities that the EIO Directive foresees. Moreover, the opportunity to draw an adequate system of procedural safeguards as an expression of the common European culture of procedural rights was squandered.

The EPPO that was finally approved is quite different from the Commission's initial aspirations. Trying to put a more optimistic spin on the ultimate result, one might suggest that the result of 17 years of discussions and of the negotiations since the Treaty of Lisbon is nothing more than a starting point for further developments and additional steps. As such, it is now time to let the EPPO come to life and to see where the EPPO's concrete strengths and weaknesses actually lie.

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# Transactions and "Simplified Procedures" in the Framework of the European Public Prosecutor's Office. A National Perspective

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**Abstract** The procedure for entering plea agreements in the realm of the EPPO proceedings has been a much-discussed issue. Due to the diverse forms of negotiated justice within the EU Member States it has not been easy to come to an agreement on this point. While the initial proposal regulated an own system of transactions, the final Regulation 2017/1939 has adopted a compromised solution under the title "simplified prosecution procedures". The rules governing agreements with the EPPO are those applicable under the national laws. The solution adopted avoids a complex path towards harmonization. Due to the significance of negotiated justice in practice, this contribution will also analyse the impact the EPPO Regulation's "simplified procedures" in the Spanish criminal justice system.

## 1 Introduction

The legislative process, laid down in Article 86 of the TFEU, which provided for the development of a European Public Prosecutor's Office (EPPO), has finally been adopted by the Council of the European Union through the approval of Regulation 2017/1939 the 12 of October,[1] after overcoming the obstacles and the initial

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[1] Council Regulation (EU) 2017/1939 of 12 October 2017, implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ("the EPPO"), 31.10.2017, L 283/1. In force, since November 20, 2017.

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L. Bachmaier Winter (ed.), *The European Public Prosecutor's Office*,
Legal Studies in International, European and Comparative Criminal Law 1,
https://doi.org/10.1007/978-3-319-93916-2_9

reticence expressed by some of the States Members that considered its creation unnecessary.[2]

The new EPPO will be based on the principles of independence, impartiality, proportionality, and respect of the fundamental rights recognized in the Charter of Fundamental Rights of the European Union. In this sense, the EU Member States have become aware that, in order to fight effectively fraud against the financial interests of the Union, they have to overcome their own sovereign interests and overcome the logical distrust of a supranational criminal prosecution body.[3]

The implementation of the Regulation is now on the agenda of the European Union and all efforts shall be directed to starting up the EPPO and also to ensuring cooperation and coordination with individual national authorities.[4] The launching of a coherent European system of investigation for ensuring a closer cooperation and the effective exchange of information are goals to be achieved by the EPPO in fighting crimes within its competence.[5] This will serve the needs of citizens and companies operating within the EU, as well as provide better public services and strengthen the global perception of security.

On 17th July 2013 the European Commission adopted a package of proposals; among those was included the Draft Regulation for a EPPO.[6] We won't enter into discussing here the model and the structure of the EPPO, as this has been subject to numerous studies already.[7]

The Commission's initial Regulation has suffered significant modifications, abandoning the model based on a vertical structure—a centralized EPPO and decentralized European Public Prosecutors—for the more horizontal collegial model[8] avoiding an excessive concentration of powers in the European Chief Prosecutor and limiting the number of Deputy Prosecutors.[9] In addition, it should be noted that the debates that took place in the JHA meetings, both regarding its basic design, the

[2] Zárate Conde and De Prada (2015) indicate that once the Proposal had been submitted by the European Commission, a total of 14 States Members considered that it did not respect the subsidiarity procedure. This proposal was referred back to the Commission for reconsideration in accordance with Article 7(2) of Protocol No. 2 of the TFEU. The Commission, by the communication COM (2013) 851, maintained its initial position and submitted its proposal for a European Public Prosecutor's Office COM (2013) 534 final in July 2013.

[3] On the added value of the EPPO see Bachmaier Winter (2015), pp. 121 ff.

[4] See the Strategic Agenda of the Advice of the European Union, which emphasizes the consolidation and the efficiency of the existing instruments in the field of cooperation in criminal matters and the fight of the fraud against the financial interests of the European Union, including the Regulation on the EPPO, stands out.

http://data.consilium.europa.eu/doc/document/ST-12396-2015-INIT/en/pdf.

[5] See, among others, Moreno Catena (2014), pp. 10–11; Bachmaier Winter (2012), pp. 6–12.

[6] See Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, 17.7.2013, COM (2013) 534 final and Proposal for a Regulation on the European Union Agency for Criminal Justice Cooperation (Eurojust), Brussels, 17.7.2013 COM(2013) 535 final.

[7] Zárate Conde and De Prada (2015) and Moreno Catena (2014).

[8] Zárate Conde and De Prada (2015), p. 4.

[9] On the structure and functions of the European instruments related to criminal prosecution, see Ormazábal Sánchez (2009), pp. 4 ff.

organizational structure and the principles of action, attracted broad consensus from the States that took part in it.[10]

In contrast, an issue that raised major discussions during the lengthy process of negotiations, was the one related to the institution of plea agreements or transactions, which will be addressed in this chapter. Despite the fact that the diversity of the national systems within the EU is now less marked than it was two decades ago, and that the process of harmonization is also continuing to advance, there are still sharp differences when it comes to the approach to negotiated justice.

Finally, Regulation 2017/1939 has adopted a compromised solution by regulating under the title "simplified prosecution procedures" different forms of negotiated justice under Article 40. The conditions will be defined by national laws, and the decision on the final disposal upon the proposal of the agreement shall belong to the Permanent Chamber. By allowing the criminal conflict to be solved with an agreement, and at the same time referring to national laws, the EPPO Regulation has come to a solution that shall streamline the criminal proceedings of the EPPO.[11]

Due to the significance of negotiated justice in practice, it is worth analysing how the implementation of the EPPO Regulation's "simplified procedures" will be in the Spanish criminal justice system. To that end, we will describe briefly the system of *conformidad* in Spain—both before and after its amendment by Law 41/2015, of October 5—and second we will address the content of the EPPO Regulation and its impact at the national level.

## 2 Overview of the *Conformidad* in Spanish Criminal Procedure

Different forms of negotiated justice in criminal matters have existed throughout history and the present trend towards a privatization of criminal law might also explain the increasing importance it has gained in the last few decades. Not only from the point of view of addressing overloaded court dockets, but also as a way of reconciling the competing interests present in criminal procedure: fairness of the proceedings against the need for efficiency and avoiding undue delays.[12]

Under the term of plea agreements or transactions[13] several forms of negotiated justice can be found in European criminal procedure, as plea-bargaining, the guilty plea, *Absprache*, or the *conformidad* and the *patteggiamento*. Much has been written on negotiated justice and also on *conformidad*. But our aim here is only to give a brief overview on the Spanish *conformidad* in order to understand the context in which the "simplified procedures" of the EPPO Regulation shall apply.

[10] See Article 86 TFEU.

[11] Zárate Conde and González Campos (2015), pp. 32 ff.

[12] See Del Moral García (2015), p. 6.

[13] See Montero Aroca (2015), pp. 349–350.

From a legal perspective, the *conformidad* is a procedural act of a complex nature, under which the defendant, assisted by their lawyer, expresses willingness to accept, within certain limits, the penalty requested by the prosecution (or the most severe, if there are several accusers as can be the case in Spain). It entails the waiver of the trial and all fair trial rights, and once it is validated by the court it is *res judicata*.[14]

Organic Law 7/1988, December 28, already provided for plea agreements in the Spanish criminal justice system,[15] and later by Law 38/2002, October 24, negotiated justice was extended within fast track proceedings, where the penalty is not higher than 3 years' imprisonment; the defendant who accepts the penalty gets an automatic reduction of one third of the penalty. Recently, Organic Law 1/2015, amending the Criminal Code, which decriminalized certain misdemeanours, openly recognized certain limited discretionary powers of the Public Prosecutor, under the so-called "regulated principle of opportunity".[16]

At present, plea agreements are widely used in Spain, although they are regulated in the Criminal Procedure Code (CPC) in a fragmented way under different types of proceeding and can be entered into at different points during proceedings.[17]

The guilty plea is a legal way to put an end to the proceedings by accepting the highest penalty requested according to the charge and the civil damages claimed, thereby avoiding public trial. As it is conceived of in the Spanish CPC, the defendant is given the opportunity to agree to the indictment and accept the penalty. In principle, there should be no negotiation or plea-bargaining between the defendant and the accusing parties, only the chance to skip the discomfort and costs of a public trial.

If a guilty plea is made, and there are no other defendants in the same proceeding, the judge will ask the defendant if it is necessary to continue with the trial.[18] Judicial oversight tends to avoid the possibility of the accused pleading guilty as a result of unlawful pressure. If the defendant responds that a trial is unnecessary, the court will verify the legality of the agreement and ensure that the defendant knows the consequences and has accepted the indictment willingly. Article 787.8 CPC establishes a special rule for plea agreements entered into by a legal person where it can accept the *conformidad*, regardless of the position adopted by the other physical persons that are also accused.[19] If the legal requirements are met, the trial court shall approve the agreement and render judgment according to it.[20]

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[14] Rodríguez García (2015), Aguilera Morales (1998), Mira Ros (1998), De Diego Díez (1997) and Barona Vilar (1994).

[15] Del Moral García (2015), p. 7.

[16] Circular of the State General Prosecutor Office 1/2015 "On guidelines for the exercise of criminal action in relation to minor offenses" after the criminal reform operated by the Organic Law 1/2015. It establishes the way in which this principle of opportunity should be exercised.

[17] See Bachmaier Winter (2015), pp. 89–113.

[18] Article 694 Spanish CPC.

[19] Rodríguez García (2015), p. 11.

[20] For the legal framework of the guilty pleas or *conformidad* in Spain, see Bachmaier Winter (2015), pp. 97 ff.

By allowing criminal conflicts to be solved more quickly and at lower cost, the *conformidad* has increased in relevance in Spain, as it has in other criminal justice systems, and it may be said that its use will continue to expand.

The model adopted in the Spanish CPC—which is quite similar to the Italian one[21]—following the recommendations set out by the Council of Europe in its Recommendation Rec(87)18,[22] has managed to combine the need for efficiency and the speedy settlement of cases with the constitutional principle of legality that shall govern the acts of the Public Prosecutor's Office, through the mechanism of "regulated discretional powers".

Finally, by Law 41/2015, October 5, the system of penal orders (*aceptación por decreto*) has been introduced in the Spanish system as an even more simplified system for imposing a criminal sanction.[23] Petty offences are dealt by way of this procedure, by which the Public Prosecutor proposes a sanction without a previous adjudication phase, and only if the defendant opposes it will the case go to trial.[24]

# 3 "Simplified Prosecution Procedures" Under the EPPO Regulation

The way of addressing such transactions in EPPO proceedings has changed completely from the initial proposal of the Regulation of the Commission of 2013 to the finally adopted rule on "simplified prosecution procedures".

## *3.1 The Draft Regulation of the EPPO of 2013*

The Proposal of the Commission of July 2013 regulated the possibility of the EPPO entering into plea agreements or transactions under Article 29[25]:

1. Where the case is not dismissed and it would serve the purpose of proper administration of justice, the European Public Prosecutor's Office may, after the damage has been compensated, propose to the suspected person to pay a lump-sum fine which, once paid, entails the final dismissal of the case (transaction). If the suspected person agrees, he/she shall pay the lump sum fine to the Union.
2. The European Public Prosecutor's Office shall supervise the collection of the financial payment involved in the transaction.

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[21] On the Italian system, see, for example, Chozas Alonso (2013), pp. 12–29. See also see Rodríguez García (1997), pp. 30 ff.

[22] CoE Recommendation (87)18, of 17 September 1987, concerning the simplification of criminal justice.

[23] Castillejo Manzanares (2015), p. 6.

[24] Del Moral García (2015), p. 30; Castillejo Manzanares (2015), p. 1.

[25] De Prada and Zárate Conde (2015).

3. Where the transaction is accepted and paid by the suspected person, the European Public Prosecutor shall finally dismiss the case and officially notify the competent national law enforcement and judicial authorities and shall inform the relevant Union institutions, bodies, agencies thereof.
4. The dismissal referred to in paragraph 3 shall not be subject to judicial review.[26]

Political reasons probably explain the vague and general regulation of transactions in the Draft Regulation of 2013, in order to avoid further discussion on a much debated institution and, in particular, to avoid also debates on the scope of the discretionary powers of the EPPO. In fact, even though most of the countries initially expressed their support for a more detailed regulation of transactions, from a very early stage a possible clash between those favouring broad powers for the EPPO, amounting to a system of *plea bargaining* with little or no judicial oversight, and those who defended a plea agreement with acceptance of guilt and a judicial decision with the same effects as a sentence due to conviction, was foreseeable. Furthermore, this initial Regulation proposal granted very broad discretionary powers to the EPPO, allowing it to enter into plea agreements outside of a criminal procedure and regardless of the gravity of the offence. These broad powers together with the lack of judicial oversight and sufficient procedural safeguards were strongly rejected by several Member States.

In order to achieve greater consensus and to try to regulate transactions within the EPPO proceedings in a comprehensive way, under the Luxembourg Presidency of the Council of the European Union a new text of Article 29 was presented.[27]

Article 29.1 of this new proposal of December 2015, provides that, after obtaining the approval of the competent Permanent Chamber, the European Deputy Prosecutor handling the case could propose to the suspect the payment of a fine. Once paid, following circumstances should be checked:

1. That the offenses have not been committed in cases that may be considered especially serious. For example, that the degree of guilt of the suspect is not particularly serious.
2. The damage caused in total to the European interest or to the other victims does not exceed of 50,000 Euros.
3. That it serves the purpose of the proper functioning of the administration of justice and the objectives of criminal law.
4. That damages against the victims have been compensated.
5. That the suspect has not carried out a transaction under national law or has been convicted previously of offenses that affect the financial interest of the Union.

The second paragraph recognized that the suspect has the right to legal assistance according to the national law. In the third paragraph, it provided that the EPPO should ensure that the amount of the fine was proportional to the damage caused and

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[26] Criticizing the article on transactions according to the Proposal of the Commission for not providing for judicial oversight, see Moreno Catena (2014), pp. 159 ff.

[27] The new text was presented at the 3433rd Council Meeting of Justice and Internal Affairs, which took place in Brussels, 3 and 4 of December 2015, after diverse preparatory works carried out by the COREPER II, and also following the text presented by Austria. file:///C:/Users/MiniW7-2/Downloads/QCRU09001ENC.pdf.

the financial capacity of the suspect. The amount of the fine should be calculated in accordance to a method of calculation defined by the rules of Article 72.

This proposal presented, in our view, several aspects that merit a positive assessment and represented an improvement with regard to the initial proposal of the Commission. First, the text included a precise regulation of transactions with a detailed description of the institution, which provided for more legal certainty. Since the participation of the Permanent Chamber was required, it also ensured that this institution had a proper European nature, allowing a unified or at least harmonized application of transactions, avoiding the divergences and even inconsistencies that could have arisen if the agreement procedure had been left only in the hands of each European Deputy Public Prosecutor.

Second, transactions were linked to the observance of a series of requirements, listed in the first paragraph, limiting the discretional powers of the European Public Prosecutor on the decision of whether or not to exercise the criminal action, while at the same time its material competence was also limited to offences not exceeding damages to the victim of 50,000 Euros. The defendant had to admit to the facts, and the penalty proposed, but an express admission of guilt was not included in the text, as requested by several Member States.

Even though at the meeting of JHA Council on December 3 and 4, 2015[28] the content of Articles 17 to 23 and part of Article 28 was agreed, the approval of the Regulation was not possible, due to opposition to the original Articles 29 and 36 of the proposal referring to judicial review,[29] which were, however, the only ones of the "procedural" block that were left for later debates.

The year 2016 was characterized by numerous political problems that had to be faced by the presidency of The Netherlands and required the Regulation on the European Prosecutor's Office to be relegated to the background. It was, finally, the Slovak presidency that, at the meeting of the JHA Ministers of Brussels of 8 and 9 December 2016, got a consolidated text that attracted broader support,[30] but in which there were still questions to be answered.

The European Council, on March 9, 2017, debated the draft Regulation and noted that there was no agreement within the meaning of Article 86.1.3 of the TFEU. Then, on April 3, 2017, Germany, Belgium, Bulgaria, Cyprus, Croatia, Slovakia, Slovenia, Spain, Finland, France, Greece, Lithuania, Luxembourg, Portugal, Czech Republic and Romania informed the European Parliament, the Council, and the Commission that they wished to establish an enhanced cooperation procedure for the creation of

[28] http://www.consilium.europa.eu/en/meetings/jha/2015/12/03-04/.

[29] The drafting of the judicial review has been approached from two perspectives, the first being to consider the European Public Prosecutor's Office, in the exercise of its functions when adopting procedural measures, as a national authority, and the second one to understand that the procedural measures taken by the European Public Prosecutor's Office within the scope of its powers shall be subject to an oversight of legality before the Court of Justice of the European Union in accordance with the provisions of Article 263 of the Treaty, and corresponding to the courts of the Member States, except as provided for in Article 267 of the Treaty, to review the decisions taken by the European Public Prosecutor's Office in accordance with the requirements and procedures established by national law.

[30] file:///C:/Users/user/Downloads/st15391.en16%20(1).pdf.

the EPPO. Accordingly, under Article 86.1.3, of the TFEU, the authorization to initiate the enhanced cooperation referred to in Article 20.2 of the Treaty on European Union (TEU) and Article 329, paragraph 1, of the TFEU, and the provisions relating to enhanced cooperation apply from 3 April 2017.[31] On October 5, 2017, the European Parliament approved it.

## 3.2 *The Simplified Procedures Under the EPPO Regulation*

Finally, the Council issued Regulation 2017/1939 of October 12 that introduces a new Article 39—which includes the causes for termination of an investigation—and Article 40—which includes the simplified procedures. These provisions are based on establishing a simplified system of prosecution that will allow the European Delegated Prosecutor (EDP) who is located in each Member State, and who is subject to the requirements established in Articles 10 and 35, to apply this transaction procedure or agreement to the defendant according to national law, which will involve the intervention or not of a court depending on whether the procedural law of each Member State requires it.

At this point, we must point out that it is striking that, unlike the previous proposals, the reference to the term transaction—possibly due to the controversies that surrounds it and the breadth of concepts it encompasses—is avoided, and the expressions "simplified procedure" and "agreement" are preferred. Thus, the final wording of Article 40.1 establishes that:

> 1. If the applicable national law provides for a simplified prosecution procedure aiming at the final *disposal* of the case on the basis of terms agreed with the suspect, the handling European Delegated Prosecutor may, in accordance with Article 10(3) and 35 (1), propose to the competent Permanent Chamber to apply that procedure in accordance with the conditions provided for in national law.

And Article 40.2 Regulation:

> The Permanent Chamber shall decide on the proposal of the handling European Delegated Prosecutor taking into account the following grounds:
> (a) the seriousness of the offence, based on in particular the damage caused;
> (b) the willingness of the suspected offender to repair the damage caused by the illegal conduct;
> (c) the use of the procedure would be in accordance with the general objectives and basic principles of the EPPO as set out in this Regulation.
> The College shall, in accordance with Article 9(2), adopt guidelines on the application of those grounds.

In the event that the Permanent Chamber agrees to the proposal presented, the handling EDPs shall apply the simplified prosecution procedure in accordance with the conditions set forth in their national law and register it in the case management

[31] See Recital (8) of the EPPO Regulation. Furthermore, by means of several letters of 19 April 2017, 1 June 2017, 9 June 2017 and June 22, 2017, Latvia, Estonia, Austria and Italy, respectively, indicated their desire to participate in the establishment of enhanced cooperation.

system. Once the simplified prosecution procedure system has been finalised, upon fulfilment of the terms agreed with the suspect, the Permanent Chamber will instruct the EDP to act with a view to finally disposing of the case.

This new wording, achieved broader support, which is not surprising, as it renounces imposing a certain model of transaction or plea agreement at the EU level by referring to the national procedural law of each Member State. Through this compromise it was possible to overcome the difficulties that this much-debated institution has caused during the negotiations. In doing so, the peculiarities of each national system could be kept, and at the same time no further EU harmonization on the rules on plea agreements was required at this stage. Since national law will regulate the forms of transactions the traditional resistance in yielding sovereign powers within the criminal justice system was also avoided.

The strictly European nature of the institution, in the interests of greater coherence and uniform application in the different Member States, is achieved by keeping the involvement of the Permanent Chamber in the decision about the proposal for an agreement submitted presented by the EDP. The criteria for deciding on the proposed agreement are quite vague, and it will be for the College to set out guidelines on the application of these criteria.

Since the transactions will be basically ruled by national law, the problems of judicial review have also been solved: by giving up the European nature of the transaction there is no need to establish a supranational judicial court for oversight of the plea agreement procedure. The new proposal solves this issue by regulating judicial review in Article 40.[32]

## 4 Implementation of the EPPO "Simplified Procedures" in Spain

The wording of the new Article 40, by referring to the rules provided by each of the national legal systems of the Member States and avoiding to use the term "transaction", tries to adapt to the diverse forms of by which negotiated justice is understood. Apart from the fact that the model of the EPPO does not exactly conform to the current scheme of the Spanish criminal justice system—where the investigating judge still directs the pre-trial criminal investigation[33]—the text of the EPPO Regulation regarding negotiated justice or "simplified prosecution procedures" does not seem, in principle, to be incompatible with the rules provided by the Spanish CPC. In this sense, the following considerations are to be taken into account.

[32] However, the provision is not clear enough to know the scope of the review carried out, respectively, by the national judges and by the ECJ. The text so limits the jurisdiction of the ECJ to questions of validity raised on the basis of Union law (Article. 42.2.a)).

[33] Despite the agenda presented by the Spanish Ministry of Justice on 5 December 2016, stating that one of the priorities was to amend the Criminal Procedure Code and transfer the competences to direct the criminal investigation to the public prosecution service, no major changes have been undertaken so far.

First, from the material point of view and the very nature of the offences Article 40 establishes the conditions that the crime must not be considered serious and the particular damage caused to the financial interests of the European Union is not, based on the analysis of its amount, especially severe. This provision seems consistent with the consideration of less serious crimes of Article 13 Penal Code in relation to Article 33 Penal Code of less serious penalties that include imprisonment from 3 months to 5 years.

Article 22 of the Regulation defines teh competence of the EPPO by referring to the offences that affect the interests of the European Union, as foreseen in Directive (EU) 2017/1371 and as that Directive has been transposed by national legislation, regardless of the same behaviour constituting a another type of crime under the domestic law. This Directive defines a series of crimes against the EU budget, including fraud and related offences such as corruption, embezzlement, money laundering, and serious VAT fraud in amounts exceeding ten million euros with a cross-border nature.

The Penal Code provides for, in Article 305(3), the crime of fraud against the Treasury of the European Union and, in Article 306 PC, the defrauding of the budget of the European Union, misappropriation of funds, and fraudulent acquisition of funds. Both articles include as penalties the prison term of 1–5 years if the amount defrauded exceeds 50,000 euros; and if it does not reach that limit, but is higher than 4000 euros, the penalty is imprisonment from 3 months to 1 year.[34] This would allow the latter to benefit from the ordinary regime on the *conformidad* of the CPC, without taking into account envisaging applicable aggravations of Article 305 bis Penal Code.

Article 40.2 a) of the Regulation sets out that, in deciding to accept the proposed agreement, the Permanent Chamber shall take into account the "seriousness of the offence based on in particular the damage caused". But the Regulation does not limit the scope of transactions to offences up to a certain penalty. Apart from the guidelines that the College shall adopt in this regard, so far the scope of the plea agreements, is determined by national law. If ultimately the College considers that only less serious offences, taking into account damages, should be disposed of by way of a transaction, in Spain this would mean applying Article 13 PC to less serious crimes in relation to Article 33 PC, which provides for penalties of imprisonment from 3 months to 5 years. However, it is not clear that the College, by way of guidelines, might be willing to limit the scope of EPPO transactions.

Article 22 of the Regulation (material competence), states that "the EPPO shall be competent in respect of the criminal offences affecting the financial interests of the European Union that are provided for in Directive (EU) 2017/1371, as implemented by national law". The PIF Directive includes specifically offences against the EU budget, cases of fraud and other related offences, such as corruption, misappropriation of funds, money laundering, and serious cross-border VAT fraud exceeding ten million euros.[35]

[34] LO 1/2015 has decriminalized the misdemeanours and the frauds of 4000–50,000 euros have been aggravated transforming them into less serious crimes under Article 305(3) of the Penal Code.

[35] For the material competence of the EPPO, see Vilas Álvarez in this volume.

Article 305.3 of the Spanish Criminal Code regulates the crime of fraud against the Treasury of the European Union, and Article 306 Criminal Code sanctions fraud against the budget of the European Union, the fraudulent use or obtaining of funds. Both articles provide for prison sentences of 1–5 years if the amount defrauded exceeds 50,000 euros, and 3 months to 1 year imprisonment if lower than 50,000, but higher than 4000. This would allow in the latter case to resort to the ordinary plea agreement proceedings of the Spanish CPC, without applying the aggravated circumstance of article 305 bis Criminal Code in consideration of the amount defrauded. Otherwise, the recourse to the ordinary *conformidad* foreseen in the Spanish CPC would not be possible.

Secondly, from a procedural point of view, Article 40 of the Regulation has established as a condition to apply the simplified prosecution procedure that the national law establishes a system based on the agreement with the suspect that entails the final disposal of the case, provided that the proposed agreement is authorised by the Permanent Chamber based on the criteria that were previously stated. The EPPO Regulation does not impose a condition of the particular involvement of the judicial authority in the plea agreements proceedings, thus leaving it open for the Member States to apply their own law in this regard. It goes without saying that by referring to national law, there will be no obstacles in applying the system of the *conformidad* to EPPO cases.

Finally, regarding the impact of the rules of judicial review on the EPPO’s acts with regard to transactions, Article 42 has to be applied. This rule states that for the acts of the EPPO to produce legal effects vis à vis third parties, they “shall be subject to review by the competent national courts” according to their own law. All this is without prejudice to the CJEU to give preliminary rulings in accordance to Article 42.2 EPPO Regulation.[36] This system would be completely in accordance with the Spanish system, as it would allow judicial oversight of the plea agreement by a Spanish judge following Spain’s own procedural law.

In any case, even when this rule of the Regulation does not pose problems of compatibility with the Spanish legal system, specific legal amendments will be necessary to ensure the judicial oversight of the agreements reached by the EDP. It has to be underlined that for a plea agreement or transaction to produce legal effects in Spain, the competent judge must render a sentence validating the *conformidad*. The new Directive on the protection of the Union’s financial interests and the Regulation of the EPPO will require amendments both to the Spanish Criminal Code and to the Criminal Procedure Code that could affect also the plea agreement procedures.

[36] Regarding the criticisms of this wording of art. 36, we can summarize them into two categories: the first, the abstraction and the lack of clarity and uncertainty that the EPPO, its national counterparts, the judicial power (national courts and the ECJ) and all interested parties create by not making clear who is the body exactly competent to review transactions; and secondly, to the compatibility of the text with the primary law of the Union. According to the new text, procedural acts of the EPPO that are intended to produce legal effects against third parties are the subject of national judicial review. See Ligeti (2013), pp. 36 ff.

## 5 Concluding Remarks

The challenge for the near future is to establish the EPPO and provide for the resources and internal rules for it to start fighting criminal offences against the interests of the EU. As the national criminal response has so far been unsatisfactory, the supranational institution should aid in overcoming some of the present shortcomings in prosecuting these crimes.

The system of the EPPO set out in the Regulation of 12 October 2017, provides also for the possibility of disposing of the cases within its competence by way of a transaction in the form provided by national law. Negotiated justice, whether it is wanted or not, has become a key piece in criminal justice systems and the proceedings of the EPPO could not remain without it. Plea agreement procedures, insofar as they foster a speedy disposal of the case, and comply with the general and special prevention aims of criminal law and promote the compensation of damages for the victim, have gained increasing importance in the handling of criminal cases worldwide. Criminal justice systems rely on diverse forms of negotiated justice, and as long as the necessary safeguards are put in place to prevent possible abuses and coercive practices, the waiver of the right to a public hearing should be accepted. It is to be expected that within the EPPO proceedings plea agreements shall also play a significant role. As the main victim is ordinarily the EU itself, it is not surprising that negotiated justice mechanisms were contemplated in the several drafts from the very beginning.

The finally adopted text in Article 40 of the Regulation does not refer to transactions but has opted for a more neutral and overarching expression of “simplified prosecution procedures”. Such a solution enables putting an end to the on-going discussions regarding the model of negotiated justice that should be adopted by the EPPO. This was the way to reach the necessary consensus for adopting Council Regulation 2017/1939. By leaving the regulation of the EPPO’s plea agreements—scope, requirements, conditions, etc.—to the national laws of each Member State, the EPPO has renounced striving for a supranational European form of negotiated justice. In order to reach consensus among the Member States on the EPPO Regulation, the harmonisation in this field had to be given up, at least for the moment.

Through enhanced cooperation it has been possible to give birth to a new judicial actor within the European Union. Spain will have to undertake several amendments to adapt its criminal justice system to this new institution. Spain does not have an easy job here, as it will need to integrate the role of the new EDP within a system that does not attribute general investigative powers to the public prosecutors. The legal amendments at the national level will not be uncontroversial, as the whole structure of the pre-trial investigation phase will be under discussion and this is an issue where no agreement has been reached among Spanish political parties during at least the last three decades. The “simplified prosecution procedures” are intended to ensure efficiency in the EPPO proceedings, and in particular, they seek to promote the recovery of assets, compensate for damages, and prevent further fraud.

The European Union now needs to make a joint effort to start up the EPPO. The challenge will not be simple, for to the traditional challenges that have marked the historical development of the Union additional ones have been added recently: just mentioning a few, international terrorism, immigration and asylum for refugees and Brexit are setting the future agenda of the EU. This is the scenario in which the EPPO is being born, with the challenge of overcoming the present uncertainties of the European Union. Only by providing for a more efficient fight against fraud against the EU's financial interests and ensuring that the construction of the European Union will not allow crimes at the cost of the European taxpayers will this institution be legitimized. To this end further consensus among the Member States will be necessary, and perhaps the forms of addressing negotiated justice under Article 40 of the Regulation may serve as a good example of such consensus.

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# Protection of Fundamental Rights of the Suspect or Accused in Transnational Proceedings Under the EPPO

**Giulio Illuminati**

**Abstract** The Regulation on the establishment of the EPPO must balance the objective of combatting crimes affecting the financial interests of the Union with the due protection of all fundamental rights enshrined in the Charter of Fundamental Rights of the EU. While a more efficient and effective supranational investigation and prosecution of such offences, within the limits laid down by the Regulation, is likely to be implemented, the protection of the rights of the suspect is mostly left to the national legislation of each Member State. Only few articles are dedicated specifically to procedural rights within the EPPO proceedings, so that uniform guarantees for the defence are limited to minimum standards required by the EU directives for strengthening the procedural rights of the suspected or accused persons in criminal proceedings. However, specific provisions refer to the investigation measures that the European Prosecutor is entitled to use, and to the conditions required to this end, including adequacy and proportionality, even though no common procedural rules are laid down. On the other hand, evidence shall not be rendered inadmissible at trial merely on the grounds that it was collected in another Member State. In conclusion, the Regulation does not reach a real harmonization of procedural safeguards and protection of the fundamental rights in criminal proceedings, and in this respect it can be seen as a missed opportunity.

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L. Bachmaier Winter (ed.), *The European Public Prosecutor's Office*,
Legal Studies in International, European and Comparative Criminal Law 1,
https://doi.org/10.1007/978-3-319-93916-2_10

## 1 Introduction

According to the Explanatory Memorandum of the Commission proposal,[1] the establishment of the European Public Prosecutor's Office and the definition of its competences and procedures aimed at strengthening the protection of the Union's financial interests and further developing an area of justice, and enhancing the trust of EU businesses and citizens in the Union's institutions, "while respecting all fundamental rights enshrined in the Charter of Fundamental Rights of the European Union". The text of the EPPO Regulation finally adopted[2] mentions the protection of fundamental rights at different points in the Explanatory Memorandum[3] and Chapter VI, under the title "Procedural safeguards".[4]

Such reference to the protection of fundamental rights is a sort of commonplace in several EU instruments, and it is repeated even in recent studies stressing the need to tackle crime at a European level by means of closer cooperation between State authorities.[5] The EU's stated goal is apparently to combine effectiveness of law enforcement in criminal justice and compliance with the rule of law and fundamental rights.

However, as a matter of fact, priority has been given so far to the former, in order to ease the prosecution of transnational crimes and to ensure the smooth development of criminal proceedings within the Area of Freedom, Security and Justice (AFSJ).

In more recent years, specific attention has been devoted to the issue of granting common minimum standards of protection of the defendant's rights, moving from the Council Resolution on a Roadmap for strengthening the procedural rights of the suspected or accused persons in criminal proceedings.[6] A number of well-known Directives spring from this programme: on the right to interpretation and translation[7]; on the right to information,[8] on the right of access to a lawyer and on the right

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[1] Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, 17.7.2013, COM (2013) 534 final, *Explanatory memorandum*, 3.3.

[2] Council Regulation (EU) 2017/1939 of 12 October 2017, implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ("the EPPO"), 31.10.2017, L 283/1.

[3] Recitals (80), and (83) to (86).

[4] This chapter includes two articles: article 41 on the scope of the rights of suspects and accused persons and article 42 which provides for rules on the judicial review of acts of the EPPO.

[5] See, *e.g.*, *The Cost of Non-Europe in the area of Organized crime and Corruption. In-Depth Analysis*, European Union, Brussels, 2016, p. 10, p. 21, p. 24.

[6] Resolution adopted by the Council on 30 November 2009, afterwards included in *The Stockholm programme—An open and secure Europe serving and protecting citizens* (2010/c 115/01), adopted by the European Council of Stockholm on 10–11 December 2009 and followed by the *Action Plan* COM (2010) 171 of the Commission of 20 April 2010.

[7] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings.

[8] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.

to communicate with third persons,[9] on the presumption of innocence and on the right to be present at the trial.[10] And finally, the Directive on legal aid.[11]

The establishment of the EPPO, of course, has much more to do with criminal law enforcement than with protection of the suspect or accused's rights. Art. 86 TFEU, which provides the EPPO's legal basis, clearly states the rationale of the new institution. "In order to combat crimes affecting the financial interests of the Union, the Council… may establish a European Public Prosecutor's Office from Eurojust" and, with the same or a subsequent decision, may "extend the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension". The main objectives of this new institution are, in particular, to ensure a more efficient and effective investigation and prosecution of offences, as well as to increase the number of prosecutions, leading to more convictions and the recovery of fraudulently obtained Union funds, as well as enhancing deterrence.[12]

In this context, the issues of compliance with the rule of law and the protection of defence rights become only collateral ones. This is reflected in the text of the finally adopted Regulation, where at present just a couple of articles are expressly devoted to procedural safeguards, while, on the other hand, some relevant omissions on the same subject do exist, causing shortcomings and doubts.

## 2 Structure of the EPPO and Fundamental Rights

The vast majority of the 120 articles of the EPPO Regulation deal with the structure of the office (Arts. 3–25) and the rules on the right to data protection (Arts. 47–89), while in contrast only two provisions deal with the procedural safeguards. After a statement on the basic principles, a detailed set of rules provides for the organization of the EPPO at a central level and at a decentralised level, and regulates the existence and the powers of the office members (College, Permanent Chambers, European Chief Prosecutor and his deputies, European Prosecutors at the central level and European Delegated Prosecutors at the decentralised level). As we can see, the structure of the EPPO has become a very complex (or rather, a too complex) one, and this requires a large number of definitions and specifications in the

[9] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

[10] Directive 2016/243/EU of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.

[11] Directive 2016/1919/EU of the European Parliament and of the Council of 26 October 2016, on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.

[12] In this sense, para. (41) of the *Explanatory Memorandum* of the Regulation, in similar terms as the *Explanatory Memorandum* of the Commission Proposal of 2013, para. 3.3.

Regulation, including as regards the relationships between these different bodies and subjects.[13]

The organizational structure of the EPPO is not irrelevant to the rights of the suspects during the investigations. The mere existence of so many actors might already affect the right to defence, since the possible uncertainty on who is actually entitled to exercise the investigative powers is likely to prejudice the foreseeability of what will be the rules applicable to the investigation as well as the outcome of the investigations. Therefore, a more precise attribution of the competence would have been desirable, both within the office and between the EPPO and the national authorities.

The rules on appointment and dismissal of the European Prosecutors are linked as well—albeit indirectly—to the safeguarding of the defendant's rights. In fact, the procedure and the qualifications required for the appointment of the EPPO members and the legally established grounds for their dismissal are a crucial safeguard, not only for the defendants, but for every single citizen. Such rules are meant to ensure the EPPO's independence and unbiased action by the prosecution.[14]

All European Prosecutors, irrespective of their position within the organization, shall be active members of the public prosecution service or judiciary, and their independence shall be beyond doubt; they shall be appointed for a predetermined term pursuant to the Regulation.[15] Only the European Court of Justice, on application by the European Parliament, the Council, or the Commission, may dismiss the European Chief Prosecutor and the European Prosecutors, if they are no longer able to perform their duties or if they are guilty of serious misconduct.[16] A Member State may not dismiss or take disciplinary action against a national prosecutor for reasons connected with his/her responsibility as European Delegated Prosecutor without the consent of the European Chief Prosecutor.[17]

These provisions aim to avoid interference by the governments of Member States, as well as by EU institutions, in the prosecution of crimes within the competence of the EPPO. Therefore, the Regulation defines the EPPO as an independent body: it shall act in the interests of the Union as a whole and neither seek nor take instructions from any subject external to the office.[18] The main goal is obviously to prevent inaction or obstacles to the prosecution, created for political reasons, in order to ensure conviction for offences when Union's financial interests are involved.

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[13] On the relationship of the EPPO with Eurojust see Espina Ramos, in this volume.

[14] Salazar (2017), p. 19.

[15] These terms are: 7 years for the European Chief Prosecutor (Art. 14(1)); 3 years renewable for the Deputy European Chief Prosecutors (Art. 15(1)); 6 years for the European Prosecutors (Art. 16(3)); and 5 years for the European Delegated Prosecutor (Art. 17(1)).

[16] See Art. 14(5) Regulation on the dismissal of the European Chief Prosecutor; Art. 16(5) Regulation on the dismissal of the European Prosecutors.

[17] Art. 17(4) Regulation.

[18] Art. 6(1) Regulation.

Nevertheless, from the defence's point of view, the EPPO's independence is to be seen also as a pre-condition for the implementation of the legality principle, that ensures equal treatment of citizens, no matter whether nationals or foreigners. The EPPO shall be accountable to the European Parliament, to the Council, and to the Commission for its general activities,[19] but the jurisdictional guarantee in case of dismissal of its members from their position prevents any indirect political pressure on the Central Office in individual cases.

It must be pointed out that, after lengthy negotiations, the original structure of the EPPO as proposed by the Commission has radically changed, shifting from a hierarchical and centralised model[20] to a collegial and decentralised one. Without going into details, the result is the "re-nationalisation" of the EPPO, since the investigation and prosecution of a case will be mainly in the hands of the European Prosecutor and of the national European Delegated Prosecutors coming from the Member State that has jurisdiction on the case.

The European Prosecutor shall supervise the activity of the European Delegated Prosecutor, give instructions, and function as liaison between the Permanent Chamber and the European Delegated Prosecutor handling the case.[21] Then, as in the original proposal, the European Delegated Prosecutor shall in principle bring the case for judgment at a competent court of his/her Member State.[22] Therefore, the national law of the Member State, both during the investigations and at trial, will be the applicable law, unless the Regulation provides otherwise.[23] In fact, no common European rules of procedure are going to be enacted, except for the internal rules of procedure that shall be adopted by the College.[24] These rules shall govern the "organization of the work of the EPPO", however, it remains to be seen in how far they can affect the application of the rules on competence and jurisdiction. As these internal rules of procedure shall only be adopted "once the EPPO has been set up", we shall have to wait until then.

Even though this is not the place to wonder what the added value of the EPPO would be, in comparison with the previous system of interstate judicial cooperation,[25] it is possible to realize that such re-nationalisation has undoubtedly a relevant impact on the issue of protection of defence rights.

[19] Art. 6(2) Regulation.

[20] See Martínez Santos, in this volume. See also Ligeti and Simonato (2013), pp. 13 ff. and note 21, who follow a threefold theoretical distinction between a "college" model, a "centralised" model, and an "integrated" model. The latter would represent the original approach of the Commission. See also Venegoni and Minì (2017), p. 5, pp. 10 ff.

[21] Art. 12 Regulation.

[22] Art. 13 Regulation.

[23] Art. 5(3) Regulation.

[24] Art. 21 Regulation.

[25] On the potential added value, see, among others, Bachmaier Winter (2015), pp. 121–144.

## 3 Procedural Safeguards in the EPPO Regulation

Art. 5 of the Regulation provides that (1) the EPPO shall ensure that its activities respect the rights enshrined in the Charter of Fundamental Rights of the EU; and (2) the EPPO shall be bound by the principles of rule of law and proportionality in all its activities.[26]

This kind of reference is appropriate although somewhat obvious. The reference is included among the "basic principles" of the EPPO activities, but perhaps it was not even necessary, because it should be taken for granted, if one bears in mind the legal force of the primary sources of Union law. On the other hand, there is a clear lack of specification about the individual rights recognised and their implementation measures.

In addition, Art. 41 Regulation (that represents by itself the main part of Chapter VI, "Procedural safeguards") refers again to the Charter, under the rubric "Scope of the rights of the suspects and accused persons", with an explicit mention of the right to a fair trial and of the rights of the defence. Even so, no step forward is made, and the acknowledgment of these rights is limited to the level of national standards, since their actual implementation is left to the national legislation of each Member State. The substantial differences existing between national legislations in the protection of procedural rights, and—more generally speaking—the presence, within the EU, of judicial systems that are so diverse, hinder the adoption of uniform rules and make it difficult even to reach an acceptable degree of approximation.

The same is true for the already mentioned EU Directives on the rights of the defendant in criminal trials that are referred to by Art. 41(2) Regulation beside the quotation of the Charter. Since directives leave much room for discretion, Member States are not bound to offer a uniform protection to suspects or accused in criminal proceedings brought by the EPPO, other than the minimum standards required by each directive. The reference itself to the directives could have been omitted, since their applicability would in any case be outside consideration, both in the context of Union law and of national law.

Consequently, the defendant's rights, beyond minimum standards imposed by the directives, are variable, depending on the national law of the State that has jurisdiction on the case, where the European Delegated Prosecutor handling the case performs his/her investigations. Union law is therefore relevant only as regards general principles.[27]

[26] Recital (83) Regulation: "This Regulation requires the EPPO to respect, in particular, the right to a fair trial, the rights of the defence and the presumption of innocence, as enshrined in Articles 47 and 48 of the Charter. Article 50 of the Charter, which protects the right not to be tried or punished twice in criminal proceedings for the same offence (*ne bis in idem*), ensures that there will be no double jeopardy as a result of the prosecutions brought by the EPPO. The activities of the EPPO should thus be exercised in full compliance with those rights and this Regulation should be applied and interpreted accordingly."

[27] As Spencer (2010), p. 604, note 21, put it: "If these rights are to be made effective, they must be accompanied by a rule that evidence obtained in breach of them is inadmissible, and for such a rule

It is worth underlining that—apart from Art. 42 Regulation on judicial review—the aforesaid provisions are the only ones dealing with procedural safeguards. This means that no guarantees peculiar to the EPPO activity are envisaged on this issue, and national law will prevail. Art. 41(3) Regulation confirms this conclusion with a clause stipulating that, without prejudice to the rights provided in the Regulation, suspects and accused shall have all the procedural rights available to them under the applicable national law.

## 4 A Missed Opportunity?

The so-called re-nationalisation of the EPPO turns out to be a missed opportunity in many respects. First of all, the idea of the EU territory as a "single legal area" in which the EPPO may exercise its competence[28] has been abandoned.[29] In the Commission's original proposal, the idea was closely linked to the harmonisation of national legislations with regard to the investigative powers of the EPPO and consequently the connected procedural guarantees and defence rights.

Art. 86(3) TFEU provides that the Regulation shall determine the general rules applicable to the EPPO, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions. This means not just minimum rules, as foreseen by Art. 82(2) TFEU in order to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation. The Regulation should lay down procedural rules applicable exclusively to EPPO proceedings, where the defence rights have not yet been harmonised.[30]

However, no measures of harmonization peculiar to EPPO proceedings have been adopted in the Regulation. The investigations will still be performed on the basis of a new system of interstate cooperation, namely, mutual legal assistance accompanied by mutual recognition, by way of the "assignation" of measures. In cross-border investigations, the European Delegated Prosecutors from the Member States shall act in close cooperation, assisting and consulting each other.[31] The investigative measures shall be assigned to the assisting European Delegated

to be applicable throughout the Union it would have to be included in the EU instrument by which the defence rights were guaranteed".

[28] See Art. 25(1) of the Commission proposal of 2013: "For the purpose of investigations and prosecutions conducted by the European Public Prosecutor's Office, the territory of the Union's Member States shall be considered a single legal area in which the European Public Prosecutor's Office may exercise its competence". See Vervaele (2013), pp. 167 ff.

[29] See Salazar (2017), pp. 14, 55; Venegoni and Minì (2017), p. 13.

[30] Recital (34) of the Commission Proposal.

[31] Art. 31(1) Regulation.

Prosecutor located in the State where the measure needs to be carried out,[32] and shall be subject to the law of the State of the European Delegated Prosecutor handling the case,[33] including judicial authorization if required. If the law of the State where the investigative measure needs to be undertaken requires judicial authorization, such authorization shall be obtained in accordance with the law of the assisting State.[34] If the assigned measure is not available under the law of the assisting State, or a less intrusive measure can achieve the same results, and the European Delegated Prosecutors involved cannot resolve the matter through bilateral consultations, the competent Permanent Chamber shall decide whether the assisting European Delegated Prosecutor shall undertake the measure, or a substitute one.[35]

This minimalist choice also has repercussions on the protection of the right to a fair trial and of defence rights. In this respect, the Regulation does not provide for any common rules, so that only the national law of each Member State can determine the level of protection of fundamental rights of the suspect or accused person. There is no obligation for the States to ensure equal or equivalent protection in all EPPO proceedings.

The required implementation of the directives on the rights of the defendant in criminal trials, referred to in the Regulation,[36] is limited to minimum standards, and the actual breadth of these rights depends on the discretionary choices of national legislators.[37] In any case, such directives are binding upon national law with reference to all criminal proceedings in the domestic jurisdiction, no matter whether within the competence of the EPPO or not, and are consistent with the priority recognised to national law in the Regulation.

EU Member States are not really aiming at harmonisation in criminal law and procedure, even in matters assigned to the competence of the EPPO. Moreover, harmonisation, in order to work properly, should extend in principle to all domestic proceedings.

Criminal justice and law enforcement represent a field in which the territorial sovereignty of the State imposes itself the most. During the negotiations on the EPPO Regulation, Member States have been pushing successfully to reduce the common and uniform approach that would be needed to the measures of their own national law and of their own legal order. Therefore, the mutual legal assistance and mutual recognition system is viewed as a preferred alternative to harmonisation. In sovereign State interests, it seems that national criminal policy choices must still prevail over fundamental rights of EU citizens.

This seems to be a short-sighted solution, as it is limited to ensuring the effectiveness of criminal law enforcement at national level and does not consider the

[32] Art. 31 (1) Regulation.

[33] Art. 31 (2) Regulation.

[34] Art. 31(3) Regulation.

[35] Art. 31(5), (6), (7) Regulation.

[36] Art. 41(2) Regulation.

[37] See Misilegas (2013), pp. 3 ff.

protection of defence rights at the European level, in the so-called Area of Freedom, Security and Justice. The risk is of widening and strengthening investigative powers without counterbalancing them with a uniform set of rules enacted as common and general safeguards of fundamental rights. The lack of specific limits and of precise safeguards applicable to EPPO proceedings represents, to my mind, a step backward in building an integrated system of criminal justice.

## 5 Investigative Measures in EPPO Proceedings

The problem of protecting the rights of the suspect and accused person can be viewed in two ways. It refers to the rules of procedure applicable in the course of the investigations, on the one hand, as well as to the collection and admission of evidence, on the other.

In the first respect, the Regulation sets out types and conditions of the investigative measures that the European Delegated Prosecutors will be entitled to use. The text does not regulate in detail each of these measures, so it requires the application of national law.

Art. 30 (1) Regulation lists the specific measures that Member States shall ensure at the request or by order of the European Delegated Prosecutors.[38] Such measures shall be available "at least" in cases where the offence subject to investigation is punishable by a maximum penalty of at least 4 years of imprisonment, and they may be subject to conditions in accordance with the applicable national law. In addition, the European Delegated Prosecutors shall be entitled to request or to order any other

[38] The investigation measures listed in Art. 30(1) are the following: "a) search any premises, land, means of transport, private home, clothes and any other personal property or computer system, and take any conservatory measures necessary to preserve their integrity or to avoid the loss or contamination of evidence;

b) obtain the production of any relevant object or document either in its original form or in some other specified form;

c) obtain the production of stored computer data, encrypted or decrypted, either in their original form or in some other specified form, including banking account data and traffic data with the exception of data specifically retained in accordance with national law pursuant to the second sentence of Article 15(1) of Directive 2002/58/EC of the European Parliament and of the Council;

d) freeze instrumentalities or proceeds of crime, including assets, that are expected to be subject to confiscation by the trial court, where there is reason to believe that the owner, possessor or controller of those instrumentalities or proceeds will seek to frustrate the judgment ordering confiscation.

e) intercept electronic communications to and from the suspect or accused person, over any electronic communication means that the suspect or accused person is using;

f) track and trace an object by technical means, including controlled deliveries of goods."

In comparison with Art. 20 of the Commission proposal, the list is much shorter, since most of the specific investigative measures originally included were deleted (among them, real-time surveillance of telecommunications, monitoring and freezing of financial transactions, covert investigations, summoning and questioning of suspects and witnesses, access to national and European public registers, appointment of experts, and so on).

measures in their States which are available under national law in similar cases (Art. 30 (4)). The European Delegated Prosecutors may only order the measures where there are reasonable grounds to believe that the specific measure might provide information or evidence useful to investigation, and where there is no less intrusive measure available which could achieve the same objective (Art. 30 (5)).

As we can see, the Regulation provides for specific conditions, independent of those required by the applicable national law. Such conditions pertain to the justification of the measure, in connection with the expected results. It seems therefore that the request or the order (as well as the judicial authorization, if required) should always be reasoned in writing, specifying the aim of the measure and its necessity or—as in case of freezing of goods—the risk of the judgment being frustrated. In other words, any measure should be proportionate to the needs of the investigation, and may not be undertaken without a stated reason.

The abovementioned requirements are basic safeguards for the suspect and they are applicable to all investigations carried out by the EPPO in every Member State, even if national law does not require them. As European law, they are binding for all Member States, but they do not go further than the minimum level of safeguard. What is still lacking is a comprehensive and common set of supranational rules providing for procedural formalities in relation to each investigative measure and for specific safeguards for the person subject to it, especially where his/her fundamental rights are involved.

A theoretical example of uniform codification concerning the investigations of the EPPO can be found in the *Model Rules of Procedure*, that represent the outcome of an academic project carried out by Luxembourg University.[39] The goal of the project was to design a complete and self-contained system of procedural rules for the pre-trial phase, running from the official start of the investigation to the beginning of the trial.

This text affirmed the principle of procedural legality, stipulating, as a general safeguard, that the EPPO should apply investigative or prosecutorial measures only as provided for by the Rules (Rule 8). However, the EPPO was allowed to resort to any non-coercive measure—namely, a measure to which the person freely consents—not specifically listed in the Rules, in order to collect information and evidence, provided that the measure did not affect fundamental rights (Rule 23).[40] Prior judicial authorisation, at the request of the EPPO, was required for intrusive measures or measures resulting in deprivation of liberty.

[39] Study on *EU Model Rules for the Procedure of the EPPO*, 2010–2013. The steering commission of the project was composed of Charles Elsen, Ulrich Sieber, John R. Spencer, John A.E. Vervaele and Thomas Weigend, and directed by K. Ligeti. The content and scope of the *Model Rules* are accessible under http://www.eppo-project.eu/index.php/EU-model-rules.

[40] According to this academic proposal the EPPO should exercise its power in the least intrusive manner and in accordance with the principle of proportionality (Rule 9). All measures were divided into three categories: non-coercive measures, coercive measures without prior judicial authorisation, and coercive measures with prior judicial authorisation (Rule 22). The EPPO might order coercive measures not needing prior judicial authorisation via a reasoned decision in writing (Rule 31). The powers not regulated in the Rules were not available to the EPPO.

The EPPO should seek authorisation of the competent national judge. The authorisation was given by a written and reasoned decision (Rule 47), enforceable throughout the EU single legal area. A specific set of rules (Rule 58 to 62) regulated arrest and pre-trial detention.

It is noticeable that, as consequence, for all such measures there was no need for mutual recognition instruments. All measures listed in the Rules were regulated in detail, and such provisions were meant to prevail over national law. The Model Rules strove to establish a fair balance between the powers of the EPPO and the rights of the suspect. They placed a strong emphasis on procedural safeguards and extended them beyond the current EU acquis on defence rights.[41]

According to Rule 11, a person acquired the status of suspect where the EPPO had reasonable grounds to suspect his/her committing an offence, or where the EPPO took an investigative measure that might be taken only against a suspect. Acquiring the status of suspect implies that the person enjoys the rights connected with such a position.[42]

The Model Rules were designed, as mentioned before, to prevail over national law, so that the rights of the suspects afforded thereby would be directly enforceable in every national jurisdiction, within the EU single legal area, as regards EPPO proceedings. This makes the difference from the directives on defence rights, as referred to in the Regulation, which are applicable only insofar as they are implemented by national law.

The Commission's original proposal did not follow the path suggested by these *Model Rules*, apart from the reference to the single legal area. The proposal maintained a comprehensive set of investigative measures that should be available with regard to the offences within the mandate of the EPPO for the purpose of its investigations and prosecutions.[43] The measures might be ordered by the EPPO or by the competent judicial authority at its request and should be carried out in accordance with national law. However, this proposal listed only the type of measures that Member States should ensure to be used in the investigation and prosecutions conducted by the EPPO, providing few and generic indications on the way they should be carried out. Moreover, no specific mention of safeguards was made with reference to individual measures, and only the minimum standards of guarantee as provided for in the directives on defence rights and in national law[44] would apply.

With the re-nationalisation of the EPPO and the withdrawal of the single legal area, as results from the current Regulation, the focus is entirely on national

[41] *Explanatory note* to Rule 12.

[42] Rule 12 listed the specific rights of the suspect and most of the suspect's rights were explained and detailed in specific rules (Rules 13 to 18); in some cases, these rules confirmed the directives on the rights of the defendant in domestic criminal trials or anticipated them, and implemented the case law of the European Court of Human Rights. Rule 20 set out a closing clause: the Rules should be interpreted and applied in conformity with the obligation under Article 6 of the TEU to respect fundamental rights and general principles of Union law.

[43] Art. 26(1), letters *a* to *u*, of the Commission proposal.

[44] Art. 32 of the Commission proposal.

legislation, both with regard to the rules on investigations and the rights of the suspect. Even those measures expressly mentioned by Art. 30 Regulation are subject to national law, as are the measures that the European Delegated Prosecutor, as national authority, may use where available under national law in similar cases.[45] Consequently, the actual scope of defence rights is mainly determined by the judicial system of the Member State.

No specific provision in the Regulation refers to arrest or pre-trial detention and defence rights thereof. In cross-border cases, the applicable instrument will be the European Arrest Warrant,[46] according to the logic of mutual recognition and without any attempt at harmonisation.

## 6 Defence Rights in EPPO Proceedings

In this context, another problem remains unsolved, at the level of Union law: how the defence will participate in the investigations. According to the Regulation, suspects and accused persons shall have all the procedural rights available to them under the applicable national law.[47] National law will therefore rule on the general structure of the pre-trial phase and on the role of the defence during the investigations. However, the Charter of Fundamental Rights of the EU applies to EPPO proceedings, since they fall within the EU legislative competence.

The Regulation does not address some crucial questions, such as the notice of the execution of investigative measures and the right of the suspect to be present, the access to the material of the case during investigations, the right to question witnesses, the right to make statements, the right to gather exculpatory evidence.[48] Art. 41(3) Regulation, partly accepting the suggestions contained in the *Model Rules*, provides for the possibility to present evidence, to request the appointment of experts or expert examination and hearing of witnesses, and to request the EPPO to obtain investigative measures on behalf of the defence, but apparently only if the right is available under the applicable national law.

The guarantees for the rights of the suspect in national criminal proceedings are closely connected with the nature of the acts performed by the investigating authority. Such guarantees need to be structured at different levels, depending on the system, since their relevance increases inasmuch as the acts of investigation of the pre-trial phase may become directly admissible evidence at trial. The overall picture is even more confusing due to the lack of clear rules on the way evidence can be admitted.

According to Art. 5(4) Regulation, the EPPO shall seek all relevant evidence, whether inculpatory or exculpatory. This means that a quasi-judicial role is

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[45] See also Herrnfeld (2017), pp. 400–402.

[46] Art. 33(2) Regulation that recalls Framework Decision 2002/584/JHA.

[47] Art. 41(3) Regulation.

[48] See also Buric (2016), pp. 74–82.

conferred on the prosecutor, as happens in most continental systems, in some ways also entrusting to the prosecution the protection of the interests of the defence. Even so, the active participation of the suspect is not ensured.

The Regulation relies on the already mentioned directives on the defendant's rights in criminal trials.[49] As we know, such directives set only minimum standards, and are applicable only as far as they are implemented in national legislation by Member States, which have broad discretion in defining the scope of these rights.

Taking into account both the Regulation and the directives recalled thereby, it is still unclear what the exact moment is from which procedural safeguards begin to apply. The reference to "any suspect or accused person" is not decisive, as the status of accused is acquired only when the prosecutor brings the case to trial, after termination of the investigation, while the official status of suspect depends on the definition in national law.[50] In almost all the aforementioned directives, there are no further specifications,[51] and in some cases the relevant time is delayed "at the latest" until the submission of an indictment to a court.[52]

Only in the Directive on the right of access to a lawyer can we find a more precise definition. The access to a lawyer shall be ensured before suspect or accused person are questioned by the police or another authority: at least upon the carrying out of certain predetermined investigative acts, without undue delay after the deprivation of liberty, when the person is summoned to appear before a court—whichever the earliest.[53]

It seems that such a provision cannot be generalised and extended to cover all procedural safeguards recognised in the Regulation. Uncertainty remains on whether the relevant moment should be determined through objective criteria, such as the undertaking of coercive measures, or subjective criteria, such as the moment when the EPPO has reasonable grounds to believe that a person has committed an offence. The adoption of a coercive measure implies that an investigation against a suspect is under way and defence rights should be ensured, but such measures might take place even at the end of the investigations, when these rights become of little or no

[49] Art. 41(2) Regulation.

[50] Rule 11 of the *Model Rules* specified that "1. A "suspect" is a person whom the EPPO has reasonable grounds to suspect of the commission of an offence. 2. If the EPPO takes an investigative measure that may be taken only against a suspect, the person affected then acquires the status of a suspect".

[51] Art. 1(2) of the Directive on the right to interpretation and translation and Art. 2(1) of the Directive on the right to information refer to the time persons are made aware by the competent authorities of a Member State that they are suspected or accused of having committed a criminal offence, which in fact depends on a discretionary choice.

Recital (12) of the Directive on the presumption of innocence states that the Directive should apply even before the person is made aware by the competent authorities of a Member State, by official notification or otherwise, that he or she is a suspect or accused person. Even so, the moment from which the Directive begins to apply remains undetermined.

[52] See Art. 6(3), Art. 7(3) of the Directive on the right to information.

[53] Art. 3(2) of the Directive on the right of access to a lawyer. On this Directive see Bachmaier Winter (2014), pp. 509 ff.

use. On the other hand, relying on the evaluation by the investigating authority or on the formal notification of the status of suspect makes the identification of the point in time from which defence rights begin to apply subject to the discretion of the authority.

The Regulation does not contain any reference to the person other than the suspect, such as a witness who becomes a suspect. The Directive on the right of access to a lawyer addresses in part the issue, providing that the Directive also applies to persons other than suspects or accused persons who, in the course of questioning by the police or by another law enforcement authority, become suspects or accused persons.[54] Recital (21) of the Directive explains that in such case questioning should be suspended immediately and may be continued only if the person concerned has been made aware that he or she is a suspect or accused person and is able to fully exercise the rights provided for. This provision seems to be expression of a general principle, which should be applicable also with reference to similar situations, as for instance the right of any witness to refuse to give evidence to the extent that it would incriminate him or herself.[55]

Art. 86(3) TFEU requires the Union legislator to determine also the rules applicable to the judicial review, thus requiring special rules for the EPPO.[56] According to Art. 86(2) TFEU, the EPPO shall exercise the functions of prosecutor in national courts of the Member States. The investigative acts of the EPPO will be governed by national law, will be carried out by national enforcement authorities, and, where necessary, authorised by national courts. Therefore, since the EPPO's action will be relevant mainly in national legal orders, its acts should not be considered as acts of an office of the EU and the Union courts should not be directly competent with regard to those acts pursuant to Arts. 263, 265 and 268 TFEU.[57]

In any case, Art. 267 TFEU will be applicable with regard to preliminary rulings on the interpretation or the validity of provisions of Union law, according to Art. 42(2) Regulation in following cases:

> a) the validity of procedural acts of the EPPO, in so far as such a question of validity is raised before any court or tribunal of a Member State directly on the basis of Union law;
> b) the interpretation or the validity of provisions of Union law, including this Regulation;
> c) the interpretation of Articles 22 and 25 of this Regulation in relation to any conflict of competence between the EPPO and the competent national authorities.

The preliminary rulings will ensure that the Regulation is applied uniformly throughout the EU. The original proposal of the Commission left no room for any

[54] Art. 2(3) of the Directive.

[55] See Rule 27(1) of the *Model Rules*.

[56] See also Schouard (2012), pp. 61 ff.

[57] *Explanatory memorandum, supra*, note 1, 3.3.5. On the contrary, Rule 7 of the *Model Rules*, *supra*, note 35, provided that decisions of the EPPO affecting individual rights should be subject to review by a European court, which was quite logical since the investigative acts were regulated by common European rules. The definition of the competent court as a "European court" referred to the possibility of establishing a European criminal court, *e.g.*, as a specialised chamber at the Court of Justice of the EU (*Explanatory note* to Rule 7).

challenge to the validity of the acts of the EPPO before the Court of Justice of the EU. Even the possibility of requesting a preliminary ruling was expressly excluded for issues concerning the interpretation of provisions of national law, which are rendered applicable by the Regulation. Such issues should be dealt with by national courts alone.[58]

## 7 Admissibility of Cross-Border Evidence

From the second point of view, the problem of protecting the rights of the suspect or accused person concerns, as mentioned before, the admission of evidence at trial. Evidence collected by the EPPO during the investigations is to be submitted to the court that has to adjudicate on the merits of the case. If the competent national court, according to Art. 26 Regulation[59] is located in the Member State where the investigations took place, the applicable law is the same, and the admission of the evidence is governed by uniform and consistent rules, as the EPPO acts in both phases as the national authority. Quite another question arises in cross-border cases.[60]

The basic rule is Art. 37 Regulation, according to which evidence presented by the prosecutors of the EPPO or the defendant to a court shall not be denied admission merely on the grounds that the evidence was gathered in another Member State or in accordance with the law of another Member State. Such evidence is presumed to meet any relevant evidentiary requirement under the national law of the State where the court is located.[61] In other words, all outcomes of the investigative measures undertaken by the EPPO according to Art. 30 and Art. 31 Regulation are free to circulate throughout Member States along the lines of mutual recognition.[62]

A major shortcoming is the absence of common or at least harmonised rules on the gathering of evidence during investigations, and the absence of common specific and detailed safeguards protecting defence rights in that phase, vis-à-vis the increase in the powers of the prosecutor.

The only rule addressing the problem is Art. 32 Regulation, according to which the handling European Delegated Prosecutor may indicate formalities and procedures to the assisting European Delegated Prosecutor who has to carry out the assigned measure. In this way, the prosecutor can rely on the admissibility in the competent court of his/her Member State of all evidence gathered abroad pursuant to his/her own national law. The method is the same as the one envisaged by the

[58] Recital (38) and Art. 35 of the Commission proposal.

[59] See Vilas Álvarez, in this volume.

[60] On cross-border evidence and its admissibility, see extensively Allegrezza in this volume. See also Zerbes (2015), pp. 211–233, pp. 221 ff.; Monici (2017), p. 8.

[61] See *Explanatory Memorandum* of the Regulation, para. (80).

[62] Caianiello (2013), p. 122.

Directive on the European investigation order,[63] which is a typical instrument of mutual recognition.

In other cases the trial court, even where the gathering of evidence did not abide by national law of the State, retains only the power to freely assass the evidence admitted (Art. 37(2) Regulation).[64] Therefore, such an evaluation is not based on the violation of the law, or on the existence of an exclusionary rule, but goes into the merits of the case.

This might raise problems difficult to solve, depending on different national systems of criminal procedure. Let us take for example the use as evidence at trial of the previous statements of a witness. Despite the above-cited Art. 37 Regulation, it seems that the prescribed admissibility of evidence gathered in another State should not prevail over the rule that in some judicial systems bans out-of-court statements as hearsay. Another unsolved question is the admissibility of physical evidence, in cases where it was unlawfully collected in violation of the law of the State where it is presented. The admission or exclusion of such evidence might cause blatant disparities in the treatment of defendants before the same or different jurisdictions, and might eventually lead to the practice of forum shopping.[65]

The same standards of admissibility, according to Art. 37 Regulation, apply both to evidence presented by the prosecutor and by the defendant. However, in practice, the balance of powers is not fully achieved, since the Regulation does not foresee the possibility of the suspect to gathering evidence during the investigations. The only way for the suspect to collect evidence abroad under European law is to request the issuing of a European investigation order, which, however, depends on the law of the State where the investigations take place.[66]

In conclusion, this kind of solution does not seem to fulfil the provision of Art. 86(3) TFEU, according to which the Regulation should determine the general rules of procedure applicable to EPPO's activities, as well as those governing the admissibility of evidence. Such provision seems to require unification, rather than mutual recognition.

Neither does the finally adopted Regulation completely correspond to the approach envisaged by Art. 82(1) TFEU, which foresees, albeit within the logic of mutual legal assistance and mutual recognition, the approximation of the laws and

[63] Art. 9(2) Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.

[64] As originally proposed by the Commission, according to Art. 31(1) *Draft Regulation* EPPO the trial court might deny admission if the admission would violate the fairness of the procedure, the rights of defence, or other rights as enshrined in the Charter of Fundamental Rights of the EU. Such provision has been eliminated in the finally adopted text of the Regulation.

[65] In the same sense, Luchtman (2013), pp. 3–60. In the same volume see also Böse (2013), pp. 73–87; Helenius (2015), pp. 178–209, p. 192. See Panzavolta in this volume.

[66] Art. 1(3) of the Directive on the European Investigation Order 2014/41: "The issuing of an EIO may be requested by a suspected or accused person, or by a lawyer on his behalf, within the framework of applicable defence rights in conformity with national criminal procedure".

regulations of the Member States.[67] Even the implementation of minimum standards, as provided for by the directives on protection of the defendant's rights in criminal trials, will not solve all problems related to the circulation of evidence, as no common rules are going to be enacted.

## 8 Concluding Remarks

It can be concluded that the EPPO Regulation does not meet the expectations connected with the establishment of the new body of the Union along the lines set forth in Art. 86 TFEU. On the contrary, the re-nationalisation choice follows the path of mutual recognition without addressing the core issue of harmonisation before the variety of legal bases for investigative measures and for the admission of evidence at trial.

As European forms of prosecution and jurisdiction, the highest level of guarantees should be afforded to EPPO proceedings, even before the national courts of Member States. Sticking to minimum standards of safeguards does not allow any improvement in the protection of defence rights, even less so if no judicial review of the investigative measures will be admitted before the Court of Justice of the EU.[68] The procedural safeguards provided for in the Regulation do not ensure equality of arms between prosecution and defence.

The Regulation does not provide for any specific protection against intrusive measures or measures resulting in deprivation of liberty. The protection of these fundamental rights is left to national law and, as far as applicable, to the principles enshrined in the Charter of Fundamental Rights of the EU. There is no question about the applicability of the Charter when, as in these cases, Union law is enforced, but the direct competence of the Court of Justice on EPPO proceedings and investigation measures, as mentioned before, is still denied, so that the enforcement of the Charter will be reserved only to national courts.

Another critical point is the discretion of the EPPO in deciding in which Member State the prosecution shall be brought, when more than one State has jurisdiction on the case, which is quite normal for transnational crimes. The Permanent Chamber shall in principle decide to bring the prosecution in the State of the European Delegated Prosecutor handling the case, but it may also decide to bring the prosecution in a different State, if there are sufficiently justified grounds to do so.[69]

The Permanent Chamber may also choose the handling prosecutor itself during the investigations, by deciding to reallocate the case to a European Delegated

[67] See Ligeti (2013), pp. 73–83; in the same volume, see also Kaiafa-Gbandi (2013), pp. 85–116.

[68] In the same sense, see Herrnfeld (2017), p. 406.

[69] Art. 36(3) Regulation.

Prosecutor in another Member State, or to merge or split cases, if such decisions are in the general interest of justice.[70]

The Regulation spells out some rules for the identification of the European Delegated Prosecutor who shall initiate the investigation. The basic reference is to the Member State which according to its national law has jurisdiction on the offence.[71] If several States are involved, the European Delegated Prosecutor from the State where the focus of the criminal activity is or where the bulk of the offences has been committed initiates the investigation. A European Delegated Prosecutor of a different State may initiate an investigation if a deviation from these principles is duly justified.[72]

It is clear that any decision on jurisdiction and, even earlier, on the prosecutor handling the case, determines the applicable national law. This is a sensitive issue, given the differences existing between national laws of Member States.[73] The EPPO might decide to give preference to the State whose law is more favourable to prosecution, not only in view of the definition of the offences and of the applicable penalties, but also, for example, because of the type and the limits of the investigative measures available, or because of the rules on admission of evidence at trial.

The legal framework resulting from the Regulation is disappointing, and does not seem to comply with Art. 47(2) of the Charter of Fundamental Rights of the EU, which requires the tribunal to be "previously established by law".[74] The directions provided are far from precise. Concepts like "sufficiently justified grounds", "general interest of justice", and "duly justified" are vague and indeterminate, and require an evaluation that should not be assigned to a party in the proceeding. Even the reference to more specific elements, such as "the focus of the criminal activity" or "the bulk of the offences" is unclear, since their actual extent might be disputable.

Where the Permanent Chamber exercises the power to reallocate a case for investigation or prosecution, it shall take into account as subsidiary criteria, in order of priority, the habitual residence of the suspect or accused person, his nationality, the place where the main financial damage has occurred (Art. 26(4) Regulation). However, these guidelines refer to the choice of the venue among others, not to the reasons for deviating from the general principles of the *forum delicti commissi*.

[70] Art. 26(5) Regulation.

[71] Art. 26(1) Regulation.

[72] Art. 26(4) Regulation.

[73] On the choice of jurisdiction and its implications in the protection of human rights and precisely the right to the natural judge pre-determined by the law I refer to Panzavolta, in this volume.

[74] As stated with regard to the Proposal of Regulation already by Panzavolta (2013), pp. 143–165. In the same sense, Giuffrida (2017), pp. 152 ff.

Given all this, the defendant's challenge to the assignment of the case to a European Delegated Prosecutor for the investigations or the prosecution should be allowed before the Court of Justice of the EU.[75]

In the end, the main concern should be to ensure equal treatment of all defendants within the Union, at least in matters covered by Union law: which means that clear and specific rules with high standards of protection should be laid down. EU citizens must be able to foresee with reasonable certainty what powers judicial authorities are entitled to use in criminal law enforcement and under which legal requirements and safeguards. The lack of harmonisation and the multiplicity of national approaches result in a lack of predictability, which represents a violation of the legality principle.

In any case, even if the EPPO Regulation fully complied with Art. 86(3) TFEU, providing common procedural rules, the problem to be solved beforehand is the unification of the legal definition of the offences within the competence of the EPPO. The so-called substantive legality principle requires that a suspect must know in advance for which offences he may be held liable and which penalties may apply.[76]

The Treaty is not clear on whether harmonisation of substantive criminal law should be reached through Art. 83, on establishing minimum rules, or Art. 325, on equivalent protection against fraud. On the basis of Art. 86(1) TFEU, the EPPO shall be competent for the offences affecting the financial interests of the Union,[77] and they were newly regulated in the PIF Directive of 2017.[78]

However, a directive is not the most adequate tool for pursuing harmonisation, since the implementation by Member States may vary depending on the way national law defines the offences and the amount of the penalties.

The best solution would be that of harmonising criminal law of Member States through a regulation, based on Art. 86 TFEU[79] that allows the adoption of regulations determining, among the other things, the general rules applicable to the EPPO (para. 3). A key role, to this end, could be played by Art. 86(2) TFEU through the reference to the offences against the Union's financial interests "as determined by the regulation provided for in paragraph 1". However, the current political trend does not seem at all to point in this direction.

[75] Sciarabba (2017), p. 34; Salazar (2017), pp. 34 ff.

[76] Luchtman (2013), pp. 11–33, pp. 13 ff.; Vervaele (2014), p. 85 ff.

[77] Art. 22(1) Regulation.

[78] Directive 2017/1371/EU 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.

[79] Vervaele (2014), p. 277.

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# Criminal Investigations, Interference with Fundamental Rights and Fair Trial Safeguards in the Proceedings of the European Public Prosecutor's Office. A Human Rights Law Perspective

**Stefano Ruggeri**

**Abstract** The EPPO Regulation displays a complex picture in which unprecedented procedural mechanisms coexist with traditional arrangements, such as the view of a public prosecutor's office as an independent body of justice giving rise to a number of new problems from the perspective of the fundamental rights of the individuals involved in the inquiry of the EPPO. Issues as how fundamental safeguards should be ensured in the proceedings conducted by the European prosecutorial authority, the decision to drop the case, or the distribution of the investigative competences and the reallocation of the case highlight new problems that mainly derive from the concentration of considerable decision-making powers in the hands of Permanent Chambers.

This discussion, while calling for confrontation of the new rules with constitutional law, as well as with the European Convention and EU law, raises a systematic problem, namely whether fundamental constitutional-law safeguards should also be ensured across borders *ratione personae*. The examination of this problem from the angle of the EPPO's inquiry enhances the need for an understanding of cross-border investigation and prosecution that aims at ensuring full respect for the main criminal law and criminal justice rights of the individuals concerned.

## 1 Introductory Remarks

In the Area of freedom, security, and justice, two landmark legal instruments were issued in 2017, namely Directive 2017/1371 on fighting fraud against the EU's financial interests by means of criminal law (hereafter, DirPIF) and Regulation

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L. Bachmaier Winter (ed.), *The European Public Prosecutor's Office*,
Legal Studies in International, European and Comparative Criminal Law 1,
https://doi.org/10.1007/978-3-319-93916-2_11

2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (hereafter, RegEPPO). More than 4 years after the issuing of a proposal of Regulation on the part of the EU Commission (hereafter, PRegEPPO)[1] and almost two decades after the first initiatives aimed at the introduction of a European Public Prosecutor, the long process of harmonisation of criminal law and criminal justice in the field of the offences affecting the EU budget has finally been completed through the establishment of a special body charged with the investigation and prosecution of such crimes.

The strict link between these legal instruments, however, does not entail a perfect overlap between the two dimensions.[2] Moreover, the structure and functions of the new European prosecutorial authority have considerably changed during the legislative process.[3] The original proposal of a European Public Prosecutor was abandoned in favour of a much more complex body, namely a European Public Prosecutor's *Office* (EPPO). The forms of cooperation with domestic authorities also depart from the 2013 draft proposal, as the 2017 Regulation enacted a system of shared competence between the EPPO and domestic authorities, which not only entails the possibility of evocation by the EPPO,[4] but also enables the referral and transfer of the proceedings to the competent national bodies.[5] In this context, the principle of sincere cooperation requires both the EPPO and the domestic authorities to support each other with a view to efficiently fighting the crimes falling under the competence of the European Public Prosecutor's Office.[6]

Furthermore, the new European prosecutorial authority has a highly decentralised structure,[7] as European Delegated Prosecutors (EDPs) are in charge of the investigations and can make use of the tools and powers provided for by domestic law.[8] Nonetheless, the use of the investigative competences and the decisions on whether or not to bring defendants to court do not lie in the hands of the EDP

[1] COM(2013) 534 final.

[2] On the one hand, the EPPO's competence does not cover the overall area of the offences affecting the EU financial interests. Thus, concerning intentional acts or omissions having cross-border dimension in the field of revenue arising from VAT own resources, the European prosecutorial authority only has competence for those conducts "connected with the territory of two or more Member States and involve a total damage of at least EUR 10 million". See Art. 22(1) RegEPPO. On the other, the competence of the EPPO exceeds the scope of application of the PIF Directive, being extended to offences regarding participation in a criminal organisation as defined in Framework Decision 2008/841/JHA, as implemented in national law, if the focus of the criminal activity of such a criminal organisation is to commit one of the PIF offences, as well as any other criminal offence that is inextricably linked to criminal conduct that falls within the scope of such offences. Cf. Art. 22(2-3) RegEPPO. See further, Vilas Álvarez, in this same volume.

[3] Legal scholarship has already deeply examined the EPPO Regulation. See among others the contributions published in No. 3/2017 of *Eucrim*, which specifically deals with this legal instrument.

[4] Recital No. 13 RegEPPO.

[5] Art. 34 RegEPPO.

[6] Recital No. 14 RegEPPO.

[7] Art. 8(1-2) RegEPPO. On the structure of the EPPO see Martínez Santos, in this same volume.

[8] Arts. 8(4) e 13(1) RegEPPO.

responsible for the investigations, but with special bodies within the EPPO, i.e. the Permanent Chambers.

This set-up poses a number of problems from a human rights perspective. The present study focuses on pre-trial inquiry and the exercise of investigative and prosecutorial competences by the European Public Prosecutor's Office. Within this area, I shall firstly deal with the initiation of criminal investigations by the EPPO. This phase highlights problems of the utmost importance, which concern, in particular the need for preferment of formal charges and the granting of fundamental procedural safeguards to the individuals investigated, such as the right to be informed of the accusation, the right to be questioned fairly during the pre-trial inquiry, and the privilege against self-incrimination. Another important issue is the distribution of investigative competences and the possibility of a reallocation of the case during the pre-trial stage. The carrying out of intrusive investigations and the use of further forms of interference with fundamental rights, moreover, call for the enhancement of procedural safeguards, particularly in transborder cases. Ultimately, I shall examine the problems concerned with the completion of the pre-trial inquiry and the decision on whether or not to indict defendants before a national court.

The analysis of these issues brings to light unprecedented challenges for traditional principles of criminal law and the criminal justice systems of European countries, especially the principle of *nullum crimen, nulla poena sine lege*, and the right to the legally pre-established judge, as well as other relevant fundamental rights, such as the right to an effective defence. Difficult problems also arise in relation to those countries, such as Italy, which orient criminal prosecutions towards the principle of legality.

Ultimately, a systematic examination of these complex issues highlights the even more general problem of whether and how the EPPO Regulation fulfils the fundamental principle of equal treatment. In the current European scenario, this fundamental principle can no longer be seen as exclusively relating to the equal treatment of individuals belonging to the same country (and therefore, the same cultural context) *vis-à-vis* domestic law. The principle of *par condicio* requires the adoption of a broader viewpoint that looks at the need for equal treatment of EU citizens (even outside the area of enhanced cooperation) in light of a complex notion of 'lawfulness', made up of principles and rules harmonised at the level of EU law, safeguards in constitutional law, and the requirements set out by the case-law of European and domestic courts. Doubtless, the need for multilevel protection of fundamental rights in a legal action conducted by the EPPO requires an interdisciplinary approach which combines the perspective of constitutional law with that of international human rights law and even EU (human rights) law, even beyond the explicit reference made by the EPPO Regulation to EU legislation on specific defence safeguards.[9] This sheds new light on the principle of highest protection of fundamental rights, while posing a final, problematic question, namely whether and to what extent the individuals involved in the proceedings falling within the competence of the EPPO hold the right to be protected by fundamental constitutional-law safeguards across borders.

[9] Art. 41(2) RegEPPO.

## 2 The Initiation of a Criminal Inquiry by the European Public Prosecutor's Office

### *2.1 The Initiation of Criminal Investigations and the Right to Be Heard Fairly*

The first problems related to the investigative competence of the European Public Prosecutor's Office concern the initiation of the pre-trial inquiry. Difficult questions arise both where a judicial or law enforcement authority of a Member State starts an investigation with respect to a criminal offence for which the EPPO can exercise its competence and where the European prosecutorial authority starts a criminal investigation without the previous initiative of the domestic authorities. The 2017 Regulation provides scant indications as to the requirements due and the procedural safeguards that must be ensured in both cases. In the former, the domestic authorities are only required to inform the EPPO "without delay", so as to enable it to decide whether or not to exercise its right to evocation under Article 27 of the Regulation.[10] There is no specific deadline, however, beyond this generic requirement, nor is it clear whether and under which conditions the domestic authorities can continue to investigate in the meantime. The main difficulties, moreover, arise in the latter case, in which the EPPO initiates a criminal investigation without a report from the national authorities. This case in turn relates to two different situations.

It may firstly happen that, in accordance with the applicable national law, there are reasonable grounds to believe that an offence falling within the competence of the EPPO was committed. In this case, any EDP of a Member State having jurisdiction over the offence may initiate an investigation.[11] Where no European Delegated Prosecutor has initiated an investigation, the competent Permanent Chamber for the case can "instruct a European Delegated Prosecutor to initiate an investigation".[12] Both these situations raise several human rights concerns. As to the former, the Regulation only requires the EDP who instituted the investigation to note the case in a new "case management system" (CMS).[13] This system, which will be established, owned, and managed by the EPPO, contains the information received about possible offences that fall under the EPPO's competence, as well as information from the case files, including cases that have been closed.[14] In other words, the CMS will include both the information regarding the alleged offence and the evidence gathered by means of the investigations eventually performed at the domestic level and those that will be carried out by the European Delegated Prosecutors.

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[10] Art. 24(2) RegEPPO. On the right to evocation, see Satzger, in this volume.

[11] Art. 26(1) RegEPPO.

[12] Art. 26(3) RegEPPO.

[13] Art. 26(1) RegEPPO. For the analysis of the CMS I refer to Pérez Enciso, in this volume.

[14] Recital No. 47 RegEPPO.

This solution raises several questions. Within what timeframe should the case be noted in the case management system? It is worth observing that the EPPO Regulation also provides no deadline in relation to registering the case, without, however, preventing the competent European prosecutorial authority from carrying out investigations in the meantime. But pursuant to which procedures—and above all, with which safeguards—should investigations be conducted before registering the case? In particular, which guarantees are due to the person who is already under investigation, even if he has not yet assumed the formal status of a suspect? In which terms can he claim his right to be heard fairly in the pre-trial inquiry headed by a EDP?

The new rules only require the investigative authorities to fulfil the requirements of *lex loci*. In this regard, however, it is noteworthy that in some European countries, domestic law enables the enforcement authorities to carry out urgent investigations prior to the preferment of charges. For instance, the 1988 Italian Criminal Procedure Code (CPC), although introducing a centralised model of pre-trial inquiry headed by public prosecutors, already allowed the police to conduct autonomous investigations prior to the registration of *notitia criminis* by the competent prosecutor—a model that is still in force.[15] In this context, a problematic situation arises where the police or the prosecutor question a person under suspicion, even though no formal charges have yet been preferred. Domestic procedural law provides different solutions in this regard. EU law in turn only grants the person examined legal assistance and the privilege against self-incrimination[16] when he "becomes a suspect or accused person during questioning by the police or by another law enforcement authority in the context of criminal proceedings".[17] As a consequence, not only are these safeguards due at the level of EU law solely in the case of questionings by the police or other law enforcement authority, but furthermore their application presupposes that domestic law foresees the possibility of the person examined assuming the formal status of 'suspect' during such questioning. In other words, the activation of EU law guarantees is subject to the condition that the competent authorities for questioning—therefore, also the police—are entitled to prefer formal charges under national law. A comparative-law analysis of European countries, however, would easily reveal that this is not always the case, and that some jurisdictions do not even provide for a specific procedural act aimed at charging the person under investigation of a criminal offence.[18] Moreover, it is interesting to note that, even if EU law

[15] Arts. 347 et seqq. CCP-Italy. It is noteworthy that since 1992 the police can carry out autonomous investigations even after the prosecutor has taken over the leadership of the case See Art. 348(1) CCP-Italy.

[16] At first glance, Article 7 of Directive 2016/343/EU may seem to ensure the right to silence only to those who have already assumed the formal status of suspects. On close examination, the link between the privilege against self-incrimination and the right to legal assistance is so strict that the former safeguard must be granted within the limits laid down by the latter. See Recital 21 of Directive 2013/48/EU.

[17] Recital 21 and Art. 2(3) of Directive 2013/48/EU (hereafter, DAL).

[18] For a similar remark see Bachmaier Winter (2013), p. 114.

requires the questioning to be suspended immediately once it appears that he/she is to be considered formally a suspect, this solution is not absolute, since the drafters of Directive 2013/48/EU provided for the hearing to be continued if the person concerned was made aware of his new status as a suspect and is able to fully exercise the rights provided for in this legislation.[19]

This set-up does not appear to be entirely satisfactory. Italian law, for instance, lays down an interesting solution in relation to cases in which either the police or the prosecutor or a judge question a person other than the suspect, if a suspicion of guilt arises during the examination. The Italian legislation not only requires the competent authority to suspend the questioning, but also to inform the person examined that criminal proceedings can be initiated against him and that he has the right to be assisted by a lawyer. Interestingly, the Italian CPC also excludes the possibility of using *contra reum* the statements rendered.[20] This solution is noteworthy taking into account that in Italy the person concerned does not formally become a suspect during questioning but through the aforementioned registration of *notitia criminis*. The arrangements made by Italian lawmakers go beyond the guarantees provided by EU law, in that they enhance the protection of both the suspect and third parties in cases in which, although a suspicion of guilt had already arisen at the time of the questioning, the person concerned was not provided with the safeguards set forth in relation to the questioning of suspects. In this case, Italian law not only excludes the possibility of using the evidence obtained against the person examined but also *erga alios*, thus making the information gathered useless in absolute terms.[21]

The arrangements of Italian procedural law may seem to provide useful indications to soften the approach adopted by the EPPO Regulation, who ruled out the inadmissibility at trial of the information taken by the EPPO "on the mere ground that the evidence was gathered in another Member State or in accordance with the law of another Member State".[22] At first glance, this provision—read together with the acknowledgment of the "power of the trial court to freely assess the evidence presented by […] the prosecutors of the EPPO"[23]—might lead to worrisome interpretations, allowing the admissibility and (free) use even of statements rendered by individuals against whom a suspicion of guilt had already arisen, without being, however, formally charged with a criminal offence. On close examination, it does not seem that the provisions of Article 37 can be interpreted as justifying the full use of any piece of evidence gathered by the EPPO regardless of whether essential guarantees were fulfilled. As a matter of principle, the safeguards foreseen by Article 63 CPC-Italy should be ensured by European Delegated Prosecutors acting in Italy because of the general commitment of the EPPO to comply with *lex loci*. Nevertheless, the exclusion of any use of the statements rendered, as laid down by

[19] Recital 21 DAL.

[20] Art. 63(1) CCP-Italy.

[21] Art. 63(2) CCP-Italy.

[22] Art. 37(1) RegEPPO.

[23] Art. 37(2) RegEPPO.

Article 63(2) CPC-Italy, only applies if the person concerned should have been examined pursuant the rules governing the questioning of suspects, which presupposes a clear dividing line between individuals under investigations and those who are not. If the European prosecutorial authority exercises its right to evocation, the person examined will probably be registered as a suspect prior to questioning by the EPPO. But if a European Delegated Prosecutor starts investigating (or is charged with this task by the Permanent Chamber) before the national authority taking responsibility for the case, when and how will the person under investigation exactly assume the formal status of a suspect?

## 2.2 *The Preferment of Charges and Procedural Guarantees in the Investigative Phase: Rights to Information, Legal Assistance and the Privilege Against Self-incrimination*

In light of these observations, it is not an easy task to establish which safeguards will be ensured to suspects by EU and domestic law, a result that largely depends on the procedure through which the person investigated by the EPPO will become a suspect. Although the Regulation does not contain clear indications in this regard, we may assume that the registering in the CMS should entail the prosecutorial decision to charge, at least when the investigations are directed against one or more individuals. Recital No. 78 seems to confirm this conclusion by way of requiring the EPPO to exercise its prosecutorial functions starting with the indictment not only of defendants but also of suspects. This requirement, while extending the notion of 'prosecution' to the preferment of charges in the pre-trial inquiry, should also be interpreted together with other guarantees recognised by the Regulation. Thus, if both the European Convention[24] and the EU Directive 2012/13/EU[25] (hereafter, DICP), to which the Regulation expressly refers,[26] grant suspects the right to proper information about the charge according to the developments in the proceedings, this acknowledgment may also seem to impose upon the competent authority the obligation to set the necessary precondition for the exercise of this safeguard, that is, the preferment of formal charges. There is little doubt that this responsibility lies with

[24] It is true that the European Convention stands out among other human rights charters for ensuring that the person 'charged' with an offence has the right to be informed of the 'accusation'. It would probably be reductive, however, to interpret this terminological distinction as limiting this informational safeguard to the decision to bring the individuals concerned to court with a formal indictment (in this sense see instead Trechsel 2005, pp. 198 f.). This interpretation, moreover, does not seem to reflect the approach followed by Strasbourg case-law, which for almost 30 years has acknowledged the right to information on the charge in relation to a number of investigative acts interfering with fundamental rights. See among others ECtHR, *Brozicek v. Italy*, 19 December 1989, Appl. No. 10964/84.

[25] Art. 6 DICP.

[26] Art. 41(2)(b) RegEPPO.

the European prosecutorial authority, where no previous inquiry is instituted at the domestic level. Furthermore, the competent EDP will also be required to provide detailed information on the charges according to the standards laid down by Strasbourg case-law and the 2012 Directive.

The systematic relevance of the right to information about the accusation, therefore, should provide sufficient protection to the individuals investigated by the EPPO in a country that does not require the investigative authorities to prefer formal charges by means of specific investigative acts. Furthermore, there is a need for immediate noting in the CMS of the information regarding the alleged offence after the EPPO takes responsibility for investigation, in that, as noted, it marks the starting point for the granting of the fundamental safeguards of legal assistance and the privilege against self-incrimination. These guarantees, however, cannot be restricted to the individuals who according to domestic law can assume the formal status of suspects while being questioning by law enforcement authorities, but should also be ensured to any person against whom a suspicion of guilt has arisen, if the competent European prosecutor examines him prior to the annotation of the case. The suspension of the questioning, therefore, should be the inevitable consequence of the lack of legal assistance, without exceptions being allowed on the grounds of vague criteria, such as respect for essential defence rights.

Concerning the *nemo tenetur se detegere* principle, the competent authority will certainly be required to inform the person concerned that he can remain silent. As noted, however, there is a delicate problem as to whether and to what extent the statements obtained by the person investigated who is questioned without the assistance of a lawyer and without being formally charged with an offence falling into the material competence of the EPPO can be used in court against him. At first glance, EU law stipulates nothing in this regard. Nevertheless, pursuant to Recital No. 27 of Directive 2016/343/EU, in determining whether the right to remain silent or the right not to incriminate oneself have been violated, the case law of the European Court of Human Rights should be taken into account. It is interesting to note that in *Saunders v. United Kingdom* the Grand Chamber had already strengthened the protection of the principle of *nemo tenetur se detegere* by finding a violation of the Convention regardless of the use made in court of (and the specific relevance attached by the domestic authorities to) the information obtained coercively.[27] This solution, while enabling an interpretation of the 2016 Directive that makes the protection of EU law closer to that provided by the aforementioned provision of the Italian code, holds great systematic importance, mostly if compared to the progressive softening of the sole and decisive evidence doctrine after the judgment *Al-Khawaja and Tahery v. United Kingdom*.[28]

[27] ECtHR, *Saunders v. United Kingdom*, 17 December 1996, Appl. No. 19187/91.

[28] ECtHR, *Al-Khawaja and Tahery v. United Kingdom*, 15 December 2011, Appl. No. 26766/05 and 22228/06.

## 3 The Distribution of Investigative Competences and the Reallocation of Cases. Repercussions on the Right to a Defence and the Need for Pre-determination of the Competent Forum by the Law

Another complex problem concerns the distribution of the investigative competences and therefore, the definition of the jurisdiction to investigate. This issue relates not only to the initiation of criminal investigations by the EPPO, but also to the development of the inquiry and the allocation of the case to another EDP in the course of the pre-trial phase. As to the initiation of the inquiry, the Regulation brought about considerable innovations in comparison to the 2013 proposal, which allowed the European Public Prosecutor or one EDP to initiate a criminal inquiry whenever there were "reasonable grounds to believe that an offence within the competence of the European Public Prosecutor's Office [was] being or [had] been committed".[29] The vagueness of this provision, which relied on none of the principles of international law on the spatial application of criminal law, reflected the general approach of the draft proposal that considered the territory of EU countries, for the purpose of investigations and prosecutions conducted by the EPPO, as "a single legal area in which the European Public Prosecutor's Office may exercise its competence".[30]

Furthermore, a wide degree of discretion also governed the re-definition of investigative competences during the pre-trial inquiry. Thus, the 2013 proposal enabled the European Public Prosecutor to either allocate the case to another EDP or decide to take over the case himself in accordance with the criteria set out in Article 18(5),[31] some of which also were based on vague concepts (*e.g.*, specific circumstances related to the cross-border dimension of the investigation) or unforeseeable parameters (*e.g.*, the unavailability of national investigative authorities). The lack of clear grounds for the reallocation of cases was further aggravated by the provision of criteria governing the choice of the forum, which were linked to somewhat accidental circumstances, such as the location of the evidence.[32] Worse still, the drafters of the 2013 proposal did not provide further rules aimed at governing the choice among these criteria, beyond the general consideration of the "proper administration of justice".[33]

The Regulation departed from this approach, since it not only reduced the parameters governing the choice of the forum, abolishing criteria linked with accidental

[29] Art. 16(1) PRegEPPO.

[30] Art. 25(1) PRegEPPO. On the single EU legal area for the EPPO, see Vervaele (2013), pp. 168 ff.; and the project of the *Corpus Iuris*, in Delmas-Marty and Vervaele (2000), p. 40.

[31] Art. 16(2) PRegEPPO.

[32] Art. 27(4)(c) PRegEPPO.

[33] Art. 27(4) PRegEPPO.

circumstances, but also ordered them hierarchically.[34] As a general rule, competence lies with the EDP of the State in which the "focus of the criminal activity" is, or, if several connected offences falling within the competence of the EPPO were committed, the State where the "bulk of the offences" was committed.[35] Derogations from these rules are allowed in favour of three criteria in order of priority, namely *a*) the place of the defendant's habitual residence, *b*) the State of which the defendant is citizen, and *c*) the place where the main financial damage has occurred.[36] For the purposes of the present discussion, it is worth observing that these rules will not only define the jurisdiction of adjudication but also the investigative competence.

At first glance, these solutions properly balance the need for a flexible definition of the competence for investigating crimes having a transborder dimension and the fundamental requirement of legal certainty. But this conclusion is probably too optimistic. Certainly, some doubts have already been raised from the viewpoint of the right to a defence, which could be jeopardised by the reallocation of the case during the prosecutorial inquiry, mostly because the case could be reallocated more than once. It is apparent that the possibility of setting up an effective defence strategy can be frustrated by the decision to shift the jurisdiction of investigation to another country.[37] It cannot realistically be assumed that defendants are able to defend themselves adequately in any Member State. It is true that the Regulation did not reproduce the proposal's provision that considered the scope of the investigative competence of the EPPO as a single territory, but it seems that this logic has remained substantially unchanged.

Furthermore, the negative repercussions on the right to a defence only partially cover the complex problems regarding the relationship between this legislation and the model of a fair trial as acknowledged by both constitutional and international human rights law. The most problematic issue is perhaps the consistency of the new provisions with the principle of legal certainty, which surely does not only concern substantive criminal law but also procedural law,[38] therefore including also the jurisdiction to investigate. From the perspective of constitutional and criminal law, it can be doubted that the criteria set forth by the Regulation for the establishment the EPPO's investigative competence always satisfy the qualitative requirements of the *nullum crimen sine lege* principle. This firstly applies to the general rules governing the determination of the competent forum.

To be sure, the traditional *Strafanwendungsrecht* of several European countries lacks preciseness mostly because of the absence of a clear definition of the 'part' of a criminal activity that justifies the application of domestic criminal law, a solution

[34] On the choice of forum see extensively Panzavolta, in this volume.

[35] Art. 26(4) RegEPPO.

[36] Art. 26(4)(a-c) RegEPPO.

[37] Panzavolta (2013), pp. 144 ff.; Giuffrida (2017), p. 153.

[38] Böse (2013), pp. 73 ff.

that has led to a considerable extension of territorial jurisdiction[39] in prosecuting organised crimes and offences whose commission requires the necessary contribution of participants, in particular.[40] However, the Regulation does not define the concept of 'focus' of a criminal activity, which may seem to be open to multiple interpretation. Concerning the case of several related offences falling within the competence of the EPPO, the notion of the 'bulk' of the offences, although being sufficiently defined, can give rise to questionable results, as it determines the investigative competence exclusively on a numerical basis, without taking into account qualitative criteria. This can in turn raise problems of consistency with the principle of subsidiarity in light of the rules governing the material competence of the EPPO. For instance, if one single criminal action affecting the EU financial interests, committed in State A, is inextricably linked with two different offences committed in State B, the competence to investigate will be exercised in the latter country.

The examination of the procedural mechanisms of establishment of the investigative competences and (re)allocation of cases highlights further problems. It has been observed that, where no investigations have been previously initiated at the domestic level, a European Delegated Prosecutor can institute a criminal inquiry pursuant to the aforementioned criteria. Because of the vagueness of the notion of 'focus' of the criminal activity, however, it may happen that several investigative initiatives are undertaken in two or more countries. In this event, the Permanent Chamber will decide, after consultation with the European Prosecutors and/or European Delegated Prosecutors, whether to reallocate the case to a EDP in another

[39] A number of comparative-law surveys have highlighted the increasing exercise of territorial jurisdiction due to several factors. Doubtless the widespread acknowledgment of the principle of ubiquity contributes to this result, justifying the application of domestic criminal law indifferently on grounds that the alleged perpetrator acted, or the result of his criminal action took place, on national territory. This approach, although being justified by the need to avoid dangerous areas of impunity, increases the risk of transnational conflicts of jurisdiction. Another factor that contributes to the extension of territorial jurisdiction across borders is the broadening of the notion of the 'result' of a criminal action mostly in relation to specific types of crimes. For instance, in the case of omission, the offence is widely considered to have been committed on national territory if the alleged offender should have acted there. Among the comparative-law studies that have dealt with this issue see Sinn (2012), pp. 515 ff.; Böse et al. (2013), pp. 412 ff. For further references to the aforementioned tendency to broaden territorial jurisdiction cf. also Ruggeri (2013), pp. 504 ff.

[40] Cf., in Italy, Supreme Court, 2nd Section, 7 July 1999, Cohau, in *MCP* 212974. Moreover, the widespread lack of a clear definition of the contribution that participants should have made to the alleged offence on a national territory often leads to the activation of the territorial jurisdiction in relation to all participants pursuant to the model of the so-called *Gesamtlösung*. It is noteworthy, however, that some European countries have elaborated a number of procedural mechanisms to compensate for this tendency. For instance, German law, in the framework of a complex set of rules governing the discretionary initiation of a criminal prosecution (*Opportunitätsregelungen*), allows for public prosecutors not to bring defendants to court even in relation to relevant conducts with *Inlandsbezug*. Thus, according to § 153c par. 1 n. 3 StPO, the competent prosecutor can dispense with prosecuting the offences of §§ 129 e 129a StGB (forming criminal organisations and terrorist organisations), where the group does not (or does not mainly) exist in Germany and the participatory acts committed in Germany are of lesser importance or are limited to mere membership.

Member State, or to merge or split cases and, for each case, to choose the EDP handling it.[41] Regardless of the eventuality of parallel investigations, individual EDPs can depart from the general rules governing the choice of forum, and the Permanent Chamber can reallocate the case to another EDP by way of derogation to those criteria.

This set-up poses a number of complex questions, which involve basic principles of constitutional and criminal law. The main problem concerns a fundamental principle acknowledged by the constitutional law of several European countries, that is, the right to have the competent judge legally established prior to the commission of a criminal offence. We can assume that EU secondary law formally satisfies the traditional requirement of the legal establishment of criminal jurisdiction by statutory law. The most serious concerns, as noted, arise from the general criteria aimed at the determination of the investigative competence. Whereas in cases with multiple offences the notion of 'bulk' can infringe on the principle of reasonableness and subsidiarity of the legal action of the EPPO, the ambiguity of the concept of 'focus' of a criminal activity does not allow one to know in advance the competent authority for investigation and prosecution. This in turn frustrates the basic requirement that everyone rely on the competent jurisdiction *ex ante* and pursuant to clear criteria. Without a doubt, this requirement is of the utmost importance for EU citizens, and will be even more relevant when the EPPO becomes operational, since the competent European Prosecutor for investigation will, as a rule, institute prosecution before the court of the same country in which the inquiry is carried out.

Furthermore, constitutional law problems may also arise in the event of reallocation of the case. The Italian Constitution, for example, couples the principle of the judge pre-determined by the law with another fundamental principle, which characterises the *Verfassungsidentität* of the Italian model of a fair criminal trial, namely that of the so-called 'natural judge'. This principle holds particular relevance in cases of transfers of the proceedings. At the beginning of the 1960s, the Italian Constitutional Court had already pointed out that the allocation of a case ought to follow well-established rules laid down exclusively by the law, which excluded any different solution aimed at a re-definition of the jurisdiction on the grounds of criteria set *a posteriori*.[42]

In this regard also, there can be little doubt that such requirements are even more relevant today for EU citizens, who are not only confronted with the risk of being deprived of a competent court within the same country, but furthermore often undergo a much more relevant risk, namely that the uncertainty as to the competent forum may lead to the re-allocation of the case to a country whose language and legal culture are totally unknown to the individuals under investigation. This risk is not attenuated by the fact that the Regulation, as noted, allows departing from the general rules governing the choice of the forum in favour of derogatory criteria that

[41] Art. 26(5)(a-b) RegEPPO.

[42] Constitutional Court, judgment of 3 July 1962 No. 88, in www.cortecostituzionale.it. On the evolution of Italian constitutional case law since this ruling see among others Di Chiara (2003), pp. 224 f.

(at least, the first two) reflect a clearly accused-centred perspective, i.e., the place of habitual residence and the nationality of the defendant. Indeed, the decision on departure from the general criteria is governed by a parameter that is in turn extremely vague, namely the "general interest of justice".[43] It is noteworthy, moreover, that a different assessment of such interest can also lead to the reallocation of the case pursuant to the general criteria of determination of the competent forum, which confirms the fact that the definition of the 'focus' of the criminal activity can vary considerably.

Another issue, which is strictly linked with these problems, is the distribution of the competences among the Permanent Chambers that will take responsibility for the aforementioned decisions. That the internal rules of procedure of the EPPO will establish the division of competences between the Chambers by way of ensuring "an equal distribution of workload on the basis of a system of random allocation of cases", and that the European Chief Prosecutor can "decide to deviate from the principle of random allocation",[44] without any further indication being set forth by the Regulation, can lead to worrisome results. Thus, a Permanent Chamber chaired by the European Chief Prosecutor (or one of the Deputy European Chief Prosecutors, or a European Prosecutor appointed as Chair in accordance with the internal rules of procedure of the EPPO) and two permanent members who might not have any knowledge of the constitutional law safeguards of either the State in which the criminal activity was committed or the defendant's own country could reallocate the case to another jurisdiction, if considered to be the focus of the criminal activity.

A final shortcoming of this legislative set-up can be observed in relation to the role of private parties and their right to a defence. It has been noted that the Permanent Chamber, before deciding whether to reallocate the case or to merge or split the investigative proceedings, is called upon to consult the European Prosecutors and/or EDPs concerned. However, there is no trace of any obligation to hear the individuals concerned (or their lawyers), regardless of the fact that they will be affected by the decision. This solution clearly reflects a general view of the EPPO as an 'impartial party', which is in line with the old idea of an independent body of justice.[45] This approach inevitably frustrates participatory rights, while leaving to the addressee of investigative measures only the possibility of subsequent remedies. However, this possibility is far from being effective. It is true that the Regulation emphasises the need for judicial review of the procedural acts carried out by the

[43] Art. 26(5) RegEPPO.

[44] Art. 10(1) RegEPPO.

[45] In Italy, a widespread understanding of the public prosecutor as an independent body of justice under the 1930 code dominated the structure of the intermediate phase in the proceedings in which he headed the pre-trial taking of evidence. Thus, while investigative judges carried out a formal inquiry (*istruzione formale*), prosecutors conducted an interim one (*istruzione sommaria*). This approach long justified the lack of defence rights and the failure to involve lawyers in the investigative activities carried out by the public prosecutor and the police. On the shortcomings of this view of the public prosecution and the former *istruzione sommaria* see among others Cordero (1966), pp. 3 ff.; Chiavario (1971), pp. 714 ff.

EPPO, which "are intended to produce legal effects vis-à-vis third parties".[46] While the notion of 'third party' encompasses the suspect, the victim, and other interested individuals "whose rights may be adversely affected by such acts",[47] the procedural acts subject to judicial oversight are also those regarding the "choice of the Member State whose courts will be competent to hear the prosecution".[48]

The effectiveness of the judicial review, however, largely depends on the competent body and the law pursuant to which the oversight should occur. In this respect, it is noteworthy that since EU institutions did not enact a system of an independent review by a supranational body, such as the EU Court of Justice,[49] the competence for judicial review lies with domestic courts. Nonetheless, there are no indications as to the criteria that should govern this judicial review and the way in which the interested parties can properly challenge the Permanent Chamber's decisions. That judicial review shall be carried out "in accordance with the requirements and procedures laid down by national law"[50] does not seem to ensure effective protection of the individuals concerned. While the competent courts of Member States are not allowed to apply the criteria set for the EPPO, it is questionable how they can call into question the Permanent Chamber's decision by means of domestic law on the establishment of jurisdiction. If this were possible, it would not be a review and the domestic court's oversight would in the end frustrate the objectives pursued by the EPPO. Moreover, before what competent court should the interested parties undertake proceedings? Before the court of the Member State where the investigation initially started or before the courts of the country where the case was later reallocated? It is apparent that leaving a free choice to the individuals affected by the EPPO's procedural acts could lead to very different solutions even on the basis of the same international-law principle (*e.g.*, the territoriality principle, if indifferently based upon act and result).

On close examination, the reference to the requirements and procedures laid down by national law appears to be contradicted by Recital No. 87, according to which the State "whose courts will be competent to hear the prosecution" must be determined on the basis of the criteria laid down in the Regulation. This solution, if extended to the competent authority for judicial review, entails an implication of the utmost systematic importance, namely that national courts will be required to disapply their own rules on the spatial application of criminal law and must establish jurisdiction pursuant to the criteria laid down by the EPPO Regulation. According to this interpretation, EU institutions, by way of extending the rules on the distribution of competences to the competent courts for judicial review, turned out to harmonise *Strafanwendungsrecht* within the material competence of the EPPO and to

[46] Art. 42(1) RegEPPO.

[47] Recital No. 87 RegEPPO.

[48] Ibid.

[49] In favour of this solution Giuffrida (2017), pp. 153 f.

[50] Art. 42(1) RegEPPO.

impose it upon domestic authorities. It is debatable, however, whether EU law has competence for this and whether a tiny reference by the aforementioned Recital suffices to produce such enormous result.

## 4 Intrusive Investigations, Interference with Fundamental Rights, and Procedural Safeguards

The broad investigative powers of the EPPO within its material competence pose delicate problems in relation to the use of intrusive measures in the pre-trial inquiry. Doubtless, these problems are magnified in transborder cases. In this regard also, significant developments have occurred from 2013 legislative proposal to the text approved in 2017, even though a certain continuity appears to be ensured by several provisions, particularly by the requirement that the EPPO avail itself of national authorities for the purposes of execution of coercive measures.[51]

However, compared to the final rules, the Commission's proposal contained a wider list of investigative measures that ought to be made available to EDPs. Notwithstanding that most of these measures had a clear impact on a number of fundamental rights, the 2013 proposal did not specify any threshold of punishment,[52] thus allowing the use of intrusive investigations even in cases punishable with mild sentences. As a sort of compensation, the Commission not only required respect for the principles of proportionality and necessity by way of the application of the less intrusive measures,[53] but also judicial authorisation in relation to a number of investigative measures affecting fundamental rights (*e.g.*, search of computer systems, freezing of instrumentalities or proceeds of crime, wiretaps, real-time surveillance of telecommunications, etc.). Remarkably, the draft proposal provided for judicial authorisation of such measures irrespective of the arrangements made by domestic law,[54] while in relation to other measures, the proposal conditioned this requirement on the provisions of *lex loci*.[55] This strong focus on judicial authorisation, which gained particular relevance in transborder cases, reflected the general approach of the 2013 proposal that aimed at strengthening the EPPO's accountability "with a strict regime of judicial control whereby the EPPO can only use coercive investigation powers subject to prior judicial authorisation".[56]

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[51] See Recital 13 PRegEPPO and 69 RegEPPO. It is worth observing, however, that the proposal contained a binding provision in this respect—namely, Article 18(6)—that was not reproduced in the final text.

[52] Art. 26(1) PRegEPPO.

[53] Art. 26(3) PRegEPPO.

[54] Art. 26(4) PRegEPPO.

[55] Art. 26(5) PRegEPPO.

[56] Recital 11 PRegEPPO. On close examination, the proposed rules were not fully consistent with the legislative intentions, since some of the measures for which the requirement of judicial authorisation was submitted to *lex loci* (*e.g.*, seizure of objects needed as evidence, controlled deliveries

Preventive compliance with the principles of necessity and proportionality, as well as with the requirement of judicial authorisation, was intended to justify a strong solution concerned with the admissibility in court of the evidence gathered by the EPPO. In very clear terms, the 2013 proposal required the information obtained to be "admitted in the trial without any validation or similar legal process even if the national law of the Member State where the court is located provides for different rules on the collection or presentation of such evidence".[57] The only way out for the trial court was to demonstrate that the overall fairness of the proceedings or the defence rights had been jeopardised. However, this solution manifestly left a great margin of discretion in the hands of the decision-makers, which were further increased by the acknowledgment of "the competence of national courts to assess freely the evidence presented by the European Public Prosecutor's Office at trial".[58]

The 2017 Regulation, while reproducing the principle of free assessment of evidence, re-formulated the general rule on the admissibility in court of the information produced by the European Public Prosecutor in a way that clearly looks at transborder cases. As noted, information will not be denied admission because the "evidence was gathered in another Member State or in accordance with the law of another Member State".[59] Notwithstanding this strong approach, the examination of the rules on the use of coercive measures for the purposes of evidence-gathering reveals a clear tendency to soften the need for harmonised standards of human rights protection and the adoption of more flexible solutions than those proposed in 2013. It is true that, regardless of the transnational or national nature of the inquiry conducted by a EDP, the Regulation provides for a much shorter list of investigative measures which must be made available to the competent Prosecutor, compared to those foreseen by the Commission's proposal; moreover, the adoption of these measures also requires a minimum threshold of at least 4 years of imprisonment.[60] There are no clear indications, however, as to whether the EPPO will be competent to order or to request these measures, since in relation to all of them judicial authorisation is only necessary if required by national law, to which the Regulation also relates, with regard to the establishment of further limits or conditions of use of intrusive investigations.[61] A specific focus on judicial authorisation is apparent from the rules regarding cross-border investigations, which, however, also require it to the extent it is provided for by the domestic law of the country in which the handling

of goods, targeted surveillance in public places) entailed unquestionable interference with the fundamental rights of the suspect and of third parties. It is worth noting that that Recital No. 29 of the 2013 proposal somewhat smoothed the requirement set forth in Recital 11 by circumscribing the strict need for judicial authorisation only to "certain coercive investigative measures".

[57] Art. 30(1) PRegEPPO. See also Allegrezza et al. (2016), pp. 157 ff.

[58] Art. 30(2) PRegEPPO.

[59] Art. 37(1) RegEPPO. On the admissibility of evidence, see extensively Allegrezza in this volume.

[60] Art. 30(1) RegEPPO.

[61] Art. 30(2-3) RegEPPO.

EDP operates or that in which the sought evidence is to be taken.[62] The reason for these solutions probably lies in the fact that the original intention to link the EPPO's accountability with a strict regime of previous judicial oversight of coercive investigations was not reproduced in the final text.[63]

This approach entails a number of important implications. It is true that both in national and transborder cases the handling EDP is called upon not only to justify the use of a specific measure in relation to the sought evidence, but also to abide by the principles of necessity and proportionality. Since judicial oversight may not be required, the EDP will bear full responsibility for establishing whether there are good reasons to believe a specific measure is truly necessary and whether there is no less intrusive measure available which could achieve the same result. The negative consequences deriving from the absence of independent oversight are magnified in transborder cases. Here, where the assisting EDP considers that the requested measure does not exist under *lex loci* or is only available under specific conditions, or an alternative less intrusive means would be available, assistance will not be denied at all, and the assisting EDP must inform his supervising European Prosecutor and consult with the handling EDP.[64] The Regulation emphasises the need for bilateral solution of the problem, without, however, giving any clear indication as to how this can be achieved. Worse still, there is no trace of any involvement of the individuals concerned and their defence lawyers, even in cases that under domestic law would allow participation in such a decision. Where a bilateral arrangement is not achieved within seven working days, the matter will be referred to the Permanent Chamber, which

> shall to the extent necessary hear the European Delegated Prosecutors concerned by the case and then decide without undue delay, in accordance with applicable national law as well as this Regulation, whether and by when the assigned measure needed, or a substitute measure, shall be undertaken by the assisting European Delegated Prosecutor.[65]

Therefore, it may well happen that either the handling and the assisting EDP bilaterally or the Permanent Chamber unilaterally—without any independent oversight—decide to authorise the enforcement of an investigative measure, notwithstanding that *lex loci* does not provide for it, or submits it to stricter conditions that do not occur in the specific case, or where another measure would achieve the same result with less intrusive means. It is truly not easy to understand how this can be tolerated in an area aimed at the highest protection of freedom, security and justice, and how in these cases such a measure can be adopted "in accordance with applicable national law".

Another problematic issue from the viewpoint of the present discussion concerns the enforcement of investigative measures and the procedures according to

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[62] Art. 31(3) RegEPPO.

[63] See Recital 18 RegEPPO.

[64] Art. 31(5) RegEPPO. On this issue, see above Bachmaier Winter, in this volume.

[65] Art. 31(8) RegEPPO.

which they must be executed. The Regulation requires the assigned measures to be carried out

> in accordance with this Regulation and the law of the Member State of the assisting European Delegated Prosecutor. Formalities and procedures expressly indicated by the handling European Delegated Prosecutor shall be complied with unless such formalities and procedures are contrary to the fundamental principles of law of the Member State of the assisting European Delegated Prosecutor.[66]

This formulation, while reproducing the approach followed by the EU Convention on Mutual Assistance in Criminal Matters[67] (hereafter, EU-CMACM) and Directive 2014/41/EU on the European investigation order[68] (hereafter, DEIO), does not ensure the individuals concerned any certainty as to the applicable law, and therefore, as to the limits within which specific investigations can restrict their fundamental rights. The establishment of formalities and procedures is in the hands of the handling EDP—here also, without any involvement of the defence or any independent oversight. There is nothing to ensure that the requested procedures do not negatively affect the defence rights of the addressee of the investigation and are also necessary for the validity of the sought evidence, as, for instance, required by Framework Decision 2003/577/JHA on orders freezing property or evidence[69] (hereafter, FD-FOPE). Moreover, the EPPO Regulation does not provide clear mechanisms to ensure consistency among EDPs in the selection of the procedures applicable to intrusive investigations in similar cases, notwithstanding that consistency of prosecutorial policy falls within the general tasks of the College.[70] In the light of this, it is more than doubtful that the EPPO Regulation can truly exclude the inadmissibility of evidence gathered in another Member State or in accordance with the law of another Member State. If specific formalities are necessary to ensure the validity of evidence under *lex fori*, or even reflect binding constitutional requirements, how can EU law impose the admissibility of the information taken by European Prosecutors at all costs?

It is true that EU institutions broadened the scope of the Commission's proposal by extending the same rules on admissibility and free assessment of evidence to the information gathered by the defendant. Yet, despite the acknowledgment of the procedural safeguards that are already ensured by EU law, there is no trace of specific investigative powers for defence lawyers, as the Regulation limits itself to referring to the domestic law's arrangements regarding the possibility of presenting evidence, requesting the appointment of experts, or expert examination and hearing of witnesses, and so on.[71] The main problem probably lies in the fact that, notwithstanding the harmonisation of a number of defence rights and particularly of the right to legal

[66] Art. 32 RegEPPO.

[67] Art. 4(1) EU-CMACM.

[68] Art. 9(2) DEIO.

[69] Art. 5(1) FD-FOPE.

[70] Art. 9(2) RegEPPO.

[71] Art. 41(3) RegEPPO.

assistance and legal aid, there is still no EU statutory law on investigations by the defence.

By establishing a set of procedural rules on investigations by the EPPO, the drafters of the Regulation missed an important opportunity for introducing a number of investigative powers for defence lawyers in this specific area. Even more worryingly, the drafters of the EPPO Regulation failed to recognise a *jus postulandi* to the defence, with the result that in the same cases in which specific investigative measures must be made available to EDPs, defence lawyers can only request them to the extent allowed by domestic law. Remarkably, the Regulation sponsored in this respect a very old-fashioned mechanism, acknowledging the possibility of the individuals concerned requesting "the EPPO to obtain such measures on behalf of the defence".[72] The establishment of a EPPO with such broad investigative powers should lead to a re-examination of the need to introduce a Eurodefensor, as proposed more than 10 years ago[73]—an institution that would be particularly useful in transborder cases.

## 5 The Completion of the Pre-trial Inquiry and the Decision on Whether or Not to Bring the Defendants to Court with a Formal Accusation

### *5.1 The Decision on Whether or Not to Prosecute the Alleged Offender and the Enactment of a Model of Internal Oversight of the Prosecutorial Authority in Charge of the Investigations*

Serious human rights concerns also arise in relation to the completion of the pretrial inquiry, mostly because of the considerable decision-making powers acknowledged to Permanent Chambers. The Regulation did not leave to the EDPs the decision on whether or not to initiate court proceedings, but opted for a system of internal oversight of the prosecutorial authority in charge of the investigations within the EPPO, which therefore rejects any form of oversight by external bodies at both the domestic and supranational level. After the pre-trial inquiry has been completed, the competent EDP is called upon to submit a report to the supervising European Prosecutor, containing a summary of the case and a draft decision on whether to begin a prosecution before a national court or to initiate a simplified prosecution procedure or to dismiss the case.[74] The decision, however, does not lie with the supervising European Prosecutor, who is required to forward

[72] *Ibid*.

[73] Nestler (2006), pp. 415 ff.

[74] Art. 35(1) RegEPPO.

the documents received to the competent Permanent Chamber.[75] This is rather an administrative function without any decision-making power and any obligation on the part of the supervising European Prosecutor, who can also attach his own assessment, if he "considers it to be necessary".[76]

The entire responsibility for the decision on whether or not to prosecute the alleged offender lies with the Permanent Chamber, which, moreover, can also take an interim decision by giving further instructions to the EDP with a view to the carrying out of other investigations.[77] Where the Permanent Chamber takes a decision in line with the proposal of the EDP, the latter shall pursue the matter accordingly,[78] regardless of whether the decision is to prosecute the defendant or to dismiss the case.[79] Such concentration of decision-making powers in the hands of Permanent Chambers raises complex issues in light of constitutional law. For the sake of clarity, I shall examine these issues separately in relation to decisions on dismissal of cases and prosecution.

### 5.2 *The Dismissal of Cases and the Principle of Legality*

Several problems arise in relation to the decision to discontinue proceedings and dismiss a case, because of the choice by EU institutions to structure the EPPO's legal action on the basis of the principle of legality.[80] This approach was followed in such strict terms that it characterises the overall legal action of the EPPO, "in order to ensure legal certainty and to effectively combat offences affecting the Union's financial interests".[81] The legality principle, therefore, will guide both investigation and prosecution by the EPPO, including the initiation of a criminal inquiry, the termination of investigations, the referral of a case, the dismissal of a case, and simplified prosecution procedures.[82] The most relevant implication of this approach, from the angle of the present discussion, is that "the investigations of the EPPO should as a rule lead to prosecution in the competent national courts in cases where there is sufficient evidence and no legal ground bars prosecution, or where no sim-

[75] *Ibid*.

[76] *Ibid*.

[77] Art. 35(2) RegEPPO.

[78] Art. 35(1) RegEPPO.

[79] Art. 10(3)(a-b) RegEPPO.

[80] In this regard, we can observe a terminological difference between some linguistic versions of the Regulation. The Italian text, similarly to those of other Romance languages, relates to the '*principio di legalità*', which is however not the principle of mandatory prosecution, but the principle of *nulla poena, nullum crimen sine lege*. Of course, there is a strict link between these two principles, and to a great extent the former should be seen as the procedural projection of the latter, which takes effect, however, in the field of substantive criminal law.

[81] Recital No. 66 RegEPPO.

[82] Ibid.

plified prosecution procedure has been applied".[83] Yet, the effectiveness of this system depends almost exclusively on the exhaustiveness of the grounds for dismissal laid down by the Regulation,[84] since the responsibility for the decision to terminate the proceedings, as noted earlier, lies with the competent Permanent Chamber.

This approach may give rise to difficult problems of consistency even with the law of those Member States in which the public prosecutor's legal action is structured in line with the principle of legality. Of course, this principle does not entail mandatory prosecution in rigid terms, so much so that German procedural law, after recognising the principle of legality,[85] provides for various cases in which the *Staatsanwaltschaft* can dispense with prosecution.[86] Italy provides a unique example among European countries where the principle of mandatory prosecution is enshrined at the constitutional law level.[87] Here also, notwithstanding the lack of similar provisions to those of German law aimed at governing the discretionary exercise of prosecutorial powers, the principle of legality does not mean an absolute obligation to initiate a criminal law action before a court. The examination of the new supranational rules in light of Italian law may seem to provide important indications, while raising the question of whether and to what extent the approach followed by the EPPO Regulation is in line with, or instead frustrates, the standards of protection ensured by constitutional law. Is the mechanism of internal oversight by Permanent Chambers enough to avoid the risk of uncontrolled inaction by the EPPO? Can we conceive of a divergent understanding of the principle of legality at the supranational and the domestic level? Can the same principle infringe upon itself in relation to a specific jurisdiction?

At first glance, this question does not appear to make much sense, unless we accept that the principle of legality can be viewed in such different terms that it would make a conflict unavoidable. On close examination, a different understanding does not derive from the goals of this principle—which is similar both in EU and domestic law, namely ensuring legal certainty and the effectiveness of criminal law actions against crimes—but from the way these goals are pursued at the two levels. A historical comparison with Italian law might be useful to understand the reason for the constitutionalisation of the principle of mandatory prosecution.

It is worth observing that Italian criminal justice has not always been characterised by the principle of legality. Thus, the acknowledgment of mandatory prosecution by the 1947 Constitution was seen as the best means of avoiding a shift back to the arrangements of the 1930 code of criminal procedure, which had enacted a mechanism of dismissal of cases that was paradoxically very similar to that introduced in 2017 by the EPPO Regulation. Indeed, the Rocco code originally enabled prosecutors and district court judges (*pretori*) to autonomously terminate prosecu-

[83] Recital No. 81 RegEPPO.

[84] Ibid.

[85] Cf. § 152 StPO.

[86] See §§ 153 et seqq. StPO.

[87] Art. 112 Const.-Italy.

tion, a decision that only entailed the duty to inform (according to the type of proceeding) the General Prosecutor or the Crown Prosecutor, without any requirement of judicial oversight.[88]

To be sure, this solution did not in principle entail discretionary management of prosecution.[89] Nevertheless, the absence of an independent oversight and the hierarchical subordination of public prosecutors to the Ministry of Justice under the fascist regime not only enhanced the risk of a discretionary use the power of termination, but also of a dangerous involvement of political considerations in the decisions on whether or not to institute a criminal law action. Before the hierarchical subordination of public prosecutors to the Executive was abolished,[90] Italian lawmakers enacted important changes in the dynamics of the procedure of dismissal of the case, which are of the utmost importance for the purposes of the present discussion. As a result of Royal Legislative Decree 288/1944, discontinuance of the proceedings could no longer be ordered by prosecutors or *pretori*, but required judicial authorisation of an investigative magistrate (*giudice istruttore*).[91] Although this was not a perfect solution,[92] this reform had the merit of introducing for the first time an independent oversight of the prosecutorial powers and the decision to terminate the proceedings.

It is precisely from this perspective that that old solution had an unquestionable influence on the acknowledgment of the principle of legality by the 1947 Constitution, which, as noted, did not aim at imposing on prosecutors a strict duty of initiating prosecution in any case, but at submitting the prosecutor's discretion to judicial oversight. As *Leone* clearly stressed in the 1947 Constituent Assembly, there was a need to enshrine in the new Constitution a "fundamental principle of a modern State, namely that the public prosecutor cannot have discretionary powers in deciding whether or not to prosecute".[93] The link between the need to circumscribe the prosecutorial discretion and the principle of legality was very clear in the debates that took place in the Constituent Assembly: "the public prosecutor cannot discretionarily decide on a *notitia criminis*, but must request the intervention of a judicial body, which must decide whether or not prosecution is to be instituted".[94] This approach reflected a broad conception, shared by much legal scholarship at that time,[95] of termination of proceedings as a form of prosecution.

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[88] Thus, the proceedings could only be terminated in cases of manifestly insufficient charges. See Art. 74(3) CCP-Italy (1930 version).

[89] *Ibid*.

[90] This only happened after the fall of the fascist regime by means of Royal Legislative Decree 511/1946.

[91] Art. 74(3) CCP-Italy (1944 version).

[92] Thus, investigative judges were not responsible for procedural safeguards under the former Italian code, but held prosecutorial powers and, as noted, headed the gathering of evidence prior to the trial stage.

[93] Ass. cost., ad. plen., sed. 27 November 1947.

[94] *Ibid*. See Di Chiara (2003), pp. 239 f.

[95] Conso (1950), p. 331; Leone (1959), pp. 859 f.

Although the constitutionalisation of the principle of legality banned a system of uncontrolled dismissal of criminal cases, it should be acknowledged that Article 112 of the Italian Constitution in itself says nothing about the qualitative conditions that must characterise the judicial oversight of the prosecutor's decisions. It is true that the strong formulation of this constitutional provision withstood any attempt to remove or even soften the principle of legality over more than 70 years. Yet, it does not appear that the establishment of qualitative requirements for this judicial oversight can be considered to be neutral to Italian constitutional law today. A fundamental step in the re-definition of a modern constitutional model of a criminal trial was made by Constitutional Amendment Law 2/1999, which not only enshrined some of the main fair trial rights of the accused set by the European Convention,[96] but also enacted the principle of *contradictoire* in the Italian Constitution by acknowledging that those who are party to court proceedings have the right to a fair participation on equal footing before an independent and impartial judge.[97] On close examination, this formulation does not only generically relate to all court proceedings, but also seems to orient the overall structure of judicial procedures to the principle of *contradictoire* unless conflicting interests justify derogations. In the light of this, it might be argued that arrangements such as that enacted by the 1944 legislation, which entrusted the decision of discontinuance solely to the investigative judge without involving the interested parties, can no longer be deemed consistent with the fundamental principles laid down by the current Italian constitutional law.

Against this background, it is more than doubtful that the mechanism enacted by the EPPO Regulation is in line with the Italian understanding of the principle of legality and the fundamental requirements that govern the constitutional model of a fair criminal trial. Doubts firstly arise because of the absence of a system of review by an independent body of the EDP's assessment regarding the dismissal of the case, which, as noted, shall be ordered by the Permanent Chamber. In spite of solemn proclamations, it does not seem that the independence of the EPPO and the accountability of the assessment made by Permanent Chambers can properly be ensured by the obligation to issue annual reports,[98] which explicitly relate solely to the "general activities" of the European prosecutorial authority.[99]

As noted, Article 42 of the Regulation provides for the justiciability of the decisions of the EPPO affecting third parties; however, this is a subsequent intervention of a judicial body, which shall materialise at the national level, and within the limits and pursuant to the requirements set forth by domestic law. Yet the problem is that national law often lays down conditions that are not by definition met in the procedure of termination by the EPPO. For instance, until 2017 Italian law only provided for an appeal on points of law before the Supreme Court against the judicial order

[96] Art. 111(3) Const.-Italy.

[97] Art. 111(2) Const.-Italy.

[98] Art. 6(2) RegEPPO.

[99] Art. 7(1) RegEPPO.

of discontinuance, a system that was repealed by Law 103/2017, which introduced an unprecedented complaint before the district judge (*tribunale monocratico*) in a number of cases of invalidity of the decision of termination.[100] Nevertheless, not only can the oversight of district judges not be challenged in a higher instance, but furthermore they are called upon to review the decision of dismissal without involving the interested parties.[101] Moreover, under Italian law complaint is only allowed in specific cases involving the lack of *contradictoire* in the procedure of termination, which in contrast is not required by the EPPO Regulation in relation to the dismissal of the case by the Permanent Chamber.

This raises a further criticism against EU law, which does not at all involve the individuals concerned—neither the suspect nor the victim—in the decision to dismiss a case falling within the competence of the EPPO. Except for the sole case of consultation under Article 34(6),[102] there is also no obligation for the European Prosecutor's Office to consult national authorities. It is true that the EPPO shall officially notify the competent national authorities and shall inform the relevant institutions, bodies, offices and agencies of the Union of the dismissal of the case.[103] But this information presupposes that the proceedings have already been terminated, and a subsequent safeguard is also the right to a judicial review of the decision not to prosecute, acknowledged by Directive 2012/29/UE (hereafter, DVR).[104] The failure to involve both domestic authorities and private parties prior to termination raises serious human rights concerns as to the ability of Permanent Chambers to issue a decision that reflects a proper balance between conflicting interests.

[100] Art. 410-*bis*(1-2) CCP-Italy.

[101] Art. 410-*bis*(3) CCP-Italy.

[102] Thus, where the EPPO's competence is extended to offences that, although not affecting the EU's financial interests, are inextricably linked to PIF offences, national authorities can request the Permanent Chamber to refer the case to them, and the Chamber is required to do so without delay. On close examination, this exception is only apparent, as it presupposes that the EPPO has already decided to dismiss the case. In other words, the decision still lies with the Permanent Chamber, which is only called upon to consult the domestic authority before ordering the termination of the proceedings. See Art. 39(3) RegEPPO.

[103] Art. 39(4) RegEPPO.

[104] Recitals Nos. 43-44 DVR. On the rights of the victim in the event of non-prosecution and a comparative-law analysis of the solutions provided by the Italian code before the 2017 reform and German procedural law see Alvaro and D'Andrea (2015), pp. 313 f.

### 5.3 *The Initiation of Prosecution and the Institution of the Court Proceedings*

Though the EPPO's decision to initiate prosecution and to bring a case to court is formally in line with the principle of legality, on close examination it can also give rise to human rights problems. This is mainly due to the fact that EU institutions here also opted for a system of centralised decision-making, which is "in principle" in the hands of Permanent Chambers "on the basis of a draft decision by the European Delegated Prosecutor, so that there is a common prosecution policy".[105] This mechanism raises three main concerns in light of domestic law, and again a comparison with the Italian model of mandatory prosecution can be helpful to highlight some inconsistencies that may arise with constitutional-law requirements.

The first problematic issue is the failure to ensure private parties any opportunity for participation in the decision to institute prosecution. Apparently, the constitutional principle of legality does not provide any indications in this regard. This does not mean, however, that the granting of participatory rights in the decision to charge is not a relevant issue under the Italian Constitution. On one hand, individual constitutional-law provisions are always part of a broader set of fundamental safeguards and, more importantly, contribute to an overall model reflecting specific trade-offs between state-related interests and human rights, as acknowledged by constitutional texts, as well as by international law and EU law.

In light of this, it can be argued that the institution of unnecessary prosecution with an indictment that is not supported by the evidence gathered not only impinges upon the correct functioning of criminal justice in general, but also and more specifically on the reasonable length of criminal proceedings, while exposing defendants to a trial that can seriously jeopardise their fundamental rights, starting with their right to protect their public image. On the other, legal scholarship has for decades pointed out that interpretation processes cannot be deemed to be one-sided, but are characterised by flexible and sometimes circular dynamics.[106] As a result, while the interpretation of legislative texts draws on constitutional-law principles, the latter should in turn be redefined in light of the developments that take place in legislation and case law.

As far as Italian criminal justice is concerned, it cannot be doubted that the enactment in 1999 of a notice on the completion of the pre-trial inquiry (*avviso di conclusione delle indagini*)[107]—a procedural tool due in all cases other than discontinuance of the proceedings—introduced an unprecedented model of prosecution, which no longer reflects the decision solely of the prosecutor. The institution of prosecution, therefore, incorporates a duty of promoting a previous *contradictoire* with the defendant (and in specific cases with the victim, as well), who must be granted full disclosure of the information collected by the investigative authorities

[105] Recital No. 78 RegEPPO.

[106] In this sense see already Ross (1929).

[107] Art. 415-*bis* CCP-Italy.

and detailed information about the future indictment. Other procedural mechanisms are also aimed at involving the suspect in the prosecutor's decision to bring defendants to court by means of a simplified procedure.[108] All this confirms a clear participatory understanding that characterises the constitutional obligation to institute prosecution. In light of the fundamental requirement of equal treatment, therefore, it is difficult to understand why the individuals investigated by the EPPO should be brought to court without such fundamental safeguards. Here, however, it does not seem possible to interpret the new EU rules in light of specific requirements of domestic (constitutional) law, since the Regulation empowers Permanent Chambers to decide whether to initiate prosecution "in accordance with the conditions and procedures set out by this Regulation".[109]

The second concern emerges from the acknowledgment of exclusive prosecutorial competences by the EPPO. In Italy, notwithstanding the enshrinement in the 1947 Constitution of the principle of mandatory prosecution, criminal justice still remained characterised by various forms of prosecution by bodies other than the public prosecutor, and even by individuals, without them being charged with the duty to initiate prosecution. As a consequence, constitutional case-law has since the 1960s ruled out the possibility that the principle of legality can be interpreted as entailing a monopoly of the public prosecutor's office in the institution of criminal law actions.[110] Therefore, this interpretation, shared by legal scholarship,[111] softened the principle of legality, provided, however, that private and public prosecution only concur with the public prosecutor's initiative, which can in no way be excluded. This condition has remained unchanged, notwithstanding that the 1988 code abolished any forms of prosecution by bodies other than the public prosecutor's office[112] and that in 2000 Italian legislature enacted a special legal action that the aggrieved parties can bring before justices of the peace (*ricorso immediato al giudice di pace*).[113]

The only exception to the constitutional-law requirement of concurrence with the public prosecutor's legal action is that prosecution that can be initiated against the President of the Republic for high treason against the State and attacks on the Constitution.[114] But this very special prosecution leads to a unique form of criminal-constitutional proceedings, which justifies the assignment of exclusive prosecuto-

[108] For instance, Article 453(1) CCP-Italy requires the competent prosecutor to summon the suspect to a special questioning before requesting a so-called "immediate procedure", aimed at the direct institution of the trial without the intermediate phase.

[109] Art. 10(3) RegEPPO.

[110] Cf. Constitutional Court, judgments 61/1967 and 84/1979, in www.cortecostituzionale.it.

[111] See especially Chiavario (1975), pp. 896 ff.

[112] The 1989 Rules Implementing the Code of Criminal Procedure repealed all the legislative provisions providing for prosecution by bodies other than the public prosecutor. See Art. 231 of Legislative Decree 271/1989.

[113] Art. 21 et seqq. Legislative Decree 274/2000. It is doubtful, however, whether this legal action can be viewed as a private prosecution. See Marzaduri (2016), pp. 1121 ff.

[114] Art. 90(1) Const.-Italy.

rial competences to the Congress in plenary session[115] that is called upon to bring the President of the Republic before the Constitutional Court. None of these peculiarities can be observed in the proceedings before the EPPO, which shall exercise its prosecutorial powers before ordinary domestic courts. It is true that, where the European prosecutorial authority considers the alleged offence as not falling within its competence, it shall refer the case to the competent national authorities. Nevertheless, "where the EPPO exercises its right of evocation, the competent authorities of the Member States shall transfer the file to the EPPO and refrain from carrying out further acts of investigation in respect of the same offence".[116] In light of the aforementioned observations, it is debatable whether this approach is in line with the doctrine of concurrence between the public prosecutor's legal action and the prosecution of individuals or different public authorities, and thus with the understanding of the principle of legality by Italian constitutional case-law.

The last problematic issue relates to the possibility of prosecution being instituted before the court of a State other than that in which the inquiry was conducted. This possibility shall be proposed by the EDP in the report that he will create on the case after the completion of the investigations.[117] The Regulation does not clarify the circumstances in which this situation can occur, only requiring European Delegated Prosecutors to provide "sufficient reasoning" for bringing the case before a different jurisdiction.[118] Notwithstanding that the different court is again to be chosen pursuant to the criteria set forth in Article 26(4), this further prosecutorial competence of Permanent Chambers and the failure to provide any defence safeguards gives rise to even more serious concerns than those raised with regard to the reallocation of the case during the pre-trial inquiry. It is truly difficult to understand the reasons for which, after all the investigations have been carried out in State A, prosecution should be initiated *ex abrupto* in State B, as it will clearly frustrate the defence strategy set by suspects in relation to the characteristics of the criminal justice system of State A. That the Regulation does not provide any indications as to why this prosecutorial choice should materialise only after the completion of the investigative stage, and that the individuals (defendants and victims, in particular) who will undergo the gravest consequences of this decision will not be given any opportunity for making themselves heard, raises serious doubts as to how this solution will ensure legal certainty of the EPPO's prosecution, as proclaimed by the Regulation.[119]

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[115] Art. 90(2) Const.-Italy.

[116] Art. 27(5) RegEPPO.

[117] Art. 35(3) RegEPPO.

[118] *Ibid.*

[119] Recital No. 87 RegEPPO.

## 6 Investigative Competence of the EPPO, the Principle of Non-discrimination, and Extraterritorial Application of Fundamental Constitutional-Law Safeguards *ratione personae*

The enormous competences recognised to the Permanent Chambers and the flexible management of investigation and prosecutorial powers within the area of the EU countries that share the enhanced cooperation have highlighted a number of very problematic situations. There is a serious risk, in particular, that EU citizens will be negatively affected by the distribution of jurisdictional powers among the European Delegated Prosecutors, and even more by the decision to reallocate the case during the inquiry or to bring the accused before a court of another State. These situations raise a common difficult question, i.e., whether and to what extent the individuals concerned can legitimately trust the law of their own country, or at least, the law of the jurisdiction in which the investigations were initiated and carried out. In this regard, as noted, the Regulation does not seem to have followed a coherent approach, since the criteria of the place of habitual residence and the nationality of the alleged perpetrator constitute optional derogations from the primary rules regarding the focus of the criminal activity and the bulk of the offences. Worse still, both interpretation of the general criteria and the decision on whether to depart from them are subject to the discretion of the Permanent Chambers. Yet because of increasing movement of EU citizens across borders, there is nothing to ensure that the alleged offender has any ties with the country that is deemed to constitute the focus of the criminal activity, and therefore, that he is familiar with *lex fori* both from a procedural and constitutional-law viewpoint.

As far as fundamental safeguards acknowledged by the European Convention and EU law are concerned, the establishment of the jurisdiction or the reallocation of the case should not entail significant consequences, so much so that the very Regulation explicitly required the application of the legal instruments on individual rights in criminal proceedings, launched by EU institutions after the entry into force of the Lisbon Treaty. But we also saw that fundamental rights cannot be viewed in abstract terms. Notwithstanding the harmonisation of essential safeguards (*e.g.*, the right to legal assistance and information in criminal trials), it is certainly not the same to the individuals concerned whether investigations will be conducted in State A or in State B, or even worse, that in a certain timeframe, they will be transferred several times from one country to another. Thus, domestic procedural law provides for very different tools beyond the standards set forth by EU law, and depending on the State in which prosecution is initiated, substantive criminal law safeguards also vary considerably among EU countries in spite of the harmonised provisions enacted by the PIF Directive.

Furthermore, the safeguards acknowledged by ECHR law and EU legal instruments cannot be deemed to be unconnected from fundamental requirements set forth by domestic and particularly constitutional law. This raises the question of whether constitutional safeguards can be applied across borders *ratione personae*,

or, to put it in other terms, whether constitutional-law requirements can be imposed on the national authorities of other EU countries. The EU Court of Justice dealt with a similar issue in the *Melloni* judgment, in which the Grand Chamber was called upon to decide whether Spanish authorities could refuse the surrender of an Italian citizen tried in default *in absentia* in Italy.[120] It is well-known that Luxembourg case-law, relying on the need for uniform application of EU law, excluded that the specific understanding of the right to effective judicial protection under Article 24(2) of the Spanish Constitution could allow a Spanish court not to enforce the European arrest warrant issued by the Italian authorities. It cannot however be argued that Mr. Melloni, being an Italian citizen, could not invoke specific participatory safeguards of Italian law, since Italian constitutional law does not (explicitly) ban *in absentia* proceedings.[121] Thus, at the time of trial, Mr. Melloni, although being convicted in Italy, was living in Spain and could therefore legitimately expect full respect for the right to personal participation at trial, as acknowledged by Spanish constitutional law.

Under Italian law, constitutional-law provisions can only withstand, and prevail over, EU law if they set fundamental principles that characterise the constitutional legal system, and above all, if they provide essential safeguards and inalienable rights which lie at the core of human dignity. The reference to the fundamental principles of constitutional law and inalienable human rights seems to put the Italian constitutional case-law in a position close to the doctrine on inalienable constitutional identity of the German Constitutional Court. Thus, it is precisely the focus on *Verfassungsidentität* and human dignity that led to a decision in December 2015 by the German Federal Constitutional Court, which expressly challenged the *Melloni* doctrine.[122] The main practical difference between the approaches followed by Italian and German constitutional case-law lies in the fact that the Italian Constitutional Court has until now limited itself to proclaiming the threshold of counter-limits without applying them in any concrete case in relation to EU law.[123]

[120] CJEU, judgment of 27 February 2013, *Melloni v. Ministerio Fiscal*, C-399/11. In this regard see among others Bachmaier Winter (2016), pp. 160 ff.

[121] On close examination, this conclusion also cannot be shared in absolute terms. Thus, penal order procedures, which are often traced back to the category of *in absentia* proceedings in a broad sense, raise serious concerns as to their consistency with Italian constitutional law. Furthermore, it is more than doubtful that the old default proceedings were in line with the Constitution, and serious doubts can be raise in relation to the new procedure for absent defendants introduced by Law 67/2014. For in-depth analysis of both issues see Ruggeri (2017), pp. 55 ff., 61 ff.

[122] BVerfG, decision of 15 December 2015, Az. 2 BvR 2735/14.

[123] Until now, constitutional case-law has availed itself of counter-limits in relation to international customary law. See Constitutional Court, judgment 238/2014, in www.cortecostituzionale.it. In January 2017, the Constitutional Court ruled on the well-known *Taricco* case by means of decision No. 24, in www.cortecostituzionale.it. Notwithstanding that there were great expectations about this decision, the Constitutional Court did not (immediately) invoke counter-limits but preferred to request a preliminary ruling by the EU Court of Justice. See Amalfitano (2017) and Kostoris (2017). On the ruling of the Luxembourg Court on the *Taricco* case of December 2017 see among others Bassini and Pollicino (2017). At the time of the present discussion, we are awaiting the ruling of the Italian Constitutional Court on this case.

It is questionable whether this approach is to be restricted to the relationship between constitutional law and EU law within borders. It should be taken into account that the *Melloni* case entailed the risk of an indirect infringement on fundamental rights, resulting from the surrender by Spanish courts.[124] The problem raise here is instead whether EU citizens can invoke the protection of fundamental guarantees of their constitutional law in another Member State, if foreign authorities directly restrict individual rights. At first glance, foreign courts cannot be expected to know and apply the law of another country. The problem, however, does not concern any law provisions, but is whether, specifically, respect for fundamental constitutional safeguards can be required in other EU countries. This question is of the utmost practical importance in the proceedings before the EPPO, which, as noted, are characterised by a highly flexible management of investigations within the area of the twenty Member States that adhered to the enhanced cooperation.

The topics examined in this study provide a number of relevant examples. For instance, if a EDP institutes a criminal inquiry in Italy and undertakes measures affecting the fundamental rights of an Italian citizen, the person under investigation has the right to be informed of the charge not only in detail and in a language that he understands, pursuant to the European Convention and EU law, but also in a confidential way, as required by Article 111(3) of the Italian Constitution. From this it follows that granting any information on the charge to individuals other than the suspect during the pre-trial phase is not only unlawful, by way of infringing on investigative secrecy as laid down by Italian procedural law, but also unconstitutional. Yet, what happens if the case is reallocated to another country whose constitutional law does not have a similar requirement, and the competent authorities inform the media? Can the individuals concerned claim a violation of the right to confidential information on the charge, as acknowledged by Italian constitutional law, and in the affirmative case, before what court? We saw that the Luxembourg Court should not be competent for this, as judicial review is ensured at the domestic level. But can an Italian court (and even the Italian Constitutional Court) rule on a violation that occurred in another country? And how can a court of the country in which information was provided decide on a complaint lodged on the grounds of an alleged violation of a specific guarantee acknowledged by the constitutional law of another State?

On close examination, we cannot rule out the possibility of the competence of the EU Court of Justice. It might be argued that depriving the defendant of a fundamental safeguard enshrined by constitutional law by way of transferring the proceedings to another EU country can also entail a violation of the principle of non-discrimination, which not only aims at avoiding unequal treatment of the citizens of different Member States, but also at preventing unjustified restrictions on *par condicio* as a result of legal actions having transborder dimension. There is little doubt that, as long as fundamental rights are stake, the principle of non-discrimination

[124] The Spanish Constitutional Tribunal, ruling on the *amparo* filed by Mr. Melloni in compliance with the judgment of the Luxembourg Court, explicitly referred to the doctrine of indirect infringement on fundamental rights. See STC 26/2014.

also applies to the fields of criminal law and criminal justice,[125] with the result that procedural arrangements affecting the equal treatment of EU citizens not only jeopardise constitutional-law safeguards, but also EU law. This argument, therefore, might justify the intervention by Luxembourg case-law. Yet, as noted, the main problem lies in the systematic approach adopted by the Regulation, which still reflects sovereignist considerations in light of an objective understanding of criminal inquiries that does not take into due account the specific needs of the addressee of the investigation or the prosecution. Restricting the possibilities for reallocating the case and, even more so, establishing investigative competence primarily on the basis of the place of habitual residence of the alleged offender would certainly contribute to enhancing a defendant-centred perspective on the criminal proceedings of the EPPO.[126]

## 7 Conclusions

The analysis of the new rules on the investigation and prosecution of the EPPO reveals a complex picture in which unprecedented procedural mechanisms coexist with traditional arrangements and old-fashioned perspectives such as the view of a public prosecutor's office an independent body of justice. Yet such cultural fusion, projected onto a supranational plane, gives rise to a number of new problems when viewed from a perspective of the fundamental rights of the individuals involved in an inquiry of the EPPO. While the initiation of criminal investigations and the use of intrusive measures raise the question of how fundamental safeguards should be ensured in the proceedings conducted by the European prosecutorial authority, the distribution of investigative competences and the reallocation of cases highlight new problems that mainly derive from the concentration of considerable decision-making powers in the hands of Permanent Chambers. These powers, which are further enhanced in decisions on whether to prosecute after the completion of the pre-trial inquiry, can not only severely impinge on the right to an effective defence, but could also lead to the establishment of jurisdiction in a country whose criminal law and criminal systems are not realistically accessible to the alleged offender. In spite of the great impact of the EPPO's legal actions, the 2017 Regulation does not seem to provide an effective system of judicial review.

The examination of these issues, while calling for confrontation between the new rules and constitutional law, as well as with the European Convention and EU law, raises a final systematic problem, namely whether fundamental constitutional-law safeguards should also be ensured across borders *ratione personae*. In other words,

[125] For in-depth analysis of the relevance of the principle of non-discrimination in the field of fundamental freedoms, from the viewpoint of the passive personality principle, cf. Böse (2014), pp. 45 ff.

[126] For some guidelines for an accused-centred understanding of transnational investigation and prosecution see Ruggeri (2015), pp. 147 ff.

the question arises whether the addressee of the EPPO's inquiry holds the right to be ensured essential guarantees, as laid down by the Constitution of his own country, or a country with which he has stable cultural ties. The analysis of this crucial issue from the angle of the EPPO's inquiry enhances the need for an understanding of transborder investigation and prosecution that aims at ensuring full respect for the primary criminal law and criminal justice rights of the individuals concerned.

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# The Legal Framework for the Protection of Fundamental Rights of the Suspect or Accused in Transnational Proceedings Under the EPPO

**Nuria Díaz Abad**

**Abstract** The EPPO Regulation foresees that its activities shall be carried out in full compliance with the rights of suspects and accused persons enshrined in the Charter of Fundamental Rights of the European Union. This article analyses the protection of fundamental rights of suspected or accused persons in the light of fundamental rights, under European Union law and under national law. The EPPO Regulation also contains an Article to cover the question of judicial review, admitting that some procedural measures may be challenged before the CJEU and that the courts of the Member States shall be competent to review other procedural decisions taken by the EPPO in the performance of its functions, with the possibility of submitting a preliminary ruling to the CJEU. This provision shall also be analyzed here.

## 1 Introduction

The European Public Prosecutor's Office (EPPO) is meant to become a fundamental actor in the prosecution of various crimes at European Union level. Although the Council Regulation (EU) 2017/1939, of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office[1] (herein after, EPPO Regulation) only foresees that the task of the EPPO shall be to combat criminal offences affecting the financial interests of the Union, nevertheless some voices consider that in future such a body could be useful to prosecute cross-border criminal offences.[2] Therefore the establishment of a solid structure from a legal point of view that guarantees the protection of fundamental rights, on the one

[1] OJ L 283, 31.10.17, p. 1.

[2] See the statements made by the President of France, Emmanuel Macron, in support of extending the competences of the EPPO to cases of terrorism, Financial Times 26.9.2017, https://www.ft.com/content/37c54ebc-a2ad-11e7-9e4f-7f5e6a7c98a2.

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© Springer Nature Switzerland AG 2018



L. Bachmaier Winter (ed.), *The European Public Prosecutor's Office*,
Legal Studies in International, European and Comparative Criminal Law 1,
https://doi.org/10.1007/978-3-319-93916-2_12

hand, and that makes it possible to count on an effective legal remedy against the decisions taken by the EPPO, on the other, is of great interest not only for the project we face now, but also for its future development.

The protection of the fundamental rights of the suspects and accused in the EPPO transnational proceedings only represent a minor step towards the harmonization of criminal proceedings within the European Union. Such harmonization is limited, not only because not all Member States participate in enhanced cooperation, but also because the Regulation refers for the protection of these fundamental rights to the national legislation of each of the Member States. The role of the CJEU in interpreting both the EPPO Regulation and the directives on fundamental rights of the accused and suspects in criminal proceedings will be crucial in order to foster the most uniform protection possible in all Member States that participate in the EPPO.

The objective of this contribution is to describe the legal framework for the protection of fundamental rights for suspected and accused in the EPPO proceedings, under European Union Law and under national law, trying also to examine the rules on judicial review as contained in the Regulation. Both issues are covered by Chapter VI of the EPPO Regulation under the title "procedural safeguards" (Articles 41 and 42).[3]

## 2 Protection of Fundamental Rights

The first paragraph of Article 41 of the EPPO Regulation reads as follows:

> The activities of the EPPO shall be carried out in full compliance with the rights of suspects and accused persons enshrined in the Charter, including the right to a fair trial and the rights of defence.

The right to a fair trial and the right of defense are recognized as fundamental rights by the Charter of Fundamental Rights of the European Union (Article 47 of the Charter) and by the European Convention of Human Rights (Article 6 of the Convention). From the point of view of the protection of fundamental rights we also have to take into account Article 13 of the United Nations Convention on the Rights of Persons with Disabilities, which was approved on behalf of the European Community by Council Decision 2010/48/EC of 26 November 2009.[4]

[3] The protection of the fundamental rights of suspects and accused persons in the EU transnational criminal procedures has been subject to numerous studies and scholarly analysis. Aware of the impossibility to cover here the abundant specialized literature, the references will be kept to a minimum.

[4] OJ 2010 L 23, of 27.1.2010, p. 35. Article 13 regulates the access to justice stating that:

> States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

Being the EPPO a body of the European Union its activities are bound to the respect of the Charter (Article 51(1) of the Charter). According to Article 52(3) of the Charter, in so far as it contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights are to be the same as those laid down by the Convention. Article 53 of the Charter further states that nothing in the Charter is to be interpreted as restricting or adversely affecting the rights recognized *inter alia* by the ECHR.[5]

In the Charter we find several Articles related to the protection of fundamental rights of the suspect or the accused person, such as the right to an effective remedy and to a fair trial (Article 47), the presumption of innocence and right of defense (Article 48), the principles of legality and proportionality of criminal offences and penalties (Article 49) and the right not to be tried or punished twice in criminal proceedings for the same criminal offence (Article 50). The right to an effective remedy and to a fair trial guarantees judicial protection against the violation of EU law. The presumption of innocence and the right of defence of suspects and accused people cover fundamental rights of European citizens and serve also to enhance mutual trust. The implementation of the 2009 *Roadmap* for strengthening procedural rights of suspect and accused persons in criminal proceedings[6] is nowadays nearly finished. The principles of legality and proportionality of criminal offences and penalties and the *ne bis in idem* principle are one of the cornerstones of criminal law and have been analyzed in several judgments of the CJEU.

It has to be kept in mind that these fundamental rights are recognized for "every person", which in the interpretation of the CJEU means that it includes moral persons, including those of third States.[7]

In paragraph 2 of Article 41 of the EPPO Regulation it is foreseen that:

> any suspected or accused person in the criminal proceedings of the EPPO shall, at a minimum, have the procedural rights as they are provided for in Union law, including directives concerning rights of suspects and accused persons in criminal procedures, as implemented by national law (…).

This paragraph gives several examples of Directives including these rights.[8] It mentions Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings[9] and also Directive 2012/13/EU on the right to information in

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[5] *Volker und Markus Schecke and Eifert*, C-92/09 and C-93/09, EU:C:2010:662, paragraph 51; and judgment in *Lanigan*, C-237/15 PPU, paragraph 56.

[6] Resolution of the Council, OJ C 295, 4.12.2009, p. 1. See Jimeno Bulnes (2009), pp. 157–161; Spronken (2011), pp. 213–233; Blackstock (2012), pp. 20–35, pp. 23 ff.

[7] Judgments in *Bank Mallet/Council,* T-496/10, ECLI:EU:T: 2013:39 paragraphs 36–38 and 41 and in *Bank Saderta Iran/Council*, T-494/10, ECLI:EU:T:2013:59, paragraphs 36, 39.

[8] On the Proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union and the long road to the final approval of the present Directives see, among others, Bachmaier Winter (2007), pp. 41–69.

[9] Directive 2010/64/EU of the European Parliament and the Council, of 20 October 2010, on the right to interpretation and translation in criminal proceedings, OJ L 288, 26.10.10, p. 1.

criminal proceedings[10] and Directive 2013/48/EU, on the right of access to a lawyer.[11] Finally other procedural rights are mentioned: the right to remain silent and the right to be presumed innocent, recently regulated in Directive 2016/343/EU,[12] and the right to legal aid for citizens suspected or accused and for requested persons in European arrest warrants, as provided in Directive (EU) 2016/1919.[13]

In all these cases, since Member States would be applying EU law, they will be bound to the Charter, following Article 51 of the Charter.[14] When implementing Directives into national law, Member States are implementing Union law.[15] The CJEU settled case-law states, in essence, that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations. As the Court ruled in case *Ackerberg Fransson*:

> where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised (see, in relation to the latter aspect, Case C-399/11 Melloni [2013] ECR, paragraph 60). For this purpose, where national courts find it necessary to interpret the Charter they may, and in some cases must, make a reference to the Court of Justice for a preliminary ruling under Article 267 TFEU.[16]

[10] Directive 2012/13/EU of the European Parliament and of the Council, of 22 may 2012, on the right to information in criminal proceedings OJ L 142, 1.6.12, p. 1.

[11] Directive 2013/48/EU of the European Parliament and of the Council, of 22 October 2013, on the right of access to a lawyer in criminal proceedings and the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294, 6.11.13, p. 1.

[12] Directive 2016/343/EU of the European Parliament and the Council, of 9 March 2016, on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJ L 65, 11.3.16, p. 1. On this Directive see Cras and Erbežnik (2016), pp. 25–35; Lamberigts (2016), pp. 36–42.

[13] Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016, on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings OJ L 297, 4.11.16, p. 1.

[14] Article 51 Charter: "the provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties."

[15] See, for example, Alonso García (2014). In Spain Directives 2010/64 and 2012/13 were transposed by a law of 27 April 2015. The law foresees the creation of a judicial translators' and interpreters' registry. Directive 2013/48 has been transposed by a law of 5 October 2015.

[16] C-617/10, EU:C:2010:105, paragraphs 29 and 30. On this landmark case see, among others, Reestman and Besselink (2013), pp. 169–175; Lavranos (2013), pp. 133–141.

It also has to be kept in mind that all these Directives have been adopted on the legal basis of Article 82(2) TFEU, which means that they are considered a way of establishing the area of freedom, security and justice. In that sense Advocate General Bot stated that "the rules adopted on the basis of Article 82(2) TFEU must be interpreted in such a way that they are fully effective in so far as such an interpretation, which will strengthen the protection of the rights, will also strengthen mutual trust and accordingly facilitate mutual recognition. Reducing the scope of these rules by a literal reading of the provisions may stand in the way of mutual recognition and thus the construction of the area of freedom, security and justice" (…).[17]

This legal basis is foreseen to facilitate mutual recognition of judgments and judicial resolutions with a cross-border element. In that sense it allows a harmonization of criminal procedural law in the European Union for cases with this cross-border element. However, the legal basis chosen makes it impossible to have a common standard in the EU of these fundamental rights since, according to Protocol No. 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the TEU and the TFEU, both Member States may choose to take part or not in the different Directives, whereas Denmark, according to Protocol No. 22 is not bound by these Directives or subject to their application.

### *2.1 The Right to Interpretation and Translation in Criminal Proceedings*

Going into more detail with regard to the different Directives mentioned in Article 41(2) of the EPPO Regulation we have to consider, first of all, Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings.[18]

The Directive lays down rules concerning the right to interpretation and translation in criminal proceedings and proceedings for the execution of a European arrest warrant and states that this right "shall apply to persons from the time that they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings, which is understood to mean the final determination of the question whether they have committed the offence, including, where applicable, sentencing and the resolution of any appeal" (Article 1(2)).

The right to interpretation is provided to persons who do not speak or understand the language of the criminal proceedings concerned, including persons with hearing

[17] Conclusions in *Covaci*, C-216/14, ECLI:EU:C:2016:305, paragraph 33. On this judgment, see Ruggeri (2016b), pp. 42–51.

[18] See Jimeno Bulnes (2007), pp. 95–128. See Moreno Catena (2014), pp. 98–99.

or speech impediments (Article 2). In that sense we also have to consider the Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings[19] that includes certain obligations for judges and prosecutors. Member States shall also ensure that suspected or accused persons who do not understand the language of the criminal proceedings concerned are, within a reasonable period of time, provided with a written translation of all documents which are essential to ensure that they are able to exercise their right of defense and to safeguard the fairness of the proceedings (Article 3).

As the CJUE has ruled in *Covaci,* Articles 2 and 3 of this Directive govern the right to interpretation and the right to translation of certain essential documents, and considering the context as an element for the interpretation of these Articles, the CJEU has ruled that "only suspected or accused persons who are unable to express themselves in the language of the proceedings, whether that be due to the fact that they do not speak or understand that language or the fact that they have hearing or speech impediments, are able to exercise the right to interpretation".[20] However the Court considers that to require Member States to translate every appeal brought by the persons concerned against a judicial decision which is addressed to them, would go beyond the objectives pursued by the Directive itself. In that sense the European Court of Human Rights (ECtHR) has also stated that compliance with the requirements relating to a fair trial merely ensures that the accused person knows what is being alleged against him and can defend himself, and does not necessitate a written translation of all items of written evidence or official documents in the procedure.[21] Therefore the CJEU ruled in that case that the Directive does not preclude national legislation which does not permit the individual against whom a penalty order has been made to lodge an objection in writing against that order in a language other than that of the proceedings, even though that individual does not have a command of the language of the proceedings, provided that the competent authorities do not consider, in accordance with Article 3(3) of that directive, that, in the light of the proceedings concerned and the circumstances of the case, such an objection constitutes an essential document.

In case *Slentjes*[22] the CJEU examined whether a measure such as an order provided for in national law for imposing sanctions in relation to minor offences and delivered by a judge following a simplified procedure, constitutes a "document which is essential" within the meaning of Article 3(1) of Directive 2010/64 and came to the conclusion that it has to be considered as such, taking into account that this kind of order is effected only after the court has ruled on the merits of the accusation and represents the first opportunity for the accused person to be informed of the accusation against him. Furthermore, if that person does not lodge an objection

[19] OJ 2013/C 378/02.

[20] See paragraph 31.

[21] ECtHR, *Kamasinski v. Austria*, 19 December 1989, § 74, Series A No. 168.

[22] *Slentjes*, C-278/16, judgment of 12 October 2017, (ECLI:EU:C:2017:757).

within 2 weeks from its service, the order acquires binding authority and the penalties provided for become enforceable.

In another case the CJEU was confronted with the question of whether this Directive was applicable to a proceeding which has as its purpose the recognition of a final judicial decision handed down by a court of another Member State.[23] Since by definition in this special procedure the decision takes place after the final determination of whether the suspected or accused person committed the offence and, where applicable, after the sentencing of this person, the court considered that the Directive is not applicable to this proceeding.

The Directive also establishes that Member States shall ensure that, in accordance with procedures in national law, suspected or accused persons have the right to challenge a decision finding that there is no need for interpretation or translation of documents or passages thereof and, when interpretation or translation has been provided, the possibility of complaining that the quality of the interpretation or translation is not sufficient to safeguard the fairness of the proceedings (Articles 2(5) and 3(5)).

It is interesting to point out that the Directive specifically underlines the importance of training in these matters.[24] And finally, Article 8 contains a non-regression clause by stating that "Nothing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Charter of Fundamental Rights of the European Union, other relevant provisions of international law or the law of any Member State which provides a higher level of protection."

## *2.2 The Right to Information and Access to the Case Materials*

Directive 2012/13/EU[25] lays down rules concerning the right to information of suspects or accused persons, relating to their rights in criminal proceedings and to the accusation against them. This Directive relates to measure B of the Roadmap and builds on the rights laid down in Articles 6, 47 and 48 of the Charter as interpreted in Articles 5 and 6 of the ECHR. As Recital 14 of this Directives stresses out "in this Directive the term "accusation" is used to describe the same concept as the term

[23] Case *Istvan Balogh,* C- 25/15, of 9 June 2016, (ECLI:EU:C:2016:423).

[24] In that sense Article 6 reads as follows: *"Without prejudice to judicial independence and differences in the organization of the judiciary across the Union, Member States shall request those responsible for the training of judges, prosecutors and judicial staff involved in criminal proceedings to pay special attention to the particularities of communicating with the assistance of an interpreter so as to ensure efficient and effective communication."*

[25] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.

"charge" used in Article 6(1) ECHR." The Directive applies also to the United Kingdom and to Ireland, but not to Denmark.

According to Article 2:

> This Directive applies from the time persons are made aware by the competent authorities of a Member State that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspect or accused person has committed the criminal offence, including, where applicable, sentencing and the resolution of any appeal.

The right of information includes information concerning at least the following procedural rights, as they apply under national law, the right of access to a lawyer, any entitlement to free legal advice and the conditions for obtaining such advice, the right to be informed of the accusation, the right to interpretation and translation and the right to remain silent (Article 3(1)).

On the other hand the Directive also provides for the right to be informed on the accusation, although the Directive does not regulate procedures by which the information about the accusation must be provided to the accused persons. Nevertheless the CJEU considered in *Covaci* that the Directive 2012/13 does not preclude legislation of a Member State, which, in criminal proceedings, makes it mandatory for an accused person not residing in that Member State to appoint a person authorized to accept service of a penalty order concerning him, provided that the accused person does in fact have the benefit of the whole of the prescribed period for lodging an objection against that order.

Suspects or accused persons who are arrested or detained are provided promptly with a written Letter of Rights drafted in simple and accessible language and written in a language that they understand.[26]

When necessary, suspects or accused people have to be provided with a translation or interpretation into a language that they understand, in accordance with Directive 2010/64/EU. Particular attention has to be paid to persons who cannot understand the content or meaning of the information, for example because of their youth or their mental or physical conditions.

Suspects shall be provided promptly with information on the criminal act, at the latest before their first official interview by the police or another competent authority, and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defense (Article 6). In the judgment of 22 March 2017[27] the Court has ruled that the objective of Article 6 of the Directive 2012/13 is manifestly infringed if the addressee of a penal order, which has become

[26] They shall be given an opportunity to read the Letter of Rights and shall be allowed to keep it in their possession throughout the time that they are deprived of liberty (Article 4). To help Member States to draw up such a Letter of Rights a model is provided in Annex I of the Directive. The right to written information also applies, *mutatis mutandis*, to persons arrested for the purpose of the execution of a European Arrest Warrant. Therefore, a model is provided in Annex II to help Member States to draw up a Letter of Rights for such persons.

[27] Joined cases C-124/16, C-188/16 and C-213/16, *Tranca and others*, of 22 March 2017 (ECLI:EU:C:2017:228).

final and enforceable, could no longer object to it, even though he had not been aware of the existence and content of that order at the time when he could have exercised his rights of defence, insofar as, for want of a known place of residence, it was not served on him personally.

Thus the Directive must be interpreted as not precluding legislation of Member States which, in criminal proceedings, provides that the accused persons who neither resides in that Member State nor has a fixed place of residence in that State or in his Member State of origin is required to appoint an agent for the purposes of service of a penalty order concerning him, and that the period for lodging an objection to that order, before it becomes enforceable, runs from service of that order on that agent.[28]

Finally, suspects or accused persons have the right to have access, by themselves or through their lawyers, to documents related to the specific case in the possession of the competent authorities which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention (Article 7).[29] Nevertheless access to certain materials may be refused if such access may lead to a serious threat to the life or the fundamental rights of another person or if such refusal is strictly necessary to safeguard an important public interest, such as in cases where access could prejudice an ongoing investigation or seriously harm the national security of the Member State in which the criminal proceedings are instituted. Member States shall ensure that, in accordance with procedures in national law, a decision to refuse access to certain materials in accordance with this paragraph is taken by a judicial authority or is at least subject to judicial review (Article 7(4)). These restrictions are to be interpreted strictly and in accordance with the right to a fair trial under the ECHR and as interpreted by the European Court of Human Rights.

Advocate General Bot has noted in his opinion in the case *Kolev and others*[30] that Directive the does not state at what precise moment in the proceedings the information on the charges and access to the case materials must be granted to the person suspected of having committed an offence. Detailed information of the accusation is to be provided "at the latest upon submission of the merits of the accusation to the court" (Article 6.3), and access to the case materials must be granted "in due time to allow the effective exercise of the rights of the defence and at the latest upon submission of the merits of the accusation to the judgment of a court" (Article 7.3). In this context, Advocate General Bot considers that informing the accused person on the accusation after the indictment has been submitted to the court, and granting

[28] Article 6 of Directive 2012/13, however, requires that, when the penalty order is enforced, as soon as the person concerned has actually become aware of the order, he should be placed in the same situation as if that order had been served on him personally and, in particular, that he has the whole of the prescribed period for lodging an objection, where necessary, benefiting from having his position restored to the *status quo ante*.

[29] In this sense Spanish Constitutional Court judgment 13/2017, of 30 January 2017.

[30] *Kolev and others* C-612/15, of 4 April 2017 (ECLI:EU:C:2017:257).

access to the case materials, at the request of the parties, during the pre-trial investigation before the final indictment is drawn up, are in line with the Directive.

Member States shall ensure that suspects, or accused persons, or their lawyers have the right to challenge, in accordance with procedures in national law, the possible failure or refusal of the competent authorities to provide information in accordance with this Directive (Article 8(2)). The same provisions are included with regard to the training of judges, prosecutors, police, and judicial staff, as well as the non-regression clause. The date by which this Directive had to be transposed by Member States was the 2nd. June 2014.

### 2.3 The Right to Access to a Lawyer and the Right to Communicate with and Have Third Persons Informed in Case of Detention

Directive 2013/48/EU[31] lays down minimum rules concerning the rights of suspects and accused persons in criminal proceedings and of persons subject to proceedings pursuant to Framework Decision 2002/584/JHA ('European arrest warrant proceedings') to have access to a lawyer, to have a third party informed of the deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (Article 1).

In the case *Kolev and others*, already cited, Advocate General Bot points out that the Directive is silent on the possibility of a court removing from the criminal proceedings a lawyer defending clients with conflicting interests in the same case, but that this possibility safeguards the right to defence. The court must appoint a new lawyer in this case and ensure that the lawyer appointed can have sufficient time to examine the case and defend his client effectively.

The fairness of proceedings requires that a suspect or accused person is able to obtain the whole range of services specifically associated with legal assistance. In that sense the Directive regulates the right of access to a lawyer in such time and in such a manner so as to allow the persons concerned to exercise their rights of defense practically and effectively (Article 3(1)),[32] the confidentiality of communication between suspects or accused persons and their lawyer in the exercise of the right of access to a lawyer (Article 4), the right to have a third person informed of the deprivation of liberty without undue delay if they so wish (Article 5(1)), the right to communicate without undue delay with at least one third person, such as a

[31] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

[32] On the right to counsel and the parameters for assessing the effectiveness of the legal assistance under the Convention, see the comprehensive study by Coster van Voorhut (2017), in particular p. 153 ff.

relative, nominated by them (Article 6(1)), and the right to have the consular authorities of their State of nationality informed of the deprivation of liberty without undue delay and to communicate with those authorities, if they so wish (Article 7(1)). The right of suspects or accused people who are deprived of liberty to consular assistance is foreseen in Article 36 of the 1963 Vienna Convention on Consular Relations, where it is a right conferred to States to have access to their nationals.

As pointed out in the Recitals, this Directive should be implemented taking into account the provisions of Directive 2012/13/EU. The term "lawyer" in this directive refers to any person who, in accordance with national law, is qualified and entitled, including by means of accreditation by an authorized body, to provide legal advice to suspects or accused persons.

The right of access to a lawyer has to be guaranteed without undue delay, but does not include preliminary questioning by the police or by another law enforcement authority. Suspects or accused persons should have the right to meet in private with the lawyer representing them, and communication with their lawyer may take place at any stage, including before any exercise of the right to meet that lawyer. Suspects and accused persons have the right for their lawyer to be present and participate effectively when they are questioned by the police or by another law enforcement or judicial authority.

When suspects or accused persons are deprived of liberty, Member States have to undertake the necessary arrangements to ensure that such persons are in a position to exercise effectively the right of access to a lawyer, including by arranging for the assistance of a lawyer when the person concerned does not have one, unless they have waived the right. However the right of access to a lawyer may be temporarily derogated on a case-by-case basis for one of several compelling reasons.[33]

The right to have a third person informed of the deprivation of liberty may be temporarily derogated where there is an urgent need to avert serious adverse consequences for the life, liberty, or physical integrity of a person or where there is an urgent need to prevent a situation where criminal proceedings could be substantially jeopardized (Article 5(3)).

The rights regulated in this Directive can only be object of a waiver if the suspect or accused person has been provided, orally or in writing, with clear and sufficient information in simple and understandable language about the content of the right concerned and the possible consequences of waiving it, and if the waiver is given voluntarily and unequivocally (Article 9).

Member States are bound to establish an effective remedy under national law in the event of a breach of the rights under this Directive (Article 12) and to ensure that the particular needs of vulnerable suspects and vulnerable accused persons are

[33] Where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person or where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings (Article 3(5)). In these cases the competent authorities may question suspects or accused persons without the lawyer being present, provided that they have been informed of their right to remain silent and providing that such questioning does not prejudice the rights of the defense, including the privilege against self-incrimination.

taken into account in the application of this Directive (Article 13). The Directive shall be transposed by 27 November 2016 (Article 15). Neither the United Kingdom nor Ireland take part in this Directive. The Directive does not apply to Denmark.

## *2.4 The Right to Remain Silent and the Right to be Presumed Innocent*

The Commission worked out these rights in a draft Directive of 2013,[34] but it was not until 2016 that the Directive (EU) 2016/343 was approved. In the Stockholm Programme, the European Council expressly invited the Commission to address the issue of presumption of innocence, since presumption of innocence and its related rights are tools by which the principle of the right to a fair trial is implemented. But in its Recitals the Directive expressly contemplated that "the current proposal will also contribute to strengthening the legal safeguards that protect individuals involved in proceedings conducted by the European Public Prosecutor's Office" (Recital 10).

This Directive lays down minimum requirements at the EU level to ensure certain aspects of the right of suspects or accused persons to be presumed innocent, in line with the Stockholm Programme and the ECHR case law. Although the presumption of innocence and the right to a fair trial are enshrined in Articles 47 and 48 of the Charter of Fundamental Rights of the EU, in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), in Article 14 of the International Covenant on Civil and Political Rights (ICCPR) and in Article 11 of the Universal Declaration of Human Rights and although the Member States are party to all these international agreements, "experience has shown that this in itself does not always provide a sufficient degree of trust in the criminal justice system of the other Member States" (Recital 5). For that reason "by establishing common minimum rules on the protection of procedural rights of suspects and accused persons, this Directive aims to strengthen the trust of Member States in each other's criminal justice systems and thus to facilitate mutual recognition of decisions in criminal matters. Such common minimum rules may also remove obstacles to the free movement of citizens throughout the territory of the Member States" (Recital 10).

The Directive applies only to criminal proceedings and only to natural persons. To rule on the rights of legal persons was considered premature, taking into account the current stage of development of national law and case law at the national and EU level.

[34] Draft Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings, COM (2013) 821 final, 27.11.13.

The Directive focuses on the principle of presumption of innocence, the burden of proof, the right to remain silent, the right not to incriminate oneself, the right to be present at one's trial, and the right to a new trial.

In regard to the principle of presumption of innocence, Article 4 of the Directive regulates the public references to guilt and Article 5 obliges Member States to take the appropriate measures to ensure that suspects and accused persons are not presented as being guilty in court or in public, through the use of measures of physical restraint, such as the measures mentioned in Recital 20—handcuffs, glass boxes, cages and leg irons–unless these measures are required for case-specific reasons.

The burden of proof for establishing the guilt is on the prosecution, but the Directive foresees that "in various Member States not only the prosecution, but also judges and competent courts are charged with seeking both inculpatory and exculpatory evidence. Member States which do not have an adversarial system should be able to maintain their current system provided that it complies with this Directive and with other relevant provisions of Union and international law" (Recital 23).

The right to remain silent and the right not to incriminate oneself are important aspects of the presumption of innocence. Competent authorities should not compel suspects or accused persons to provide information if those persons do not wish to do so. Nevertheless the Directive establishes that Member States may allow their judicial authorities to take into account, when sentencing, the cooperative behavior of suspects and accused persons (Article 7(4)).

The Directive also regulates the question of the trials *in absentia* under Article 8.[35] Recital 36 clarifies that informing a suspect or accused person of a trial should be understood to mean summoning him or her in person or, by other means, providing that person with official information about the date and place of the trial in a manner that enables him or her to become aware of the trial.

It is also foreseen that, if the conditions laid down in Article 8(2) are not fulfilled, because a suspect or accused person cannot be located despite reasonable efforts having been made, Member States may provide that a decision can nevertheless be taken and enforced, making sure that, when suspect or accused persons are informed of the decision, in particular when they are apprehended, they are also informed of the possibility to challenge the decision and of the right to a new trial.

The CJEU had the opportunity to examine the questions of trials *in absentia* in the *Melloni* case.[36] In this case the Spanish Constitutional Court asked the CJEU whether Article 4a(1)(a) and (b) of the Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States[37] is to be interpreted as precluding the executing judicial authority, in the circumstances specified in that provision, from making the execution of a

[35] See Ruggeri (2016a) and of the same author (2016b), pp. 42–51.

[36] ECLI:EU:C:2013:107. On the *Melloni* case, see Bachmaier Winter (2015), pp. 153–181; of the same author (2016), pp. 160–178; De Visser (2013), pp. 576–588; Martín Rodríguez (2014), pp. 603–622; Pollicino (2014), pp. 143–153.

[37] OJ 2002, L 190, p. 1.

European arrest warrant conditional upon the person who is the subject of the warrant being able to apply for a retrial in the issuing Member State.

Taking into account that the Framework Decision provides an exhaustive list of the circumstances in which the execution of a European arrest warrant issued in order to enforce a decision rendered in absentia must be regarded as not infringing the rights of the defence, any retention of the possibility of the executing judicial authority making that execution conditional on the conviction in question being open to review in order to guarantee the rights of defence of the person concerned is incompatible with European Union law. According to Article 4a(1)(a) and (b) of Framework Decision the person concerned may have waived, voluntarily and unambiguously, his right to be present at his trial, with the result that the execution of a European arrest warrant issued for the purposes of executing the sentence of a person convicted *in absentia* cannot be made subject to the condition that that person may claim the benefit of a retrial at which he is present in the issuing Member State, in two circumstances: when the person did not appear in person at the trial despite having been summoned in person or officially informed of the scheduled date and place of the trial, or when the person, being aware of the scheduled trial, deliberately chose to be represented by a legal counselor instead of appearing in person.

Finally the Directive regulates the right to a new trial (Article 9) or to another legal remedy which allows a fresh determination of the merits of the case, including examination of new evidence and which may lead to the original decision being reversed. The Directive emphasizes the particular needs of vulnerable persons that are to be taking into account according to the Commission Recommendation of 27 November 2013, mentioned above.

Member States shall bring into force laws, regulations and administrative provisions necessary to comply with this Directive by 1 April 2018.

In its judgment of 27 October 2016[38] the CJEU has examined the question of whether Articles 3 and 6 of Directive 2016/343 must be interpreted as precluding an opinion delivered by Supreme Court of Cassation of Bulgaria conferring on the national courts, having jurisdiction to hear an action brought against a custody decision, the ability to decide whether, during the trial phase of the criminal proceedings, the continued custody of an accused person must be subject to a review by the court, according to whether or not there are reasonable grounds to suspect that he committed the offence with which he is charged. After a reminder that, from the date upon which a directive has entered into force, the authorities and courts of the Member States must refrain as far as possible from interpreting domestic law after the period for transposition has expired in a manner which might seriously compromise attainment of the objective pursued by that directive, the CJEU ruled that the above mentioned opinion of the Supreme Court of Cassation of Bulgaria is not likely to compromise seriously the attainment of the objectives prescribed by the Directive.

[38] C-439/16 PPU, *Milev*, 27 October 2016, (ECLI:EU:C:2016:818).

This Directive does not apply to the United Kingdom and Ireland, and Denmark is not bound by it.

## 2.5 The Right to Legal Aid

Directive (EU) 2016/1919[39] seeks to improve the rights of suspects or accused persons in criminal proceedings, to complement and ensure the effectiveness of the rights in the Directive on access to a lawyer and to improve mutual trust between criminal justice systems, and will also contribute to strengthening the legal safeguards that protect individuals involved in proceedings conducted by the European Public Prosecutor's Office. The Directive stipulates that Member States are obliged to provide for legal aid immediately—before the competent bodies of the Member States concerned have taken any definitive decision on the granting or refusal of legal aid in cases where people are deprived of liberty or subject to a European arrest warrant and who are deprived of liberty in the executing Member State. This early intervention may help to reduce pre-trial detention.

The fundamental principles on which a legal aid system should be based are outlined in the United Nationals Principles and Guidelines in Access to Legal Aid in Criminal Justice Systems adopted on 20 December 2012 by the General Assembly and Article 47(3) of the Charter expressly provides that "legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice." In its opinion on this proposal the European Economic and Social Committee[40] stresses that legal aid in criminal proceedings must not be jeopardized because of the budgetary difficulties facing some Member States. It suggests studying to what extent resources can be made available at European level, e.g. in the form of a European Fund; since ensuring that the right to legal assistance from a lawyer applies to everyone, legal aid has to be made available to people who have no sufficient financial means to cover the costs of a lawyer themselves.

This Directive is presented together with a Commission recommendation on the right to legal aid for suspects or accused persons that seeks to foster certain convergence with regard to the assessment of eligibility for legal aid in the Member States, as well as encouraging the Member States to take action to improve the quality and effectiveness of legal aid services and administration.

[39] (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings.

[40] OJ C226/65,16.7.14.

## 3 The Judicial Review of EPPO

It is settled case law that "the very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of the rule of law".[41] Article 86(3) TFEU allows the Union legislator to determine the rules applicable to judicial review of procedural measures taken by the EPPO in the performance of its functions. Therefore the EPPO Regulation contains an Article to cover the question on judicial review. Article 42 distinguishes the cases that are competence of the national courts and the one that are competence of the CJEU.

Article 42.1 states that "procedural acts of the EPPO that are intended to produce legal effects vis-à-vis third parties shall be subject to review by the competent national courts in accordance with the requirements and procedures laid down by national law. The same applies to failures of the EPPO to adopt procedural acts which are intended to produce legal effects vis-à-vis third parties and which it was legally required to adopt under this Regulation."[42] The national procedures have to ensure effective remedies and the protection granted must be no less favorable than the protection governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Union law (principle of effectiveness).

Paragraphs 2 to 7 of this Article enumerate the cases where the CJEU shall have jurisdiction, namely in certain cases of preliminary rulings under Article 267 TFEU (validity of procedural acts of the EPPO, insofar as such a question of validity is raised before any court or tribunal of a Member State directly on the basis of Union law; interpretation or validity of provisions of Union law, including this Regulation and interpretation of Articles 22 and 25 of this Regulation in relation to any conflict of competence between the EPPO and the competent national authorities); decisions by the EPPO to dismiss cases, in so far as they are contested directly on the basis of Union law, in accordance with Article 263, paragraph 4, TFEU; any dispute relating to compensation for damages caused by the EPPO, under Article 268 TFEU, any dispute concerning arbitration clauses contained in contracts concluded by the EPPO, in accordance with Article 272 TFEU; any dispute concerning staff related matters, under Article 270 TFEU and, finally, on the dismissal of the European Chief Prosecutor or European Prosecutors, in accordance, respectively with Articles 14(5) and 16(5).

So the decisions taken by the EPPO may be reviewed at national level, with the possibility of national courts submitting a preliminary ruling on the interpretation or the validity of European law, but some of its acts will be reviewed directly by the CJEU, since the EPPO is a body of the European Union.

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[41] *Les Verts v Parliament*, 294/83, EU:C:1986:166, paragraph 23; *Johnston*, 222/84, EU:C:1986:206, paragraphs 18 and 19; *Heylens and others*, 222/86, EU:C:1987:442, paragraph 14; and *UGT-Rioja and others*, C-428/06 to C-434/06, EU:C:2008:488, paragraph 80 and *Schrems*, C-362/14, EU:C:2015:650, paragraph 95.

[42] See also Recital 87 of the Regulation.

Recital 88 of the EPPO Regulation refers to the preliminary ruling system and establishes that:

> when national courts review the legality of such acts, they may do so on the basis of Union law, including this Regulation, and also on the basis of national law, which applies to the extent that a matter is not dealt with by this Regulation. As underlined in the case-law of the Court of Justice, national courts should always refer preliminary questions to the Court of Justice when they entertain doubts about the validity of those acts vis-à-vis Union law. However, national courts may not refer to the Court of Justice preliminary questions on the validity of the procedural acts of the EPPO with regard to national procedural law or to national measures transposing Directives, even if this Regulation refers to them. This is however without prejudice to preliminary references concerning the interpretation of any provision of primary law, including the Treaties and the Charter, or the interpretation and validity of any provision of Union secondary law, including this Regulation and applicable Directives. In addition, this Regulation does not exclude the possibility for national courts to review the validity of the procedural acts of the EPPO which are intended to produce legal effects vis-à-vis third parties with regard to the principle of proportionality as enshrined in national law.

This mixed system of challenging measures before national courts and before the CJEU is not new, since it has been applied in other areas of European Union law. In that sense, a similar system applies in the field of Community trademarks, the Unitary Patent, or in the area of the Banking Union, where direct actions can be brought before the General Court against decisions of the European Central Bank and of the Single Resolution Mechanism (SRM), including liability actions, but in the context of the Single Supervisory Mechanism (SSM) acts may be challenged before national courts with the possibility of submitting preliminary references to the CJEU.

Decisions stating that there are not enough grounds to initiate an investigation, or decisions to initiate an investigation, or decisions to reallocate the case to a European Delegate Prosecutor of the same Member State, or decisions to merge or split cases for purpose of investigation, or decisions to order or take investigative measures shall be challenged before national courts. National courts will proceed in a more efficient fashion. However, a decision to dismiss a case, contested directly on Union law, has to be challenged before the CJEU.

Finally, Article 42.8 establishes judicial review by the CJEU on the basis of Article 263(4) TFEU in the following cases: decisions of the EPPO that affect "the data subject's rights under chapter VIII of this Regulation and decisions of the EPPO which are not procedural acts, such as decisions of the EPPO concerning the right of public access to documents", or decisions dismissing European Delegated Prosecutors adopted pursuant to Article 17(3) of this Regulation, or any other administrative decisions.[43]

[43] Recital 89 of the EPPO regulation makes clear that "the provision of this Regulation on judicial review does not alter the powers of the Court of Justice to review the EPPO administrative decisions, which are intended to have legal effects vis-à-vis third parties, namely decisions that are not taken in the performance of its functions of investigating, prosecuting or bringing to judgement. This Regulation is also without prejudice to the possibility for a Member State of the European Union, the European Parliament, the Council or the Commission to bring actions for annulment in accordance with the second paragraph of Article 263 TFEU and to the first paragraph of Article 265 TFEU, and to infringement proceedings under Articles 258 and 259 TFEU."

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# Exchange and Processing of Information Between the European Public Prosecutor's Office and National Authorities. The Case Management System

**Pedro Pérez Enciso**

**Abstract** The Regulation on the EPPO foresees different scenarios which demand the exchange of information between national authorities and the EPPO. These situations require setting up a robust, efficient and effective as well as secure, fast and automated mechanism for the transmission and management of such information. The information flow between national authorities and the EPPO must be understood as a very comprehensive concept, since the Regulation describes diverse situations where information can be transferred in different moments, in a bi-directional way, and by distinct national authorities (any having competence according to the applicable domestic law).

The topic of exchange and processing of information spins around a number of fundamental questions, e.g. which types of information should be transmitted to the EPPO or which model of Case Management System will the EPPO adopt to process the information received from national authorities.

The Council Regulation 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (the Regulation, hereinafter) foresees different scenarios which demand the exchange of information between national authorities and the European Public Prosecutor's Office, (the EPPO, hereinafter); these situations require setting up a robust, efficient and effective as well as secure, fast, and automated mechanism for the transmission and management of such information. This topic should be considered one of the most relevant issues when tackling the functioning of the EPPO, and will definitely have an outstanding impact on its road to success.

The information flow between national authorities and the EPPO must be understood as a very comprehensive concept, since the Regulation describes diverse situations where information can be transferred at different times (before an investigation

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L. Bachmaier Winter (ed.), *The European Public Prosecutor's Office*,
Legal Studies in International, European and Comparative Criminal Law 1,
https://doi.org/10.1007/978-3-319-93916-2_13

has been initiated and at different stages of ongoing investigations or prosecutions) in a bi-directional way (from national authorities to the EPPO and vice-versa), and by distinct national authorities (any having competence according to the applicable domestic law).

The topic of exchange and processing of information hinges on a number of fundamental questions, e.g. which types of information should be transmitted to the EPPO, or which model of Case Management System (CMS, hereinafter) the EPPO will adopt to process the information received from national authorities.

This article aims to analyse how the information flow between national authorities and the EPPO in the course of the investigation is structured in the Regulation as well as to make general remarks on the organization of the CMS, and does not address data protection issues or transmission of data to or from Union bodies, offices, and agencies, or to third States or international organizations.

## 1 A Precedent: The Exchange of Information Between Eurojust and National Authorities

Lessons learned from the way the exchange of information between Eurojust and national authorities has worked out since its establishment could be useful for the future mechanism of exchanging information between the EPPO and national authorities, in particular, taking into account that important issues are open for discussion in the Regulation.

Since its early years, Eurojust has strived to ensure efficient tools to fulfill its tasks are set up; obtaining adequate and comprehensive information from national authorities is fundamental for the performance of such tasks. The information exchange system under Council Decision 2002/187/JHA[1] (the Eurojust decision, hereinafter, as referred to the consolidated version) was based on the principles of willingness (national authorities were entitled to exchange with Eurojust any information necessary for the performance of its tasks, but such exchange was not mandatory), lack of concreteness (the potential situations to be notified to Eurojust were not listed), and informality (information could be exchanged by any means capable of allowing transmission: no electronic format had been produced).

Over the years, an assessment conducted at the EU level identified the need for further enhancement of the operational capacities of Eurojust; the extremely poor results of the information exchange system was one of the key conclusions. Council Decision 2009/426/JHA[2] was the outcome of such assessment. The new information exchange framework modified the three aforementioned pillars; thus, the

[1] Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime.

[2] Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime.

system is now based upon the principle of mandatory exchange (national authorities shall exchange with Eurojust any information necessary for the performance of its tasks—Article 13(1)—); on top of this general principle, a number of situations to be necessarily notified are listed under Article 13(5), (6) and (7); and, finally, the informality in the transmission of information evolved into a structured mechanism (the concrete data to be provided are listed in an Annex to the Eurojust Decision and the information should be transmitted in a structured way). For this purpose, Eurojust delivered the so called "Article 13 template", an electronic template with a twofold aim: assisting national authorities in the information transmission process and facilitating the use of the transmitted information within the Eurojust CMS and its analysis by the competent administrative instances (former Case Analysis Unit, now integrated in the Operations Unit).

The system of exchanging information between national authorities and Eurojust remains practically unchanged in the Proposal for a Regulation on the European Union Agency for Criminal Justice Cooperation (Eurojust).[3]

Although the current legal framework provides for clear rules for national authorities as to which situations trigger the obligation to notify Eurojust of ongoing investigations, it is commonly acknowledged that the overall number of notifications under all potential situations (Article 13(5), (6) and (7)) remains low.[4] Despite the fact that very little room is left for discretion to national authorities (only the identification of the situations under Article 13(1)), Eurojust is still struggling to persuade national authorities of the need to notify it of situations whenever identified and, moreover, of the benefits a compliant mechanism could provide to national investigations, via feedback Eurojust may provide to notifying national authorities after cross-referencing operations within the CMS (Article 13a).

In conclusion, the Eurojust-national authorities information exchange system framework has not brought the added value initially foreseen, mainly because of the lack of understanding of national authorities with regard to the need to notify and the reasons behind notification; the lack of feedback to national authorities by Eurojust with regard the use of information received has indeed not helped to persuade the former. The Council has insisted on the need for Eurojust to provide systematic feedback.[5]

From the technical perspective, Eurojust has recently launched a simplified and more user-friendly "Article 13 template" to make the notification process less

[3] Document of the Presidency 12677/17, of 2 October 2017 (Article 21).

[4] According to the 2015 Eurojust Annual Report, the number of notifications was 273; the number of notifications dropped dramatically in 2016 where, pursuant to the 2016 Eurojust Annual Report, only 176 situations were notified. With regard to notifications related to conflicts of jurisdiction the 2015 Eurojust Annual Report states that "even though the number of notifications on the basis of Article 13(7)(a) of the Eurojust Council Decision has increased since 2011, the actual number of notifications in 2015, namely 35, remains low" (p. 57).

[5] In its Conclusions on the Eurojust Annual Report 2014, the Council "recommends that Eurojust acknowledges receipt of any notifications under Article 13 and provides systematic feedback to the Member State concerned".

cumbersome for national authorities.[6] We doubt that this new template will trigger an escalation in notifications if the "feedback issue" remains the same, although Eurojust has developed a new CMS to strengthen feedback capacities and make overnight link detection possible.

Apart from the mandatory notifications, and related more to the exchange of information with the EPPO, national authorities also share and exchange information with Eurojust in the operational cases Eurojust opens upon request of such national authorities. It is normally acknowledged that national authorities provide a very limited amount of data when a case is opened and the CMS is often not sufficiently "fed" to allow Eurojust to conduct its coordinating role in a more efficient fashion. National authorities are free to decide what amount of data they want to share with Eurojust when asking for its support.

Some additional issues can be highlighted: on one side, information should be exchanged between Eurojust and national authorities via secure network connections but, despite the time elapsed since the new Eurojust Decision was published, only 14 Member States have established secure connections[7]; thus this question remains unsolved for more than half of Member States. On the other side, the Eurojust National Coordination System (ENCS, hereinafter) has already been set up in 26 Member States; one of the responsibilities of the ENCS is to ensure that the CMS receives the information related to the concerned Member States in an efficient and reliable manner (Article 12 (5a)) and ENCS members should be connected to the CMS to the extent provided for in Article 16b. Nevertheless, to this date, the ENCS-CMS connection has not been created and the ENCS members can only carry out this fundamental task "indirectly" via their National Desks. The possibility for European Delegated Prosecutors (EDP, hereinafter) to be part of the ENCS has been considered and proposed in some instances to facilitate the interaction between Eurojust and the EPPO.

Some general conclusions can be drawn from the described situation and considered useful for the EPPO-national authorities' information exchange system:

- Clear rules need to be defined as to which types of information should be included in the system.
- The EPPO CMS should include a comprehensive set of data regarding the investigations to allow, *inter alia*, double checking for possible parallel investigations.
- The EPPO CMS interface should be as simple and user-friendly as possible.
- A secure connection tool must be developed to connect national CMSs with the EPPO CMS to ensure an adequate transmission of information whenever needed:

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[6] A new more user-friendly template was one of the key recommendations to Eurojust as a result of the Sixth Round of Mutual Evaluations on the practical implementation and operation of the Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime and of the Council Decision 2008/976/JHA on the European Judicial Network in criminal matters.

[7] Information provided in the 2016 Eurojust Annual Report.

this is a very complicated task that has not been solved between Eurojust and the national authorities or the ENCS.

- The possibility for Eurojust CMS to identify cases under the potential competence of the EPPO on the basis of a hit/no hit functionality cannot be disregarded (via information provided in the cases opened or in Article 13 notifications).

## 2 Information Exchange Between National Authorities and the European Public Prosecutor's Office: Two Perspectives

Different approaches have coexisted in the course of the EPPO Regulation negotiations; the choice for one or the other set of sensibilities does have a fundamental impact on the performance of the EPPO, in particular with regard to the competences to be exercised at central level. Two options have been considered here:

- The handling EDPs should only share via the CMS the minimum information needed so that the central office can carry out its functions in accordance with the Regulation. Two main issues arise with regard to this option: the dangerously unclear understanding of what "minimum information" is, and the possibility that the information provided is considered insufficient by the central office and additional information is requested, a situation which involves delays and cumbersome additional work. This option entails that the handling EDPs necessarily need to work in their national CMSs or in a different electronic environment other than the national CMSs and other than the EPPO CMS, where all the available information would be included; only relevant information would be transferred from the file the EDPs are managing to the EPPO CMS.
- The handling EDPs should include in the EPPO CMS all information available related to the investigations opened by them. In theory, the second option provides for the possibility for handling EDPs to work in their national CMSs, in a different electronic environment other than the national CMSs and other than the EPPO CMS or for the possibility to work directly in the EPPO CMS[8] (which has the added value of having an only and single CMS where no duplication would be needed). This option, in our opinion, grants in a clearer manner the adequate performance of the competences of the central office since all collected information is available to it.

The choice of the Regulation, as explained further below, is more aligned with the second option, where the CMS include all electronically stored information from the case files opened by the handling EDPs. Whether or not the EDPs will use

[8] The use of the EPPO CMS instead of the national CMSs has many advantages, among them, being an option when the EPPO decides to reallocate a case to another EDP (Article 28(3)) in the same Member States, because if the option was that EDPs worked in national CMSs, the new EDP might be working in a national CMS different to the national CMS used by the first EDP.

their national CMSs will depend on a political decision of the Member States (some already take it for granted); whether the EDPs are double-hatted[9] or not will also influence whether they work on their national CMSs or not.

## 3 The Case Management System of the European Public Prosecutor's Office: General Features

The CMS lies at the very heart of the EPPO and is organized in three different levels of information: a register, an index and the electronically stored or storable information from case files. The CMS should not be understood as a simple database but also as a powerful engine for data processing. Its structure has evolved since its initial consideration under the Commission EPPO Regulation Proposal until the current model in the Regulation: from a close link to Eurojust CMS to an independent and diverse CMS. In this evolution process a fundamental question needs to be taken into account: because of the singularities of Eurojust as a judicial cooperation unit, National Members do not need to have access to all available information in the case file and thus only a limited set of data are transferred to them and stored in the CMS, but in the case of the EPPO, as an investigative and prosecutorial body, all produced information is available to the handling EDP and because of the fundamental functions al central level, each piece of information need to be accessible at such level.

### *3.1 The Case Management System in the Commission European Public Prosecutor's Office Regulation Proposal*

The first reference to the CMS in the Commission EPPO Regulation Proposal is to be found in Recital 44 of the Regulation pursuant to which "the data processing system of the European Public Prosecutor's Office should build on the Case Management System of Eurojust, but its temporary work files should be considered case-files from the time an investigation is initiated". In this proposal, it is assumed, that the EPPO will make use of the Eurojust CMS, a system that would profit from the existing IT tools already available. The exact meaning of the verb "build on" is not sufficiently clear[10] and could be construed in different ways: should the EPPO CMS be set up taking into account the structure and content of the Eurojust CMS and taking advantage of the already existing projects for the development of the

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[9] A double-hatted EDP exercises his or her functions as national prosecutor simultaneously as EDP, a possibility provided for in Article 13(3).

[10] This concern has also been highlighted by the Eurojust Joint Supervisory Body (JSB) in Council document 7150/16 on the opinion of the JSB about the protection of personal data in the EPPO Regulation Proposal.

Eurojust CMS via the so called EPOC Projects? Should it be the same Eurojust CMS adapted for the specific needs of the EPPO? Whatever the final configuration would be, the Commission understood that the EPPO CMS would be set up taking into account the Eurojust model; this is probably the technical side of the establishment of the EPPO "from Eurojust" as stated in Article 86 of the TFEU. In addition, the Commission Eurojust Regulation Proposal established that the Eurojust CMS and its temporary work files (TWFs, hereinafter) shall be made available for use by the EPPO.[11]

Mirroring Article 16 of the Eurojust Decision (and Article 24 of the Commission Eurojust Regulation Proposal), Article 22 of the Commission EPPO Regulation Proposal bases the architecture of the EPPO CMS on the same two pillars as the Eurojust CMS: the Index and the TWFs. The Index is a general register that contains references to all TWFs with a limited set of data and the TWFs are the files opened for processing data on individual cases with more detailed information on the concrete cases. No additional information was included with regard access rules to the Index or the TWFs.[12]

The initial approach whereby the EPPO CMS should "build on" the Eurojust CMS has been criticized because of the different nature and functions of both bodies: Eurojust is a judicial cooperation unit and its objectives are to stimulate and improve coordination and cooperation between competent authorities of the Member States and support them otherwise (Article 3 in relation with Articles 6 and 7 of the Eurojust Decision), while the EPPO is an investigative and prosecutorial body like the competent authorities of the Member States and its functions are to investigate, prosecute and bring to judgment the perpetrators of, and accomplices in, the criminal offences affecting the financial interest of the Union (Article 4 of the Regulation).

For this reason, the EPPO CMS should in principle share more features with national CMSs than with Eurojust CMS. The technical specificities, design, structure and contents of the Eurojust CMS are not at all suitable for the purposes and needs of the EPPO CMS when processing case related information. Perhaps it was initially considered that using the Eurojust CMS would have less financial impact than developing a new CMS from scratch; but, in our opinion, very few Eurojust CMS features—if any at all—are usable for the EPPO CMS, and it would have needed to be completely adapted for the new objectives had it been the final choice for the EPPO CMS: this process would likely be more costly than new software and hardware.

[11] At some point in the negotiations of the Eurojust Regulation (Document of the Presidency 12677/17, of 2 October 2017), it was stated that Eurojust should take the appropriate measures to enable the European Public Prosecutor's Office to have indirect access to information in its case management system on the basis of a hit/no-hit system (Article 45(5) in fine).

[12] In the context of the Eurojust CMS, the Index is accessible to all National Members and TWFs are accessible by the National Member that has opened it; all information inserted by a National Member goes initially to the local part of TWF and then the National Member owner of the case decides how and to which extent the information is shared with other National Members and which data go to the Index.

### 3.2 *The Case Management System in the European Public Prosecutor's Office Regulation*

We know little about how the EPPO CMS will look or how it will function in practice; the Regulation describes its general features and characteristics in Articles 44 to 46 and via other scattered mentions in different Articles, but all aspects related to the registration, verification, processing, or reporting of information received and gathered will be tackled in the internal rules of procedure: a great degree of freedom is left for the College to decide how to shape the CMS.

According to Recital 47 of the Regulation,

> the work of the EPPO should, in principle, be carried out in electronic form. A case management system should be established, owned and managed by the EPPO. The information in the case management system should include information received about possible offences that fall under the EPPO's competence, as well as information from the case files, also when those have been closed. The EPPO should, when establishing the case management system, ensure that the system allows the EPPO to operate as a single office, where the case files administered by European Delegated Prosecutors are available to the Central Office for the exercise of its decision-making, monitoring and direction, and supervision tasks.

Some general features can be drawn from this statement:

- Tailor-made CMS.
  - The initial reference to the Eurojust CMS has disappeared: the EPPO CMS is a completely different system as that of Eurojust.
- Electronic format CMS.
  - The information managed by the EPPO should be stored in an electronic format.
- CMS available at all levels.
  - Pursuant to Recital 21 of the Regulation, "the EPPO should be an indivisible Union body operating as a single office". The concept of "single office" entails that the information stored in the CMS is available at the different levels (central and national level) to allow the Chambers and European Prosecutors (EPs, hereinafter) perform their duties.
- Comprehensive CMS.
  - The CMS should include as much information available: reporting activities from national authorities or supranational bodies and the information stored in the cases under investigation (case files); it also includes information from closed cases.[13]

[13] Aspects related to the storage of information related to closed cases are not analyzed in this article.

The CMS is now regulated in Articles 44 to 46 in a more detailed fashion than in Article 24 of the Commission EPPO Regulation Proposal. The EPPO CMS has new and different features than those of the Eurojust CMS, although some similarities are still to be found.

A new architecture has been defined for the EPPO CMS, in three levels:

- a register of information obtained by the EPPO in accordance with Article 24 (information reported by national authorities, institutions, bodies, offices and agencies of the Union), including any decisions in relation to that information;
- an index of all case files;
- all information from the case files, where all information is stored electronically (essentially, TWFs of the EPPO).

The conclusion that the choice for a new different CMS that is not "built on" the Eurojust CMS is even more clear in Article 100(3) pursuant to which "the EPPO shall have indirect access on the basis of a hit/no-hit system to information in Eurojust's Case Management System": a clear statement that, regardless the privileged relations between Eurojust and the EPPO, both have completely separated CMSs.

The EPPO CMS is divided into two types of content:

- The information related to the reporting obligations of institutions, bodies, offices and agencies of the Union and of the authorities of Member States (Article 24(1), (2) and (3)). This information provided by the reporting authority in the format of a report (Article 24(4)) is stored in the CMS in the register. Once the investigation has been opened, the information in the register will be part of the case files. The decisions taken by the EPPO upon verification of the reported information are also part of this register.
- The information related to the investigations conducted by the EDPs, which is stored in the case files and referred to in the index -which lists all case files-.

A specific reference needs to be made to the case files. Pursuant to Article 45(1), the handling EDP will open a "case file" whenever the EPPO decides to open an investigation or exercise its right of evocation. This case file "shall contain all the information and evidence available to the European Delegated Prosecutor that relates to the investigation or prosecution by the EPPO".[14] According to Article 45(3)), the CMS shall include "all information and evidence from the case file that may be stored electronically" and Article 44(3)(c) states that the CMS shall contain "all information from the case files stored electronically". A slight nuance or subtle difference can be noted between both wordings which might have its impact, but we

[14] In the course of the negotiations this Article 45(1), second paragraph, at some point read: "The case file shall contain all the information available to the European Delegated Prosecutor, including evidence, related to an investigation or prosecution by the European Public Prosecutor's Office". In our opinion this former drafting is more correct than the one of the final drafting, because in the final wording "information" and "evidence" seem to be opposed and they are not: evidence gathered by the EDPs is nothing less than that part of the "information" related to an investigation.

won't elaborate on this issue to avoid making the topic on the CMS features too extensive.

One of the most significant conclusions here is that the case file opened by the EDP is not *per se* a part of the CMS, since only the information "stored electronically" or "that may be stored electronically"—which, by the way, are not equivalent concepts—is part of the CMS. So, we need to make a distinction between case file (all information, including evidence, regardless of its format, gathered by the EDP in the course of the investigation) and the information from the case file in an electronic format: only the latter is part of the EPPO CMS.

The question that arises here is: what type of information can't be stored electronically? In principle, all documents, reports, expert opinions, etc. can have an electronic format; in the case of evidence gathered, an electronic report is always produced.

Again, two different perspectives, as mentioned above, arise here: some Member States were of the opinion that the CMS should contain all the information from the case file (which would include the photographs and the electronic "image" of the whole case) but other Member States were in favour of a more "reduced" CMS where only the minimum fundamental information from the case file is inserted: this latter proposal would certainly hamper the supervision capacities at central level. Some evidence materials cannot be stored electronically (e.g. weapons, clothes), but digital images of such materials can.

The handling EDP will manage the case file opened by him/her according to the national law of his/her Member State and will "only" transfer all electronically stored or storable information to the EPPO CMS. The data from the CMS will have to be erased or rectified whenever such data are erased or rectified in the corresponding case files.

Different levels of access to the CMS coexist according to Article 46:

- The register and the index are the "public parts" of the CMS and are accessible by the European Chief Prosecutor, the Deputy Chief Prosecutors, other EPs and other EDPs (similarly to the index at Eurojust level with regard to National Members).
- The competent Permanent Chamber has direct access to the information stored electronically in the CMS and indirectly at its request to the case file. In relation to what has been stated above, this possibility will minimize the impact of a deficient CMS, where not all electronically storable information has been inserted or where not all relevant information is electronically storable. This level of access grants the exercise of the competences under Article 10; it is foreseeable that when exercising their extensive competences (including the possibility to give instructions to the EDPs) the competent Chambers requests full access to the case files.
- The handling EDP and the supervising EP have the same level of access: direct access to the case file and the information stored electronically in the CMS. The supervising role of the EP (Article 12) includes the possibility of giving instructions to the EDPs, exercising delegated competences of the Chambers,

requesting the reallocation of a case, or to take over a concrete case and conduct the investigation himself/herself (Article 28(3) and (4)): the only way to permit the adequate performance of these responsibilities is for the EP to have the same access to the CMS as the handling EDP.

The key achievement here is that all (electronic) information from case files will be part of the CMS: it's the only way, as stated above, to allow the central office to carry out its functions.

Although the case files are not per se part of the CMS, the EPPO has a high margin of maneuver since according to Article 45(2) "the internal rules of procedure may include rules on the organization and management of the case files". The College will have capacity to tackle the aforementioned issues, in particular the need to make case files as electronically storable as possible.

The basic functions of the CMS are described under Article 44:

(a) support the management of investigations and prosecutions conducted by the EPPO, in particular by managing internal information workflows and by supporting investigative work in cross-border cases;
(b) ensure secure access to information on investigations and prosecutions at the central office and by the European Delegated Prosecutors;
(c) allow for the cross-referencing of information and the extraction of data for operational analysis and statistical purposes;
(d) facilitate monitoring to ensure that the processing of operational personal data is lawful and complies with the relevant provisions of this Regulation.

The CMS has a very comprehensive set of objectives, the main one being to provide assistance in the management of the information stored in the investigations and prosecutions conducted by the EDPs. The CMS is an electronic system usable by all EDPs, a circumstance that will be extremely relevant in cross-border cases for the assignment of requests by the handling EDP in a concrete case to the assisting EDP of another Member State. Pursuant to Article 26, the system should also allow for the automated transmission of assignments in cross-border investigations.

The CMS is the communication channel between the EDPs and the central level; in such sense, pursuant to Article 28(1), *in fine* any significant developments of the case will be reported by the handling EDP via the CMS to the EP and the Permanent Chamber "in accordance with the rules laid down in the internal rules of procedure of the EPPO".

The cross-referencing functionality is of paramount importance since it may lead to the identification of other ongoing parallel or linked investigations in other Member States or potentially even, though unlikely though, in the same Member State.[15]

[15] As for Eurojust capacities to establish coincidences, the structure of Eurojust CMS remains practically the same in the COM Eurojust Regulation Proposal as in the Eurojust Decision. Eurojust demanded the inclusion of an analytical work tool that could support analysis by finding links between cases and entities. Pursuant to Council document 8488/14, Eurojust written contribution to the COPEN on the Eurojust Regulation Proposal "the architecture of the Eurojust CMS remains

### 3.3 Automated Processing of Information Within the Case Management System of the European Public Prosecutor's Office or in Other Electronic Formats

In the context of Eurojust, information should always be transmitted by electronic means and "for the processing of case related personal data, Eurojust may not establish any automated data file other than the Case Management System" (Article 16(6) of the Eurojust Decision).

In the Commission Eurojust Regulation Proposal a similar provision was included: "for the processing of operational personal data, Eurojust may not establish any automated data file other than the Case Management System or a temporary work file" (Article 24(6)). The concept of how the information transmitted is stored and processed remains the same; only the phrase "case related personal data" is reworded as "operational personal data". The reference to "or a temporary work file" is unclear, since the CMS is composed of an index and the TWFs (Article 24(1)), so no TWFs exist other than those of the CMS. This reference was suppressed in the Council General Approach to the Eurojust Regulation and in the Document of the Presidency 12677/17, of 2 October 2017 where, in addition, a possibility of interim storage of personal data in a format other than a TWF of the CMS has been included to allow a National Member a maximum period of 3 months to establish if such data are relevant to Eurojust (Article 24(6)).

Experience shows that National Members always open a TWF within the CMS whenever information is received, whether with a view to opening a Eurojust case or not; even for cases where it is not clear if it can be considered ultimately a Eurojust case or a case to be redirected to the European Judicial Network, a TWF would be opened, and the system seems to work well in this regard: if the analysis leads to the need to open a Eurojust case, such case would be opened in the CMS and if not, the TWF would be closed; thus, in our opinion, such newly introduced provision is unnecessary and could be dysfunctional.

As for the EPPO, the Commission Regulation Proposal mirrored the Eurojust Proposal in Article 22(6) according to which "for the processing of case related personal data,[16] the European Public Prosecutor's Office may not establish any

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identical (Article 24 of the Proposal). The definition of the CMS in the Proposal as temporary work files and index is still limiting and would, as currently drafted, not allow for a global system (including, for instance, an analytical work tool). Rather than being merely composed of temporary work files and of an index, the definition of the CMS could be reviewed in order to ensure that the CMS is rather understood as a comprehensive system for data processing, not as a single database. The system could be composed of several connected tools that would include the pure registration of cases, but that could also support basic analysis by finding links between cases and entities, and include an advanced search tool and an easy tool dedicated to statistics". The current wording of Article 24 in the Document of the Presidency 12677/17, of 2 October 2017 is significantly the same as in the COM Eurojust Regulation Proposal.

[16] The wording "case related personal data" is the same as in the Eurojust Decision; the new wording "operational personal data" included in the COM Eurojust Regulation Proposal has not been adopted in the COM EPPO Proposal.

automated data file other than the Case Management System or a temporary work file". Finally, in the EPPO Regulation, an additional possibility to process case related personal data other than within the CMS has been added: pursuant to Article 44(5) "for the processing of case related personal data, the EPPO may only establish automated data files other than case files in accordance with this Regulation and the internal rules of procedure. Details on such other automated data files shall be notified to the European Data Protection Supervisor".

The possibility of storing case related personal data in automated "data files" other than the case files "in accordance with this Regulation and the internal rules of procedure" leads to a certain degree of uncertainty and some questions arise: which situations justify the use of these automated data files? What is the IT environment used for these data files? Will it be the domestic CMS? How interoperable will these data files be with the EPPO CMS? The internal rules of procedure will have to address clearly all issues related to the recourse to these automated data files, taking into account that such recourse should be extremely limited and clearly justified.

## 4 Interconnection of the Case Management System of the European Public Prosecutor's Office and National Case Management Systems

A single EPPO CMS will have to coexist at national level with different domestic systems and, moreover, at national level different systems may well coexist in the same Member State; national CMSs are structured in very different ways (different set of data, diverse possibilities for uploading documents in the system, different languages, etc.) The EPPO CMS and the national CMSs need to be interoperable, the systems need to be configured in a way that data and all relevant information and documents can be transferred from a national CMS to the EPPO CMS and, if applicable, vice versa, in an automated fashion.

Such interconnection can be regarded as an outstanding challenge for the adequate transmission of information, and needs to take into account two variables: the number of EDPs appointed in each Member State pursuant to Article 13(2), and the regional/national Public Prosecution Offices they are seconded to. Member States may have different regional CMSs or different CMSs depending on the scope of their material competences. It is possible or even likely that these national CMSs are not interlinked and electronic transmission of data between them may not be feasible; it is also possible that some national case registration systems are not automated at all or are only partially automated.

Interoperability is particularly important in two opposite situations: when the EPPO exercises the right of evocation, the competent authorities of the Member States shall transfer the file to the EPPO (Article 27(5)) and when an EPPO investigation is transferred or referred to national authorities, if the competent

national authority decides to open an investigation, the EPPO shall transfer the file to that national authority (Article 34(7)).[17]

The number and territorial deployment of EDPs in Member States will be influenced by the crimes the EPPO will be competent for according to Article 22. For example, in the case of Spain, different scenarios can be envisaged (provided that the appointments are made only within the Prosecution Service):

- if the final decision is the appointment of only two EDPs, it is more than likely that those EDPs work within the Anti-corruption PPO, which is a central unit holding competence across country for major cases of corruption: only one interconnection is to be set up;
- if the decision leads to a higher number of EPDs and their deployment across country in different Provincial PPOs, additional interconnections might need to be set up, since at the Spanish PPO level, six different data base systems coexist.[18]

This interconnection is not an easy task, proof of that being the previous experience at Eurojust level, where, as mentioned before, the connection between the Eurojust CMS and the ENCS members as stated in Article 16b of the Eurojust Decision, to carry out the tasks described in Article 12(5)(a) of the Eurojust Decision, hasn't been set up yet, probably because of financial and technical issues.

Finally, the necessary interoperability of the EPPO CMS and the national CMSs will very likely be an opportunity for those national CMSs to complete their automatization, if absent or partial, or for updating their obsolete software.

## 5 Access to Information by the European Delegated Prosecutors

At Eurojust level its National Members, in order to fulfill adequately their tasks, shall have equivalent access to, or at least be able to obtain the information contained in public registers of the Member States, as would be available to them in their roles as prosecutors, judges, or police officers at the national level (Article 9(3) of the Eurojust Decision). Some Member States have enabled National Members to have direct access to national registers like criminal records, police records, etc. It has been acknowledged that this possibility of direct access facilitates the exercise of National Member's tasks and allows for a speedier response to the requests they receive from other National Members.

[17] Such interoperability needs to be in place only with national CMSs of national authorities with competence to conduct investigations, not with those national authorities with just reporting obligations under Article 24(1).

[18] These systems are not interoperable among themselves but via the Support Unit at the Prosecutor General's Office.

As for EDPs, pursuant to Article 43(1) they "shall be able to obtain any relevant information stored in national criminal investigation and law enforcement databases, as well as other relevant registers of public authorities, under the same conditions as those that apply under national law in similar cases".

The importance of EDPs having access to national registers is even greater than for Eurojust National Members since EDPs and national prosecutors or investigative judges have the same responsibilities in their respective fields of competence, unlike Eurojust National Members *vis à vis* national authorities; that is the reason why the same access regime applies to all of them (Eurojust National Members access is slightly different because they do not need necessarily to be granted equivalent access, they just need to be granted the possibility of obtaining the information indirectly).

In order to make this provision possible, the EPPO and Member States need to list all accessible national investigation and law enforcement databases and registers of public authorities and establish a secure connection for the transmission of information whenever such direct access is available to national authorities.[19]

## 6 Secure Communications Network

In addition to the CMS, the EPPO must put in place a secure communications network to facilitate swift and secure transmission of information among the different instances of the EPPO and the EDPs and the national bodies/agencies involved in the investigations (judicial authorities, law enforcement bodies and, if applicable, other national authorities with responsibilities towards the EPPO). With regard to the latter, we understand that such secure network should be set up by the time the EPPO starts its activities. An email functionality or a system like the *Europol Secure Information Exchange Network Application* (SIENA) may be considered.

A decision must be taken at national level as to which investigative bodies or agencies involved in the fight against PIF crimes should be linked to this secure communications network. In principle, we are considering here the authorities bound by the reporting obligations foreseen in Article 24, but the connection could be extended to other authorities. Reports and other documents delivered by these bodies or agencies should be transmitted to the EDPs via the secure network (regardless of what has been stated in relation with the interoperability of CMSs, where applicable).

[19] In the case of Spain, prosecutors and investigative judges may have direct access to a number of public registers such as Real Estate Register, Companies Register, Vehicles Register, Criminal Records, Treasury, etc. via the so called "Neutral Point". In addition, the Financial Ownership File has recently been created for the purpose of fighting against money laundering and terrorism financing; access to this powerful tool should be granted to EDPs whenever investigating money laundering offences where the predicate offence is a PIF crime.

Under this scheme, a number of secure connections must be set up for all these competent bodies and internal protocols for such purposes should be established. A simplified system for transmission of information may be considered, if Member States decide that the information is transmitted to the EPPO via a centralized communication portal usable by all reporting national authorities. Pursuant to Recital 52 of the Regulation "Member States' authorities should set up a system that ensures that information is reported to the EPPO as soon as possible. It is up to the Member States to decide whether to set up a direct or centralized system". In the case of Eurojust Article 13 notifications, different systems coexist: direct notification to the Eurojust inbox and indirect notification via Prosecutor General's Office, Eurojust National Coordination System or other.[20]

The experience of Eurojust setting up its secure communications network with national authorities has not been very successful since, to this date, the system is only in place for 14 Member States, as indicated previously in this document.

Setting up a secure communications network is a different issue than the needed interoperability of the EPPO CMS and the national CMSs. Both aspects, secure telecommunications network and CMSs interoperability, tackle different aspects of the same question and together should be regarded as the two pillars of an efficient and secure transfer of information system.

## 7 Exchange of Information Between National Authorities and the European Public Prosecutor's Office in the Regulation on the Establishment of the European Public Prosecutor's Office

As mentioned above, different variables need to be taken into account with regard to the exchange of information between the EPPO and national authorities: the diversity of such national authorities, the different moments and situations where the exchange of information can take place, and the bi-directional feature of the information exchange are the main issues to be tackled.

The general principle of the information exchange system is described in Recital 48 of the Regulation, according to which

> national authorities should inform the EPPO without delay of any conduct that could constitute an offence within the competence of the EPPO. In cases which fall outside its scope of competence, the EPPO should inform the competent national authorities of any facts of which it becomes aware, and which might constitute a criminal offence, for example false testimony.

[20] Information on this particular. Article 13 notification channel can be obtained in the "fiches suedoises".

### 7.1 Reporting National Authorities and Other Reporting Sources

Article 24 establishes that all authorities of the Member States competent in accordance with applicable national law should report to the EPPO any criminal conduct in respect of which it could exercise its competences; this provision always includes judicial authorities, law enforcement authorities and, if so provided for by national law, all other competent domestic authorities.

Member States should identify and list the "competent national authorities in accordance with applicable national law" and establish the secure connection from the very moment the EPPO starts its activities. In the case of Spain, the courts, Prosecution Service, National Police, Guardia Civil, customs authorities or regional police bodies hold competence in the sense of Article 24(1).

Law enforcement units do not need (and should not) report to the national Prosecution Service or Courts, but must contact directly the competent EDP in their Member States when the *notitia criminis* is related to a criminal conduct in respect of which the EPPO could exercise its competence, unless the investigation is already being led by a prosecutor (or an investigative judge, where applicable), in which case the information should be transmitted to the prosecutor (or judge); in these cases, it falls within the responsibility of the latter to report to the EPPO.

The Regulation foresees the possibility that the EPPO becomes aware of an investigation related to a criminal offence for which it could be competent through means other than the report referred in Article 24. This situation entails that in some way the competent national authority has failed to identify that a concrete investigation falls within the EPPO competence. For such cases, once the EPPO has become aware of such investigation, it shall inform the competent authority. The notified authority will have to report the EPPO in accordance with the aforementioned procedure (Article 27(3)).

One of these other means of becoming aware of such ongoing investigations is linked to the functions and tasks of Eurojust: through cases and TWFs opened by National Members or the abovementioned Article 13 notifications, cases falling under the competence of the EPPO could be identified; for such cases, the National Member of the nationality of the involved authority should promote the reporting mechanism to the EPPO. Nevertheless, due to the limited number of cases related to the competences of the future EPPO that Eurojust opens each year, the possibility of Eurojust National Members raising awareness about the reporting obligations among national authorities will very likely remain very low.[21]

Training on the scope of the material competence of the EPPO as well as on the rules on exchange of information with the EPPO should be provided to all competent investigative and prosecutorial bodies and agencies at national level.

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[21] The number of PIF crimes opened by Eurojust in 2016 is extremely low (41) in comparison with the total number of cases opened in the year (2.306)—Eurojust Annual Report 2016—even lower than in 2015, where from the total number of cases (2.214), 69 were related to PIF crimes.

As inferred from Article 24(7) *in fine*, individuals and private entities can also report criminal conducts to the EPPO; it will not be often that an individual or a private entity is familiar enough with the existence and competences of the EPPO to proceed to report directly to the EPPO, but certain NGOs or associations might be. In this sense, Recital 49 of the Regulation mentions that the EPPO "may receive or gather information from other sources such as private parties". To this end, the information provided by justice collaborators or whistle-blowers may be of paramount relevance; Recital 50 of the Regulation urges

> Member States to provide, in accordance with their national law, effective procedures to enable reporting of possible offences that fall within the competence of the EPPO and to ensure protection of the persons who report such offences from retaliation, and in particular from adverse or discriminatory employment actions. The EPPO should develop its own internal rules if necessary.

## *7.2 Situations to be Reported and Content of the Report*

The material competence of the EPPO has been defined in Article 22 of the Regulation and the territorial and personal competence in Article 23. Pursuant to Article 24, different situations need to be reported to the EPPO:

- All authorities of the Member States, whether judicial or law enforcement authorities or not, competent under the applicable national law, should report the EPPO the *notitia criminis* related to a criminal conduct which may fall within the competence of the EPPO pursuant to Articles 22 and 25(2) and (3). This reporting obligation does not require that a criminal investigation has already been initiated at national level (Article 24(1)).
- Judicial or law enforcement authorities need to report the EPPO any investigations they may have initiated with respect to criminal offences for which the EPPO could exercise its competence in accordance with Articles 22, 25 (2) and (3) or if any time after the initiation of the investigation it appears that the investigation concerns such an offence. Thus, the circumstances triggering the reporting obligation can appear at the beginning of the investigation or any time later in the course of the national investigation (Article 24(2)).
- The obligation applies even when the competent judicial or law enforcement authorities understand that the EPPO should refrain from exercising its competence in application of Article 25(3) (cases in connection to other inextricably linked crimes where the EPPO shouldn't exercise competence because the PIF crime is not preponderant or where the damage caused to the EU does not exceed the damage caused to another victim) (Article 24(3)).
- With regard to minor crimes (damages under the threshold of EUR 10,000), only cases where the two alternative situations described in Article 25(2)—the case has repercussions at Union level or the perpetrators are officials or other servants of the EU, or members of the Institutions—allow the EPPO to exercise its

competence. Pursuant to (Article 24(5)) national authorities should report the EPPO where an assessment of whether such criteria are met is not possible, taking into account the available information.

With respect to the last reporting obligation, reading together Articles 24(1), (2), (3) and (5) and Article 25(2) we come to the conclusion that the competent national authorities do not need to make a report if the internal assessment leads to the conclusion that the criteria set out in Article 25(2) are not met; for such cases the EPPO will not be able to carry out a parallel assessment. This situation has been criticized from sectors believing that the EPPO should have the possibility of analyzing all cases even when the competence should not be exercised by it, because this assessment of the merits of the case cannot be left to national authorities alone.[22]

Nevertheless, as stated in Recital 53 of the Regulation,

> the EPPO should also be able to request information from the Member States' authorities on a case-by-case basis about other offences affecting the Union's financial interests. This should not be considered as a possibility for the EPPO to request systematic or periodic information from Member States' authorities concerning minor offences.

In the course of the negotiations of the Regulation, some versions included the need to report all cases between EUR 1000 and EUR 10,000 through a "periodical summary report".[23] This cumbersome need to report all PIF crime cases even when the EPPO should refrain from exercising jurisdiction had raised criticism and was abandoned at early stages of the negotiations.

In any event, the "philosophy" that lies in the Regulation is that in case of disagreement between the national authorities and the EPPO, the former will decide (Article 25(5)). The question will be decided at national level because, according to Article 25 (6), "the national authorities competent to decide on the attribution of competences concerning prosecution at national level shall decide". This important question raises significant issues that go beyond the scope of this document.

The report produced by the competent national authorities related to the criminal conduct in respect to which the EPPO could exercise its competences shall contain, for all reported cases, "a description of the facts, including an assessment of the damage caused or likely to be caused, the possible legal qualification and any

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[22] Recital 59 provides some guidance to the EPPO and to national authorities as to which situations should be considered as having repercussions at EU level: "a particular case should be considered to have repercussions at Union level, inter alia, where a criminal offence has a transnational nature and scale, where such an offence involves a criminal organization, or where the specific type of offence could pose a serious threat to the Union's financial interests or the Union institutions' credit and Union citizens' confidence".

[23] According to some versions of the draft Regulation, minor cases where the conduct had caused or is likely to cause damage to the Union's financial interests of less than EUR 10,000 where there were no grounds to assume that the EPPO would exercise its right of evocation (because of the case has no repercussion at Union level or because the crime has not been committed by officials or other servants of the EU or members of the Institutions), the reporting obligation could be fulfilled through a "summary report". This "summary report" included a more limited set of data but, as an additional guarantee, it had to be reiterated or updated periodically (every 3 or 6 months). Minor cases under the threshold of EUR 1000 didn't need to be reported.

available information about potential victims, suspects and any other involved persons" (Article 24(4)). This is not a closed list of types of information to be provided and any relevant additional information can be added. For individuals or private entities reporting to the EPPO the Regulation does not provide specific procedures or formalities.

## *7.3 Registration and Verification of the Reported Information*

The report produced by the competent national authorities has a twofold objective: to assess whether there are grounds to initiate an investigation or to exercise the right of evocation, and to identify other possible ongoing investigations.

The information provided by national authorities via these reports will be included in a register which constitutes the "first level" of the CMS pursuant to Article 44(4a); this register is directly accessible at all different levels within the EPPO structure (Article 46).

An electronic form like in Eurojust Article 13 notifications should be considered for the reporting obligation foreseen in Article 24 of the Regulation. This form should have all the above mentioned fields (facts, estimation of damages, legal classification, suspects, victims, and other involved persons) and an additional blank field to include other important information.

It is extremely important that national authorities include all the relevant data in their reports, including personal data, to allow the system to cross reference the information provided with other ongoing investigations. The experience of Eurojust in Article 13 notifications shows extremely poor results with regard to feedback to national authorities as foreseen in Article 13a[24]; deficiently filled in forms may be one of the reasons for these poor results, due to the fact that Eurojust does not receive adequate information and it won't be able to analyze the information from the different investigations on the basis of the hit-no hit functionality.

The internal rules of procedure will have to address all aspects related to the reporting, registration and verification of the information provided by national authorities. According to Recital 49 of the Regulation "a verification mechanism in the EPPO should aim to assess whether, on the basis of the information received, the conditions for material, territorial and personal competence of the EPPO are fulfilled".

National authorities, whether reporting or not, will have to cooperate with the EPPO to facilitate the verification of the reported information.

[24] 2016 Eurojust Annual Report does not include any information with regard to hits found in the cross matching process and feedback provided to national authorities pursuant to Article 13a.

### 7.4 *Decision Making Process Within the European Prosecutor's Office*

Upon reception of the report transmitted by national authorities, the EPPO may take different decisions: initiation of an investigation or evocation of a case, non-initiation of an investigation or non-evocation of a case or, at a later stage, refer and transfer the case. These decisions are also part of the register of the CMS.

The decision to initiate an investigation or to evoke a case could be taken either by the EDP (Articles 26(1)—initiation—and 27(6)—evocation—) or "where necessary" by the competent Permanent Chamber instructing the EDP (Articles 10(4)(a) and 26(3), initiation where no investigation has been initiated by the EDP, and Articles 10(4)(b) and 26(4), evocation where the case has not been evoked by the EDP) when there is a discrepancy between the Chamber and the EDP.

The decision to initiate an investigation will be noted by the EDP in the CMS (Article 26(1)); the same procedure will have to be applied in case of evocation.

An investigation opened or a case evoked by the EPPO may be further referred to the competent national authorities when the investigation reveals that the facts do not constitute an offence under Articles 22 and 23 or the specific conditions for the exercise of the competence set out in Article 25(2) and (3) are no longer met (Article 34(1) and (2)). To our understanding, the referral decision should also be noted in the CMS.

If the assessment leads to a decision not to open an investigation or evocate a case, such decision will have to be also noted in the CMS (Article 24(7)).

Interaction between national authorities and the EPPO is permanent and bi-directional in the course of the investigations and additional decisions to evoke or refer a case after the initial decision may be also taken: after a decision not to evoke a case, national authorities should report new facts which could give the EPPO reasons to reconsider its previous decision and, after a decision to evoke a case, the EPPO could refer an investigation to the national authorities when the investigation at a later stage leads to the assessment that the abovementioned conditions for the exercise of the competence are no longer met.

A clear feature of the bi-directionality of the reporting obligations is stated in Article 24(8) pursuant to which the EPPO shall inform the competent national authorities and forward all relevant information to them when it comes to the knowledge of the EPPO that a crime outside the scope of the EPPO may have been committed. The transfer of such information should be channeled via the CMS.

A smooth, secure and speedy system to transfer the relevant information and documents from the national CMS to the EPPO CMS (in case of evocation) and *vice versa* (in case of referral) will have to be set up. The specific conditions of such transfer of information may be addressed in the internal rules of procedure.

With regard to the time limits for the decision making and the adoption of urgent measures within the EPPO, different regimes have been designed:

- Initiation of an investigation:
  - When the EPPO has received the *notitia criminis* via a report from the competent national authority or otherwise via information provided by an individual or private entity, such information needs to be verified and if a decision is taken to initiate an investigation, the EDP will do so (Article 26(1)). No time limits have been established in the Regulation for the adoption of such decision. No particular provisions have been included in the Regulation with regard to the possibility for national authorities to adopt decisions or urgent measures when the assessment of the EPPO is ongoing.
- Evocation of a case:
  - A time limit of 5 days plus an additional period of another 5 days has been introduced in Article 27(1) and (7) both for the initial decision to evoke a case or for the decision to evoke a case after an initial negative decision when the national authorities have reported new facts occurred in the course of the investigation (Article 27 (1) and (7)). Pursuant to Article 27(2), during the period when the EPPO is in the course of taking the decision whether or not to evoke a case, the national authorities can adopt any urgent measures to ensure effective investigation and prosecution.

In our opinion, there is no justification for such different regimes (initiation versus evocation), because the need for the adoption of decisions or urgent measures can arise before an investigation has been opened (which, depending on the applicable national legislation might be possible without a formal opening of an investigation), at the time of being opened or at any stage before it has been concluded. For this reason, the possibility to adopt urgent measures by the national authorities when the decision on the opening of an investigation is pending should have been included, and clear deadlines for the adoption of decision to initiate the investigation upon receiving the report from the national authority should have also been included in Article 26(1).

In any case, reading together both Articles, the Regulation should be construed in the sense that nothing in it is opposed to the possibility for national authorities to adopt urgent measures when the verification process for the initiation of an investigation is ongoing. This conclusion is somehow implicit in Recital 107 which makes no distinctions when addressing the need to grant the adoption of urgent measures.

## 7.5 Notification to National Authorities of the Decisions Taken by the European Public Prosecutor's Office

The EPPO shall notify the reporting national authority of the decision taken after the verification process: any decision to exercise or to refrain from exercising competence will be notified to the competent national authority without undue delay (Article 25(5)).

The EPPO should also inform national authorities without undue delay when it comes to the knowledge of a criminal conduct outside the scope of its competence (Article 24(8)).

These decisions should be noted in the CMS (Article 24(7)); the specific reasons why the EPPO decides there are no grounds to initiate an investigation or to exercise the right of evocation should also be noted in the CMS (Article 24(7)).

Notification to competent national authorities could be made using the same channel used by the latter when exercising the initial reporting obligation and perhaps a standardized form could be used for such purpose.

## 7.6 Information to Victims or Other Persons of the Decision Taken by the European Public Prosecutor's Office

Pursuant to the Regulation, the decisions taken by the EPPO must be notified not only to the reporting national authorities, but also to interested or affected persons; the notification regime in the Regulation is, in our opinion, somewhat inconsistent. Three different scenarios that may occur in the investigative phase can be described here:

- According to Article 24(7), when the EPPO decides not to initiate an investigation, it should notify the authority that reported the criminal conduct, "as well as to crime victims and if so provided by national law, to other persons who reported the criminal conduct". The mandatory notification to "crime victims" raises important issues: this mandatory notification may jeopardize the national criminal investigation that eventually may be continued at national level after the decision of the EPPO not to initiate the investigation. The notification to crime victims should be carried out following the same regime as the notification to "other persons who reported the criminal conduct", that is to say, only "if so provided by national law".
- If the decision taken by the EPPO is to initiate an investigation, no specific provision is included in Article 26(2), thus, in principle neither victims nor persons who reported the criminal conduct would be informed. As for the exercise of the right of evocation, Article 27 remains also silent. How crime victims would exercise their rights in investigations and proceedings conducted by the EPPO is a topic that goes beyond the objectives of this article.
- In cases where an investigation conducted by the EPPO is referred to national authorities (because the facts do not constitute a criminal offence for which the EPPO is competent under Articles 22 and 23, because the specific conditions to exercise the competence under Article 25 (2) and (3) are no longer met, or because with reference to the degree of seriousness or the complexity of the proceedings there is no need to investigate or prosecute at Union level in case where the damage is less than EUR 100,000), according to Article 34 (8), the EPPO shall inform "where appropriate under national law, suspects or accused persons

and the crime victims of the transfer". Pursuant to Article 39.4, the same notification regime applies for dismissal of cases.

Three different regimes for notification coexist here, in particular in relation to crime victims: when the decision taken is not to open an investigation (Article 24(7)), victims will always be informed; when the decision taken is to open an investigation (Article 26 (2)) or to evoke a case (Article 27), victims wouldn't be informed—the Regulation remains silent in this regard—and when the decision taken in an ongoing investigation is to refer the case to national authorities (Article 34(8)) or to dismiss a case (Article 39 (4)), victims will only be informed "where appropriate under national law". Suspects are only referred to in the third described situation (case referrals to national authorities and case dismissals) and they would also be notified in such cases only "where appropriate under national law".

Victims other than the Union—in the type of criminal activity that we are considering here—are third parties that may have been identified as a consequence of other inextricably linked offences in the same investigation or that may have been identified in criminal activities where the Union is the main victim.

Mandatory notification to victims with regard to the decision not to initiate an investigation as stated in Article 24.7 is opposed to the situation described under Article 39.4, pursuant to which the decision to dismiss a case will be notified to victims, as well as to suspects or accused persons, "where appropriate under national law". Thus, such notification will be carried out by the EPPO whenever a decision not to initiate an investigation is taken, but only if so provided by national law in case a decision to dismiss a case is taken: in our opinion such notification should be the other way round.

Despite the fact that we are not considering decisions taken by national authorities but by the EPPO, the European legal framework with respect to the right of victims to receive information about their case can provide guidance and may be taken into account. Directive 2012/29/EU[25] establishes in its Article 6 (1a) that Member States shall ensure that victims are notified "of any decision not to proceed with or to end an investigation or not to prosecute the offender". In light of this provision, mandatory notification to victims in case of dismissal of a case (Article 39.4) would have made more sense than mandatory notification to victims in case of non-initiation of an investigation (Article 24.7) due to the fact that in the latter case national authorities may decide to initiate an investigation and thus the objective of notifying victims the decision not to initiate the investigation is somehow no longer met because of the decision on the initiation of an investigation that the national authority may take (if it does not, then such notification, maybe by the national authority itself, is adequate). The practical effects of the decision not to initiate the investigation (Article 24.7) and of the decision to refer a case (Article 34) may be identical, because national authorities may decide to initiate an investigation; this is

[25] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

the reason why victim's notification regime should be the same, that is to say, when appropriate under national law.

And moreover, such mandatory notification may jeopardize the national investigation that may be initiated due to the fact that, despite the right of victims pursuant to the abovementioned legal framework, it may affect the secrecy of proceedings at national level. The victims Directive provides in Article 6 (2b) for clear rules in this respect: victims are entitled to be informed about the state of the criminal proceedings, unless in exceptional cases the proper handling of the case may be adversely affected by such notification. Depending on the circumstances of the case or the procedural regime, the secrecy of proceedings might be necessary in the beginning of the investigation; in such cases victims would be informed at a later stage and they would then be able to exercise their rights according to the applicable national law, which should be aligned with the victims Directive. The national rules on secrecy of proceedings and disclosure should always be taken into consideration whenever there is a possibility that national authorities may decide to initiate an investigation following a decision of the EPPO not to do so: a very likely possibility in these cases of shared material competence.

## 8 Concluding Remarks

As a corollary of all that has been analyzed in this article, in line to what was stated in its beginning, a main conclusion can be drawn: an adequate, secure and fast exchange of information system between national authorities and the EPPO can be regarded as one of the fundamental principles in which the structure of the EPPO is based and will pave its way to effectiveness.

The experience gathered by Eurojust with regard to the legal framework related to the exchange of information with national authorities, the management of transferred data, the results of the analysis and assessments conducted in this field as well as lessons learned may be considered as an interesting starting point when addressing similar aspects in the context of the EPPO.

Unlike in the Commission Proposal, the Regulation has opted for a tailor-made EPPO CMS which is not "built on" the Eurojust CMS due to the different nature and functions of Eurojust as a judicial cooperation unit and the EPPO as a body of the Union responsible for investigating, prosecuting and bringing to judgment criminal conducts.

A robust CMS, its interoperability with national CMSs wherever this is needed, as well as a secure communications network must be considered as the necessary IT tools to channel the exchange of information.

The fact that very different national CMSs coexist in all the participating Member States—and even within the same Member State—and that some of them might not be automated, poses an outstanding challenge for their interoperability with the EPPO CMS.

In order to fulfill its tasks, the EPPO CMS should have a number of adequate functionalities and specificities to develop a powerful engine for the management of data rather than a simple database.

Different approaches and sensibilities have coexisted in the course of the negotiations with regard to the amount of data to be transferred to the EPPO CMS: those who understood that only the minimum needed information should be shared and those who considered that all available information should be included in the CMS. The Regulation has opted for a model of a comprehensive CMS, more aligned with the second option, where all information from case files stored electronically should be included, establishing a system that enables access to case files as well (which are not *per se* part of the CMS). The system grants the exercise of the control and supervision functions at central level within the EPPO, which is part of the concept of “central office”.

The architecture of the CMS is based in three different levels of information (a register, an index and all information from case files stored electronically) and establishes its main features; nevertheless the College, upon proposal of the European Chief Prosecutor, has a high margin of maneuver in the internal rules of procedure to address all issues related to the reporting and verification of the information exchanged, organization and management of the different levels of the CMS and case files, the conditions under which storage of information in electronic files other than the CMS is admissible and other related matters. The way these questions are tackled in the internal rules of procedure will have a significant impact in the fulfillment of the tasks of the CMS.

The Regulation introduces the principle of mandatory cooperation of national authorities with the EPPO. Such authorities should report to the EPPO any criminal conduct in respect to which it could exercise its competence before or in the course of the investigation or prosecution. The EPPO can decide whether or not to initiate an investigation, exercise the right of evocation or, being that the case, to refer a case to the national authorities.

The criminal conducts for which the EPPO is competent are a field of shared material competence; this is the reason why some are of the opinion that the EPPO should always be informed and be able to verify all criminal offences falling under the scope of its competence, including all cases where it should not exercise its competence; this possibility does not always apply because national authorities do not need to report to the EPPO in all the mentioned cases.

The reporting obligation is bidirectional—due to the fact that the EPPO should also inform national authorities of any criminal conduct outside of the scope of its competence—and permanent while the investigation or the prosecution is ongoing, because if new circumstances arise in the course of such investigation or proceedings, the national authority should report to the EPPO or the EPPO refer the case to the national authorities.

The Regulation provides for the possibility that the EPPO becomes aware of criminal conducts within its scope of competence by means other than the reports from national authorities, such as private parties; Eurojust may also play a role identifying such cases. This may be a way to minimize the impact of lack of action of

national authorities that have failed to identify cases which should have been reported or simply have forgotten to report or haven't reported because of negligence.

As regards the decision making process within the EPPO while the verification of the reported information is ongoing, for the adoption of the decision to evoke a case the Regulation introduces deadlines and the possibility for national authorities to adopt urgent measures in the period comprised between the moment when the information has been received by the EPPO and the adoption of the decision. Such provisions on deadlines and adoption of urgent measures are not foreseen with respect to the process of adoption of the decision to initiate an investigation: in our opinion, this different regime cannot be justified. The Regulation should be construed in the sense that nothing in it is opposed to the possibility for national authorities to adopt urgent measures when the verification process for the initiation of an investigation is ongoing.

In relation to the notifications to victims, persons who reported the criminal conduct, suspects or accused persons, the Regulation introduces different regimes depending on which decision is taken: initiation of an investigation (or evocation of a case), non-initiation of an investigation or referral of a case to national authorities (or dismissal of a case). We consider that the notification regime is to a certain extent inconsistent and notifications to victims, foreseen as mandatory for cases of non-initiation of an investigation, should be carried out only if so provided by national law. Mandatory notification to victims might jeopardize the outcome of the investigation that may be initiated by national authorities following a decision of the EPPO not to initiate an investigation, affecting national rules on secrecy of proceedings and disclosure.