Conflicts of competence between the EPPO and national prosecution authorities

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This paper examines conflicts of competence between the European Public Prosecutor's Office (EPPO) and national prosecution authorities, emphasising the strategic and symbolic importance of such disputes within the European Area of Freedom, Security and Justice. After outlining the complex legal framework governing the EPPO's scope of competence, the author analyses the implications and rationale of the conflict resolution mechanism laid out in the founding regulation. Two emblematic cases are then discussed, which revealed shortcomings in cooperation and mutual trust between European and domestic authorities. Finally, potential amendments to the founding regulation are presented and examined, with the aim of increasing the coherence and consistency in the application of EU law across Member States.

1 Introduction

Conflicts of competence between the EPPO and national prosecution services are of great strategic and symbolic importance, as they concern the division of vertical jurisdiction between European and domestic authorities. Ultimately, the balance and division of powers between the two levels of an integrated criminal justice system are at stake.[1]

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* Author's note: This contribution is based on the presentation given on 1 April 2025; the narrative style was maintained.

1 For an overview and analysis of conflicts of competence between the EPPO and national prosecution services, indicating the substantial interest of legal scholars in this topic, see L Bachmaier Winter, 'EPPO versus national prosecution office. A conflicting case of competence with broader dimensions' in M Luchtman (ed), *Of swords and shields: due process and crime control in times of globalization. Liber amicorum prof. dr. J.A.E. Vervaele* (Eleven 2023) 515; A Hernández López, 'Settlement of Conflict of Competence between the European Public Prosecutor's Office and National Authorities: The Spanish Case' in B Ubertazzi (ed), *The EPPO and the Rule of Law* (G. Giappichelli Editore 2024) 99; L Pressacco, 'I "conflitti di competenza" tra il pubblico ministero

Furthermore, this issue affects – at least indirectly – the independence and powers of the EPPO, thereby impacting its ability to perform the tasks set out in Article 86 of the Treaty on the Functioning of the European Union (TFEU).[2]

Evidence of this phenomenon can be seen in the two major disputes that arose between the EPPO and national prosecution authorities in the early years of the Office's establishment: one of which occurred in Spain and the other in Croatia.[3] These conflicts attracted considerable media attention, with both 'parties' publicly adopting rather passionate tones in their public statements. In this essay, I will attempt to identify the lessons that can be learned from these experiences, before suggesting possible amendments to the EPPO's founding regulation in order to achieve a more balanced approach.

Before addressing the main point of this paper, I will provide some background information to offer a more comprehensive understanding of the legislative framework and how it is applied in practice. As these topics have been widely discussed among scholars, I will limit myself to a few key points relevant to the main argument.

2 Background: delimiting EPPO's Material Competence

The starting point is, of course, the considerable complexity of the provisions outlining the EPPO's material competence in the founding regulation, which contributes to legal uncertainty.[4] Notably, the final Regulation estab-

europeo e gli organi requirenti nazionali' in G Di Paolo, L Pressacco, R Belfiore and T Rafaraci (eds), *L'attuazione della Procura europea. I nuovi assetti dello spazio europeo di libertà, sicurezza e giustizia* (Editoriale Scientifica 2022) 161.

2 In this regard, see J Vervaele, 'Outlook on the European Public Prosecutor's Office: A Giant with National Clay Feet?' in M Luchtman, K Ligeti and J Vervaele (eds), *EU Enforcement Authorities. Punitive Law Enforcement in a Composite Legal Order* (Hart Publishing 2023) 313, where the author notes that 'effective enforcement of the policy goals is determined by the institutional design, tasks and powers [of the EU enforcement agencies], and their interactions with national partners'.

3 For further information on these disputes, see subsequent 4.

4 For a comprehensive analysis, see G Grasso, R Sicurella and F Giuffrida, 'EPPO Material Competence: Analysis of the PIF Directive and Regulation' in K Ligeti, MJ Antunes and F Giuffrida (eds), *The European Public Prosecutor's Office at Launch. Adapting National Systems, Transforming EU Criminal Law* (CEDAM 2020) 23; D Vilas Àlvarez, 'The Material Competence of the European Public Prosecutor's Office' in L Bachmaier

lishes a sophisticated system of shared competences between the EPPO and national prosecution services that differs from the Commission's original proposal.[5]

Consequently, the EPPO's actual field of intervention results from the intersection between the traditional 'abstract' or 'static' criteria *ratione materiae*, *loci* and *personae* (Articles 22 and 23 of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (EPPO Regulation)) and the 'concrete' or 'dynamic' criteria that define its powers (Articles 25(2), (3) and (4) EPPO Regulation).[6] In other words, we are faced with a flexible and adaptable system of prosecutorial powers that are divided between the European and the national levels according to the specific circumstances of each case, in line with the principle of subsidiarity (Article 5 of the Treaty on European Union).

This basic approach – together with a series of other factors related to the specific features of the provisions setting out the EPPO's material jurisdiction[7] – makes the issue of conflicts of competence 'an actual and rel-

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Winter (ed), *The European Public Prosecutor's Office. The Challenges Ahead* (Springer 2018) 25.

5 See K Ligeti, 'The European Public Prosecutor's Office' in V Mitsilegas, M Bergström and T Quintel (eds), *Research Handbook on EU Criminal Law* (Edward Elgar Publishing 2024) 462, 475; V Mitsilegas, 'European Prosecution between Cooperation and Integration: The European Public Prosecutor's Office and the Rule of Law' (2021) 28 *Maastricht Journal of European and Comparative Law* 245, 248; V Mitsilegas, 'The European Public Prosecutor's Office facing national legal diversity' in C Nowak (ed), *The European Public Prosecutor's Office and National Authorities* (CEDAM 2016) 11, 20.

6 H-H Herrnfeld, 'Article 25' in H-H Herrnfeld, D Brodowski and C Burchard (eds), *European Public Prosecutor's Office: Article-by-Article Commentary* (Nomos 2021) mn 26.

7 The most important factors to consider are as follows: (a) The scope of competence is determined by referral to 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 (PIF Directive), as implemented by the relevant national legislation; (b) Material competence is not defined by the type of crime or the severity of the penalty under the law, but by the amount of fraud (which could be difficult to calculate or even unknown during preliminary investigations); (c) The EPPO's material competence covers offences that are inextricably linked to the crimes set out in Article 22 of the EPPO Regulation, but is subject to the limitations and exceptions provided for in Article 25 of the EPPO Regulation. On the relevance of national legislation to the definition of the EPPO's sphere of competence, see L De Matteis, 'The EPPO's Legislative Framework: Navigating through EU Law, National Law and Soft Law' (2023) 14 *New Journal of European Criminal Law* 6, 11 and 13.

evant phenomenon that [far from remaining theoretical] is becoming one of the main stumbling blocks for the body in this first stage of operational activities'[8].

To better understand the operational implications of this system of shared competences, it is worth bearing in mind that it relies on the EPPO's priority and right of evocation.[9] This implies that when the EPPO decides to exercise its competence – in the manners laid out by the founding regulation – the competent national authorities 'shall transfer the file to the EPPO and refrain from carrying out further acts of investigation in respect of the same offence' (Article 27(5) EPPO Regulation).

For this system to work in practice, the EPPO and the competent national authorities need to cooperate loyally, through an accurate and continuous exchange of information. Therefore, it is no coincidence that the founding regulation emphasises the principle of sincere cooperation,[10] which is reflected in a strict set of mutual reporting obligations.[11] Paradoxically, the occurrence of conflicts of competence is, to some extent, connected with this principle. Indeed, such conflicts are unlikely to arise or be resolved in the absence of timely and effective communication between the EPPO and the relevant national authorities.[12]

Two further comparative law issues must also be taken into consideration before proceeding, namely the various models of preliminary investigations in force in the EU Member States and the principles that inform prosecutorial decision-making in these countries[13].

8 Hernández López (n 1) 100.

9 See Recital 13 EPPO Regulation.

10 See Art 5(6) EPPO Regulation: 'The competent national authorities shall actively *assist* and *support* the investigations and prosecutions of the EPPO. Any action, policy or procedure under this Regulation shall be guided by the principle of sincere cooperation'.

11 Consider the complex and detailed structure of Article 24 of the EPPO Regulation.

12 It is worth noting that Article 27(7)(2) of the EPPO Regulation explicitly states that the EPPO may exercise its right of evocation after receiving the relevant information from national agencies only if the domestic investigation has not already been finalised and an indictment has not been already submitted to a (national) criminal court. Consequently, one might wonder whether the EPPO is prevented from exercising its right to evocation in cases where national authorities failed to provide the information required by Article 24 of the founding regulation (and the EPPO was not otherwise aware of pending domestic criminal proceedings).

13 On the relevance of legal comparison as a scientific and operational tool for understanding the legal design and the daily functioning of the EPPO, see V Fransen and M Simonato, 'The European Public Prosecutor's Office (EPPO) as a Laboratory of

2.1 The setting of the investigation: Public prosecutor versus Investigative Judge

While some states have adopted a model in which the public prosecutor leads the investigations (seeking judicial authorisation only for specific acts hindering fundamental rights), in other countries the investigating judge (who typically gathers evidence that can be used in court) still prevails, overseeing inquiries and prosecutorial decisions.[14] This distinction is highly relevant to the subject under consideration, since it usually affects which national authority – a judicial court or a top prosecutor – is entitled to decide who should continue the investigation, in the event of a disagreement between two different offices.[15]

2.2 Prosecutorial decisions: Legality versus Opportunity

For our purposes, another important distinction is between legal systems where prosecution is *mandatory* and thus based on the legality principle, and countries that enable *discretionary* prosecution based on the serious-

Comparative Law' in M Luchtman (ed), *Of swords and shields: due process and crime control in times of globalization. Liber amicorum prof. dr. J.A.E. Vervaele* (Eleven 2023) 553.

14 On this matter, see A Marletta, 'It takes two to tango. The relationship between the European Public Prosecutor and the *Juge d'instruction* from the Luxembourg Perspective' in Ligeti, Antunes and Giuffrida (eds) (n 4) 187; G Di Paolo, 'EPPO's Transformative Powers on Criminal Justice in the Member States: The Impact of International and European Law on Criminal Procedure' (2024) 33 (5) *Studia Iuridica Lublinensia* 31, 35.

15 To illustrate this, one can consider Article 9 of the Spanish law implementing the EPPO Regulation (Ley Orgánica 9/2021, de 1 de julio, de aplicación del Reglamento (UE) 2017/1939 del Consejo, de 12 de octubre de 2017, por el que se establece una cooperación reforzada para la creación de la Fiscalía Europea). The provision makes a distinction between two scenarios. If the case is still at the preliminary investigation stage, any conflict between the EPPO and the Spanish national authorities must be settled by the Head of the Public Prosecution Service (the *Fiscal General del Estado*). If, on the contrary, a judicial investigation is already underway – being conducted by an investigating judge – the conflict will be referred to the Criminal Chamber of the Spanish Supreme Court. The French law implementing the EPPO Regulation also takes a very similar approach: compare Articles 696–135 and 696–136 of the French Code of Criminal Procedure, introduced by Law No 2020–1672 (Loi n° 2020–1672 du 24 décembre 2020 relative au Parquet européen, à la justice environnementale et à la justice pénale spécialisée).

ness of the offence and the public interest in prosecuting crimes.[16] Although conflicts of competence may occur in both legal systems, it is unlikely that 'negative' conflicts – where both the EPPO and the national authorities refuse to investigate a potential crime[17] – will arise in countries that accept the discretionary nature of criminal prosecution. This is because it is considered perfectly legitimate for public prosecutors to refrain from investigating and prosecuting certain offences. If neither party is willing to continue the investigation, the question of compliance with Article 325 TFEU may come up, since it requires the effective prosecution of conduct that is detrimental to the European financial interests. However, for the reasons explained above, it seems unlikely that this scenario would result in a negative conflict between the EPPO and the national prosecution service.

3 Conflicts of competence in the EPPO Regulation

Turning now to the solution offered by the European legislator, Article 25(6) of the EPPO Regulation states that '[i]n the case of *disagreement* between the EPPO and the national prosecution authorities over the question of whether the criminal conduct falls within the scope of Article 22(2), or (3) or Article 25(2) or (3), the *national authorities* competent to decide on the attribution of competences concerning prosecution at national level shall decide who is to be competent for the investigation of the case', and further adds that 'Member States shall specify the national authority which will decide on the attribution of competence'.

To fully understand how the legal system is shaped, two essential questions must be clarified: 1) What are the main consequences of this rule? 2) What is the rationale behind it?

16 For an overview of the principles that inform decisions on whether to prosecute, see D De Vocht, 'Prosecution and Alternatives' in C Peristeridou and A Klip (eds), *Comparative Perspectives of Criminal Procedure* (Intersentia 2024) 131, 133. Interesting reflections on the relevance of the distinction under scrutiny with a view to the implementation of the EPPO can be found in W Geelhoed, 'Embedding the European Public Prosecutor's Office in Jurisdictions with a wide scope of prosecutorial discretion: the Dutch example' in Nowak (ed) (n 5) 87.

17 For this scenario, see Herrnfeld (n 6) mn 26.

3.1 Implications of the Rule

As has been correctly pointed out, there are three fundamental implications that can be drawn from the provision under consideration.[18]

3.1.1 The subject matter of the conflict

The first basic idea is that possible conflicts of competence between the EPPO and national authorities are limited to *specific cases*. Therefore, technically speaking, no 'conflict' can arise outside of the cases set out in Article 25(6) of the EPPO Regulation. Based on this premise, any disagreement that gives rise to a conflict must therefore relate to the following circumstances:

- the existence of a criminal organisation, as defined in Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime and implemented in national law, which focuses on committing PIF offences (Article 22(2) EPPO Regulation);
- the existence of an inextricable link between a PIF offence and any other criminal conduct (Article 22(3) EPPO Regulation);
- if a minor PIF case (i.e. with an estimated damage of less than EUR 10,000) has repercussions at the European level and thus requires an investigation by the EPPO (Article 25(2) EPPO Regulation);
- if the maximum sanction provided for a PIF offence is equal to or less severe than that for an inextricably linked offence and, eventually, if the latter is purely instrumental to the former (Article 25(3) EPPO Regulation); or
- if the damage caused or likely to be caused to the Union's financial interests by a criminal offence exceeds the damage caused or likely to be caused to another victim (Article 25(3) EPPO Regulation).

In practice, disagreements may occur in circumstances other than those listed in Article 25(6) of the EPPO Regulation. For instance, one might consider whether a certain conduct can be classified as an offence outlined in the PIF Directive, as implemented by national law, or whether the VAT fraud has caused damage amounting to more than EUR 10 million (Article 22(1) EPPO Regulation). However, in such cases, the EPPO's assessment

18 See Hernández López (n 1) 103 and 104.

should prevail, at least because the provision indicates that the intention of the drafters was clearly to restrict cases of potential conflict (*ubi lex voluit dixit*, *ubi noluit tacuit*).[19]

3.1.2 Design of the dispute resolution mechanism

The second deduction we can draw from Article 25(6) of the EPPO Regulation is that any conflict of competence between the EPPO and the national prosecution authorities must be settled – at least at first instance – by a national authority of the Member State concerned, selected by the latter and through the appropriate procedure established by domestic legislation.[20] This solution certainly respects the procedural autonomy of the Member States, as well as their judicial traditions and organisations. However, the outcome is a 'variable geometry' system, the rationality and effectiveness of which can be questioned. Therefore, it is reasonable to consider amending the legal provision under examination to include some elements of *minimum harmonisation* while preserving national differences.[21]

19 See also Recital 58 EPPO Regulation: 'The competence of the EPPO regarding offences affecting the financial interests of the Union should, as a general rule, take *priority over national claims* of competence so that it can ensure consistency and provide steering of investigations and prosecutions at Union level'. A different interpretation is put forward in Grasso, Sicurella and Giuffrida (n 4) 40 footnote 59, highlighting that Recital 62 of the EPPO Regulation suggests that *any case of disagreement* over the questions of exercise of competence should be decided by the competent national judicial authority. However, it should be noted that – while the preamble to the Union's legislative acts can serve as an interpretative criterion – it cannot be used to overturn the meaning of the statute's wording.

20 See the Decision 029/2021 of the College of the European Public Prosecutor's Office of 21 April 2021 Adopting operational guidelines on investigation, evocation policy and referral of cases, amended by Decision 007/2022 of 7 February 2022 and by Decision 026/2022 of 29 June 2022 of the College of the EPPO, Annex 1 4.1. lit. c): 'In the absence of a specific procedure established by the Regulation, the EPPO shall comply with the rules established by the national Law regarding the resolution of conflicts of competence and address the authority specified by the concerning Member State as the appropriate to decide on the attribution of competence'.

21 We can already see an indication of this strategy in Recital 62 of the EPPO Regulation: 'The notion of competent national authorities should be understood as any *judicial* authorities which have competence to decide on the attribution of competence in accordance with national law'. Therefore, it seems that the task cannot be assigned to an *administrative* or *political* authority, such as the Minister of Justice.

3.1.3 The authority settling the dispute

A third conclusion that can be drawn from the provision in question is that the authorities designated by the Member States for the purposes of Article 25(6) of the EPPO Regulation must be 'competent to decide on the attribution of competences concerning prosecution at national level'. However, this could lead to illogical or inconsistent consequences. Indeed, in many Member States, the authority bestowed with the power to settle disputes between prosecution authorities is, in turn, a higher national prosecutorial body.[22] These authorities are typically judicial bodies consisting of magistrates. They may be more or less autonomous of the executive but, in any case, they are generally not considered to meet the criteria for recognition as a 'court' or a 'tribunal' under Article 267 TFEU.[23] Nevertheless, given the wording of Article 42(2)(c) of the EPPO Regulation – which envisages the European Court of Justice (ECJ) delivering preliminary rulings on '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' – entrusting the decision to a body that is not entitled to raise preliminary questions with the Luxembourg Court could be deemed to breach the Regulation itself.[24] This is precisely the reason why a recent study carried out on behalf of the European Commission concluded that the vast majority of the Member States are not compliant with the EPPO Regulation in this respect.[25]

22 Examples include the Board of the Prosecutors-General of the Public Prosecution Service (in Greece), the Prosecutor of the Supreme Court (in the Netherlands) or the General Prosecutor attached to the Court of Cassation (in Italy).

23 ECJ, Case C-66/20 *XK*, ECLI:EU:C:2021:670, para 41–42.

24 See, for instance, H-H Herrnfeld, 'Article 42' in Herrnfeld, Brodowski and Burchard (eds) (n 6) mn 53.

25 See Tipik and Spark Legal and Policy Consulting, 'Compliance assessment of measures adopted by the Member States to adapt their systems to Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO')' (Study for the European Commission, 2023), at https://www.europarl.europa.eu/cmsdata/280160/Final%20Report%20-%20DG%20JUST%20Study%20on%20the%20EPPO%20-%2029.09.2023_en.pdf 55–58.

3.2 Ratio Legis

Having clarified the meaning, we then need to consider the *rationale* behind the relevant legal provision. From this perspective, Article 25(6) of the EPPO Regulation, which allows national authorities to prevent the EPPO from taking action in certain cases, is a clear sign that the Member States are reluctant to share substantial aspects of their prosecutorial sovereignty. Thus, it has a high symbolic value, as it can be seen as an indicator of the level of integration achieved within the EU Area of Freedom, Security and Justice.

Many scholars have expressed concerns about the potential for unequal treatment of conflicts of competence involving the EPPO within EU Member States. Furthermore, it has been suggested that this setting could undermine the consistency of the system and the efficiency of the EPPO's investigations, particularly in contexts where the political or judicial environment is hostile towards European institutions.[26]

In contrast, it has been argued that Article 25(6) reflects the 'hybrid' nature of the EPPO. Specifically, it has been suggested that, '[s]ince the conflicts at stake would oppose a national prosecutor and the European delegated prosecutor (who is a national prosecutor as well), it is not unreasonable that the competence for resolving them has been bestowed upon the competent national authority, in order not to waste too much time during the investigation (or at their beginning) to identify the competent prosecution service'[27].

Although the shortcomings of a solution that prioritises national interests over European ones are hard to deny, this viewpoint does have some merits. In several European countries, the top prosecutorial bodies enjoy a high level of independence – operationally, at least, if not strictly speaking institutionally – from the executive branch. Furthermore, these authorities have significant experience in managing and resolving prosecution-related conflicts, enabling them to make prompt decisions and ensure investigations proceed efficiently.

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26 See Mitsilegas (n 5) 249. Also compare Bachmaier Winter (n 1) 521, who claims that 'such approach is completely inconsistent with the very reasons that led to the establishment of the European Public Prosecutor's Office', namely 'to combat the inefficiency, at a national level, in prosecuting crimes of fraud against the financial interests of the European Union'.

27 Grasso, Sicurella and Giuffrida (n 4) 40.

If the prosecution service is regarded as independent and autonomous from the government, its head could be entitled to request a preliminary ruling from the ECJ, especially when performing the specific function assigned by Article 25(6) of the EPPO Regulation. As a matter of fact, in such cases, the designated authority does not support any criminal prosecution in court but rather settles disputes concerning the application of European law.[28] This could justify the assertion that they are entitled to raise preliminary questions of interpretation, and that they are obliged to do so when the conditions are met.

If this evolution does not actually materialise in the future[29], one possible compromise solution – which is already in practice in some jurisdictions – would be to allow appeals against decisions issued by the competent national authority to be brought before a 'court', where the body initially handling the dispute is a national prosecutorial office.[30] This would mean that the ECJ could be involved in the second instance at least, when a conflicting party challenges the decision delivered by the head of the prosecution service.

4 A glimpse into judicial practice

As previously mentioned, conflicts of competence between the EPPO and national prosecution authorities are, to a certain extent, a predictable consequence of the complex provisions governing the scope and exercise of the EPPO's jurisdiction, within an integrated system of shared competences. Consequently, in a cooperative scenario, characterised by close cooperation and constructive dialogue, the emergence of such conflicts might be considered not only normal, but also desirable insofar as they contribute to clarifying ambiguous aspects of the EPPO's regulatory framework.

However, the cases that gained great attention from the media are precisely those in which sincere cooperation and institutional dialogue have been either lacking or insufficient, leading to serious political conflict

28 On this possible evolution of the Luxembourg case law, see Hernández López (n 1) 113 and 114.

29 As can be expected, given that such an evolution would require both the senior prosecutors' willingness to raise questions for preliminary rulings and the ECJ's acceptance to revisit its established case law on the status of the public prosecutor for the purposes of Article 267 TFEU.

30 This solution was envisaged by Herrnfeld (n 6) mn 24 and (n 24) mn 54. See also subsequent 5.

alongside legal disputes over the interpretation of the legislative provisions. For this reason, careful examination of these cases is required. The aim is to distinguish the essential aspects from the contingent ones, in order to draw useful conclusions for any amendments to the regulatory text.

The first significant case to emerge in judicial practice was the so-called 'Ayuso' affair. At the heart of the case was the purchase of facemasks by the government of the Madrid region (*Comunidad Autónoma de Madrid*) during the initial weeks of the emergency caused by the Covid-19 pandemic for an amount of EUR 1.5 million. The company that sold the masks to the Spanish region had a professional connection with the President's brother, who received a commission of EUR 55,000 for his involvement in the procurement deal. These circumstances raised suspicions that the fee paid to the broker (and President's brother) did not correspond to actual mediation services but was in fact a bribe linked to offences of fraud and corruption.[31]

The national prosecutor tasked with investigating this class of crimes (the *Fiscalía Especial contra la Corrupción y la Criminalidad Organizada*) began an investigation to determine whether an offence had been committed. However, the EPPO soon claimed its right of evocation, arguing that this was a case of fraud against the EU financial interests. The Spanish Anti-Corruption Prosecutor's Office argued it was a common offence outside the EPPO's scope.

At the request of the national prosecutor, the matter was referred to the Spanish Attorney General (the *Fiscal General del Estado*), who is responsible for settling the dispute in accordance with the Ley Orgánica 9/2021. After receiving an opinion from the Board of Prosecutors (*Junta de Fiscales*), the Prosecutor General ruled that there was no inextricable link between the alleged offences. The case was therefore separated with the investigation into the alleged corruption being assigned to the national authorities and subsequently closed without any indictment. The EPPO reacted strongly, publicly contesting the decision and announcing its determination to continue the inquiry, despite the Prosecutor General's decision.[32] In particular, the European Chief Prosecutor (ECP) raised three main procedural concerns: (a) the Attorney General's lack of impartiality, on the grounds

31 It is worth mentioning that the defence argued that the payment was provided as compensation for the efforts made to obtain masks at below-market rates from a Chinese company.

32 See the press release available at https://www.eppo.europa.eu/en/media/news/eppos-statement-decision-fiscal-general-del-estado.

that they are also the hierarchical superior of the Special Anti-Corruption Prosecutor; (b) the absence of an adversarial proceeding and the violation of the right to be heard in the dispute resolution procedure; c) the absence of an effective remedy to challenge the Attorney General's decision before a court, thus preventing the Court of Luxembourg from becoming involved through a preliminary ruling.

The second case to be discussed is the so-called 'Beroš case', a high-profile case involving the former Croatian Minister of Health. In brief, the case concerned the purchase of high-tech medical equipment – specifically, microscopes – by several Croatian hospitals. According to the prosecution's reconstruction, a criminal association profited financially from the public procurement contracts in question by guaranteeing the supply of equipment at inflated prices in exchange for bribes. As these funds came from European financing, the EPPO had opened an investigation, but did not immediately inform the competent national authorities in order to preserve its integrity.[33] However, when the EPPO was about to carry out searches and make arrests, it became aware that the Croatian Office for the Suppression of Corruption and Organized Crime (*Ured za suzbijanje korupcije i organiziranog kriminaliteta*, better known as USKOK) was conducting an investigation into the same facts. The latter had already obtained search warrants, creating a dangerous overlap in operations.

Even in that case, in view of the EPPO's decision to exercise its competence by taking over the case, the national prosecutor raised a positive conflict, referring the matter to the State Attorney General, who is vested with the decision based on national law. The Prosecutor General concluded that the investigation should be handled by the competent national authority, as the suspect organisation was not primarily focused on offences affecting the EU financial interests. The EPPO referred the case to the competent national authorities, expressing concern about procedural issues similar to those highlighted in the Spanish case. The ECP also complained to the Commission about violations of the rule of Law in Croatia.[34]

We can now consider what lessons can be learned from the judicial practice recorded during the early years of the EPPO's operation.

33 The power to temporarily postpone the obligation to notify the competent national investigative authorities is provided for by Article 41 of the Rules of Procedure of the EPPO.

34 See the press release available at https://www.eppo.europa.eu/en/media/news/eppo-raises-concerns-over-rule-law-violations-croatia-following-conflict-competence.

Firstly, it seems reasonable to conclude that we are witnessing a scenario characterised by cooperation and constructive institutional dialogue.[35] Only a few high-profile cases involving politically sensitive investigations of senior officials or state-controlled enterprises deviate from this trend. However, the examined cases also revealed how easily the EPPO's competence can be dismissed, by claiming that there is no inextricable link between the alleged offences, that the conduct caused greater loss to the State budget than to EU financial interests, or that the criminal organisation did not focus primarily on committing PIF offences.

Secondly, the most serious conflicts currently involve national bodies specialising in the prosecution of corruption, organised crime and related offences. This reveals the sensitivity of institutional interests and power struggles surrounding the exercise of criminal prosecution, particularly in politically sensitive cases that receive media attention. The EPPO has been working to reduce these conflicts by signing bilateral cooperation agreements, which are useful for establishing a climate of trust. These agreements come in response to the need to cooperate sincerely and effectively with the competent national authorities, who provide reports of offences and the essential operational assistance.[36]

Thirdly, conflicts of competence between the EPPO and national authorities are more difficult to address where the national prosecution service is under government supervision or operates within a rigid hierarchical structure. This is not surprising: on the one hand, in these countries, public prosecutors may not act impartially, and, on the other hand, the EPPO has so far demonstrated a strong commitment to promote and strengthen compliance with the rule of law and the independence of the judiciary on the European continent. In other words, national legal traditions and judicial organisations matters, as they play a significant role in the Area of Freedom, Security and Justice[37]. For example, it is crucial to understand

35 The same opinion is expressed by Hernández López (n 1) 117.

36 A significant example of this strategic approach is the 'Working agreement between the European Public Prosecutor's Office (EPPO) and the Italian National Anti-Mafia and Counter Terrorism Directorate (DNA)'. The latter document can be seen as a response to concerns among the Italian public opinion and magistrates that the intervention of the EPPO could jeopardise the extensive experience and the great expertise gained by investigative bodies in countering mafia activities at the national level.

37 On the importance of comparative law methodologies to understand the EPPO's peculiar legal system, see again Fransen and Simonato (n 13) 558.

that not all senior public prosecution bodies are the equivalent of each other. To illustrate this, consider the Prosecutor General attached to the Italian Court of Cassation, who is part of the judiciary, completely independent of the government and appointed by the High Council of the Judiciary precisely to safeguard their independence when performing their functions. Furthermore, while it is true that the Prosecutor General has some coordination and supervisory powers over the prosecution service, they do not hold a direct hierarchical position vis-à-vis public prosecutors serving in lower courts or at a local level. Therefore, it cannot be assumed that the Prosecutor General is not an 'impartial body' when resolving conflicts between the EPPO and national prosecutors.[38]

To conclude, it seems clear that extending national rules on conflicts between public prosecutors' offices to the EPPO is not a feasible solution in the long term.[39] The EPPO's involvement actually represents a substantial change to the regulatory framework applicable to the criminal proceedings in question, establishing a different procedural track. Therefore, it is not just a matter of work distribution within the prosecution service, but it also affects much more important interests that impact the rights of the defence and the fairness of the European criminal proceedings.[40]

38 The Prosecutor General attached to the Court of Cassation is the national authority appointed in Italy for the resolution of disputes between the EPPO and national prosecution authorities pursuant to art. 16 of the Legislative Decree 2 of February 2021 no. 9, which implements the EPPO Reg. (Disposizioni per l'adeguamento della normativa nazionale alle disposizioni del regolamento (UE) 2017/1939 del Consiglio, del 12 ottobre 2017, relativo all'attuazione di una cooperazione rafforzata sull'istituzione della Procura europea «EPPO»).

39 On this matter see Bachmaier Winter (n 1) 520: 'until now, in matters of conflicting prosecution offices, the General Public Prosecutor could only deal with issues of territorial or personal competence not affecting the material competence. And it is logic that conflicts between two national prosecution offices involving only territorial or personal competence are solved by the head of the prosecution office, without hearing them again and without further judicial remedy. The principle of hierarchy applies here in its full scope … However, this rationale cannot be applied to conflicts between the EPPO and the national prosecution office, since they are not subject to the same hierarchical authority'.

40 It should be noted that, according to the Strasbourg Court, the principle of procedural legality is a general principle of law, linked to the rule of *nullum judicium sine lege* and the principle of equality of arms, protecting in particular the accused from the risk of abuse of power: see ECtHR, *Coëme and Others v. Belgium* App nos 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96 (22 June 2000) para 102.

5 Potential amendments to the EPPO Regulation

Lastly, we must examine the possible amendments to the EPPO Regulation, assuming there is the political will to intervene and address the regulation of conflicts of competence, which has exposed some problematic features.

One possible way could be to assign decisions on conflicts of competence directly to the ECJ, as it may be considered better suited to settling this type of disputes. Indeed, it is extremely unlikely that the Member States would grant the ECJ exclusive power to resolve disputes concerning the exercise of criminal prosecution within the multi-level system of shared competences established by the founding regulation. Instead, they are considering a form of integrated and cooperative jurisdiction based on the preliminary ruling mechanism, as is clear from Article 42(2)(c) of the EPPO Regulation. Furthermore, from a pragmatic consideration, the solution under review would not be ideal. The ECJ is gradually increasing its workload and the time taken to reach decisions, even when it adopts the urgent procedure. Decisions on conflicts of competence, on the other hand, must be taken promptly and by those who are best placed to understand the facts of the case and the potential development for the investigation in the field.

A second approach – aimed at harmonising conflict resolution procedures between Member States while respecting different legal traditions – is to allow appeals against decisions made by designated national authorities before tribunals or courts, at least when such authorities are senior members of the public prosecution service. This would allow the customary structures found in many legal systems across the Member States to be preserved, while enabling the 'defeated' prosecution service to evaluate its interests and chances of success by appealing to a court of law. As previously stated, this would also allow for the ECJ to become involved, which could be especially significant in strategic cases. A potential disadvantage of this proposal is that it takes longer to reach a final decision. However, this could be counterbalanced by the benefits of an adversarial procedure and the prospect of engaging the ECJ to offer an official interpretation of the rules concerning the scope of competence of the European prosecution service. The EPPO itself has expressed this position in the draft for a revision of the founding regulation, which it submitted to the European Commission.[41]

41 The proposal drafted by the EPPO regarding the revision of the founding regulation on this matter reads as follows: '10. To clarify that decisions of the national authority deciding on the attribution of competence should be subject to judicial redress –

This solution could also be acceptable to Member States because, without prejudice to the need to provide for judicial review, they would remain free to determine the specific features of the procedure in question and the court responsible for settling the matter, thereby minimising the impact on the organisation of their criminal justice systems.

A third, more ambitious option emphasises procedural rationality but requires greater creativity. It suggests introducing a new and specific mechanism for the *temporary determination of competence*, given that the investigation phase can be subject to sudden shifts in circumstances. This means that the final resolution of a conflict would only occur once the facts of the case have reached a state of sufficient stability and certainty, for instance during the indictment phase or even at the opening of the trial.[42] While this proposal deserves consideration — not least because it replicates the model used in some Member States — perhaps it overlooks the importance and consequences of decisions on conflicts of competence for the legal framework of criminal proceedings. Therefore, it should be formulated bearing in mind that this kind of conflict has a 'vertical' dimension, affecting the rights of the defence and the fairness of criminal proceedings (considering, for instance, the consequences for the evidence gathered by the prosecutor to which the investigation has been temporarily assigned, when it is eventually revealed that they do not have the competence to investigate and prosecute). The issue, as previously mentioned, extends well beyond merely dividing the working load between offices performing the same functions at the same judicial level.

Article 25(6) of the EPPO Regulation – The objective is to ensure a possibility to refer to the CJEU under Article 267 TFEU (a preliminary ruling reference), so the case is not closed at the national level; particularly to address the situations in those Member States that appointed the *Prosecutor General* to decide on a dispute.
Proposed **amendment** of Article 25(6):
"6. In the case of disagreement between the EPPO and the national prosecution authorities over the question of whether the criminal conduct falls within the scope of Article 22(2), or (3) or Article 25(2) or (3), the national authorities competent to decide on the attribution of competences concerning prosecution at national level shall decide who is to be competent for the investigation of the case. **A decision of the competent authority shall be subject to judicial review**. Member States shall specify the national authority which will decide on the attribution of competence."'.

42 In this regard, see the reasoning of Bachmaier Winter (n 1) 519. The author's proposal is to grant the EPPO priority until the facts are sufficiently established to finally determine the competence.

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