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Dominik Brodowski | Sebastian Trautmann [eds.]

Strengthening the Future of the European Public Prosecutor's Office

Nomos

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Foreword by the European Chief Prosecutor

A strong European Public Prosecutor's Office

There are not so many instances in which we, as Europeans, are in a position to actually exercise power which, in our traditions, pertains to the States. The European Public Prosecutor's Office is a European institution which allows precisely that: a European exercise of the judicial power.

With several groundbreaking investigations after only four years of activity, the European Public Prosecutor's Office has surprised many, especially the criminals involved. In investigation Admiral, a VAT fraud scheme having caused almost 3 billion euro of damage to the national and European budgets, we already have the first convictions in court. In the investigation 'Calypso', a customs fraud having caused at least 800 million euro of damage to the European and national budgets, the European Public Prosecutor's Office managed to seize thousands of containers worth at least 250 million euro, the largest seizure of its kind to date. I could go on.

In short, an independent and efficient European Public Prosecutor's Office is the best weapon available to the European Union when it comes to fighting dangerous criminal organised groups which, over the years, were allowed to transform fraud against the financial interests of the EU into an industry, causing massive damages to our finances, economies and undermining our security.

Despite numerous successes, very quickly, the College of the European Public Prosecutor's Office identified a whole series of shortcomings in the founding regulation and called for necessary improvements to be made without delay. When it comes to fighting crime, when it comes to justice, the European citizens should not be asked to wait decades for improvements to be made. There is no time to waste in a situation of clear and present danger. There is no reason to delay a more efficient administration of justice, in the interest of European citizens.

In the upcoming revision of the Regulation establishing the European Public Prosecutor's Office, we should resist any temptations to weaken its independence. This is the cornerstone of its efficiency and trustworthiness in the eyes of European citizens, which is what matters most, eventually.

If there is one aspect where the European Public Prosecutor's Office should be strengthened, especially if we are considering how to fight cross-border organised crime more efficiently, then it is in its capacity to operate

as a single office, without borders within the EPPO zone, and as a fully recognised judicial authority outside the EPPO zone.

In a democratic society, the accuracy of the analysis that political leaders make of the contemporary challenges and opportunities that we face and that must be addressed serves little without the trust of the people. If you lie, cheat and steal without consequences, you instil despair and fear. If you inspire hope and then disappoint, if you say one thing to get elected but do something else once you are in power, if you abuse power, you open the gates for barbarity.

This is why I wish the European Public Prosecutor's Office to remain a truly independent, efficient and strong institution, an institution that the citizens will be able to trust. Together with the European Court of Justice, the European Public Prosecutor's Office will continue to protect the European values, citizens and financial interests.

Laura Kövesi

Introduction

Strengthening the future of the European Public Prosecutor's Office: an introduction

Dominik Brodowski & Sebastian Trautmann[*]

In June 2021, the newly established European Public Prosecutor's Office (EPPO) became fully operational in its task to investigate and prosecute crimes against the financial interests of the European Union (so-called PIF offences). Based on initial practical experiences and theoretical reflections on the EPPO's functioning, several areas for improvements in its legal framework have emerged. This article provides an overview of the state of the EPPO, its founding regulation, ideas for its improvement, and briefly introduces the contributions included in this volume.

1 The EPPO as motor for transformation in the European 'Area of Freedom, Security and Justice'

On 1 June 2021, the EPPO 'assume[d] the investigative and prosecutorial tasks' in line with Article 120(2) 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). As the first supranational prosecutorial institution, it began representing Europe in courtrooms across Europe, and it symbolises the European interests at stake when crimes committed against the financial interests of the EU are brought to justice.[1]

Such a far-reaching 'milestone'[2] of European integration in the field of criminal justice could not be reached overnight. Instead, the seed for the

* The article reflects solely the opinion of the author as a private individual and is not related to the official position of the EPPO.

1 Just see D Brodowski, 'Die europäische Staatsanwaltschaft als Meilenstein supranationaler Kriminalpolitik' (2022) *Goltdammer's Archiv für Strafrecht* 421; F Meyer '§ 3 Aufgaben der EUStA – Rolle im System europäischer Strafverfolgung' in H-H Herrnfeld and R Esser (eds), *Europäische Staatsanwaltschaft. Handbuch* (Nomos 2022) mn 3.

2 This metaphor is used widely, just see S Allegrezza 'A European Public Prosecutor Office to Protect Common Financial Interests: A Milestone for the EU Integration

EPPO was planted around thirty years ago[3] and found its way into the Lisbon Treaty in Article 86 of the Treaty on the Functioning of the European Union (TFEU). Once the Commission tabled its proposal in 2013,[4] a tedious legislative process followed,[5] where a political compromise could be reached on a decentralised 'Single Office' (Article 8(1) EPPO Regulation), prosecuting PIF crimes (as defined in national law implementing EU directives, Article 22 EPPO Regulation), and operating on the basis of national criminal procedure unless the EPPO Regulation contains specific rules (Article 5(3) EPPO Regulation).

The unique setting and design of the EPPO – and the underlying regulatory choices – create not only a fascinating research area, but also substantial momentum for the further evolution of European criminal justice as one of the pillars of the European 'Area of Freedom, Security and Justice' (AFSJ) set out in Article 3(2) of the Treaty on European Union (TEU). It raises a multitude of questions, such as: Has the EPPO become a guardian of common European values, in particular the rule of law, and thus a cornerstone of European integration? What impact do the EPPO and its further development have on the future of the 'Area of Freedom, Security and Justice'? Do the EPPO and the supranationalisation caused by its establishment contribute to a new self-image, but also to a new external perception of the EU?

These were the guiding questions for a first EPPO-related workshop at Villa Vigoni, the German-Italian Centre for European Dialogue in Menaggio, Italy, in October 2023, supported by Saarland University and its Cluster of European Research (CEUS). In view of its interdisciplinary focus on projections upon, reflections about, and transformations of Europe, the workshop was structured in three sections.

Process' in K Ambos and P Rackow (eds), *The Cambridge Companion to European Criminal Law* (Cambridge University Press 2023) 413; E Schramm 'Auf dem Weg zur Europäischen Staatsanwaltschaft' (2014) 69 *JuristenZeitung* 749, 757; MA Zöller and S Bock '§ 22 Europäische Staatsanwaltschaft' in M Böse (ed) *Enzyklopädie Europarecht, Bd. 11 – Europäisches Strafrecht* (2nd edn, Nomos 2021) mn 51.

3 M Delmas-Marty and J Vervaele (eds), *The Implementation of the Corpus Juris in the Member States* (Intersentia 2000).

4 European Commission, 'Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office', COM(2013) 534 final.

5 Just see H-H Herrnfeld, 'Introduction' in H-H Herrnfeld, D Brodowski and C Burchard (eds), *European Public Prosecutor's Office: Article-by-Article Commentary* (Nomos 2021) mn 1 ff.

In relation to *projections upon the EPPO*, the tensions created by supranational prosecution vis-à-vis state sovereignty (such as highlighted by the German Federal Constitutional Court in relation to criminal justice[6]) mean that the EPPO reshapes the image of European criminal justice from a horizontal 'cooperation model' towards a vertical 'interaction model'. This, as well as the task of the EPPO to protect the financial interests of the EU by means of criminal justice, goes along with far-reaching normative, political and societal expectations. Even though the EPPO can already refer to numerous investigations, prosecutions and adjudications, the challenges created by the supranational setting and many design choices of the EPPO Regulation raise the question to what extent the EPPO can live up to these expectations – and what needs to be changed so that it can fulfil them.

Reflections on the role of the EPPO in the AFSJ were based on the linkage between criminal justice and the EPPO on the one hand, and the rule of law on the other hand. To some extent, the EPPO itself may be considered a guardian of the rule of law. It investigates and prosecutes severe forms of norm violations, and thereby structurally tries to prevent further breaches of such laws – and does so 'in full compliance[7] with the rights of suspects and accused persons enshrined in the Charter' (Article 41(1) EPPO Regulation). On a more fundamental level, its basis *in law* and its protection *by means of law* contribute to an understanding of Europe that is based on the rule of law, and not on a rule of power and force.

Moreover, the establishment of the EPPO and nowadays its operation create *transformations of Europe* and may serve as a 'laboratory' for the future evolution of European criminal justice.[8] The EPPO transforms criminal justice in the Member States,[9] the interaction between them, and may

6 German Federal Constitutional Court (BVerfG), judgment of 30 June 2009 – 2 BvE 2/08 and others *Lisbon Treaty* ECLI:DE:BVerfG:2009:es20090630.2bve000208 = BVerfGE 123, 267 paras 252 f.

7 On the far-reaching statement of 'full compliance', see D Brodowski, 'Article 41' in H-H Herrnfeld, D Brodowski and C Burchard (eds) (n 5) mn 22.

8 V Franssen and M Simonato, 'The European Public Prosecutor's Office (EPPO) as a laboratory of 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.

9 See, for instance, T Huyeng and S Kurt, 'Clash of Prosecutors. Die Europäische Staatsanwaltschaft als Garant für den kroatischen Rechtsstaat' (Verfassungsblog, 13 December 2024), at https://verfassungsblog.de/clash-of-prosecutors/; M Slimani, 'The influence of the European Public Prosecutor's Office on French criminal law' (2023) *New Journal of European Criminal Law* 294; R Vassileva, 'The EPPO as a Domesticated

also cause transformations beyond the borders of the EU, such as when a supranational prosecution authority sends out MLA requests to third countries.[10] Its successes may also serve as a motor for further supranationalisation in other areas of European integration. At the same time, its unique design may also underline how national criminal justice systems may become 'united in diversity'. Besides the normative and structural transformations, the EPPO has the potential to transform mindsets – that of prosecutors,[11] that of criminals who now have to fear a more effective prosecution of PIF offences, but also that of the general public if it becomes aware that the EU is not a toothless tiger, but upholds its laws by means of an effective, yet hybrid criminal justice system too.

2 The need to further strengthen the EPPO

Taking the first years of practice into consideration, the implementation and impact of the EPPO Regulation, the effectiveness and efficiency of the EPPO and its working practices will be put into the spotlight in the course of the review required by Article 119 of the EPPO Regulation which is to be completed by 2026.[12] This provision also sets out that legislative proposals should be put forward if 'it is necessary to have additional or more detailed rules on the setting up of the EPPO, its functions or the procedure applicable to its activities, including its cross-border investigations.' To bridge between this future legislative agenda and the theoretical foundations built in the first workshop in 2024, participants of a second workshop in spring 2025, again at Villa Vigoni, assessed the potential for improvements of the legal framework, discussed specific policy options, and clarified challenges

Cat: A Perspective from Bulgaria' (Verfassungsblog, 13 June 2024), at https://verfassungsblog.de/the-eppo-bulgaria/.

10 On the effects on Switzerland, just see T Fingerhuth and S Matjaz, 'Die Europäische Staatsanwaltschaft und ihre Bedeutung für die Schweiz' (2023) *forumpoenale* 115.

11 See the contribution by *Vitková* in this volume.

12 See also the (extended) compliance assessment conducted on behalf of the Commission, at https://www.europarl.europa.eu/thinktank/en/events/details/study-presentation-compatibility-of-nati/20240118EOT08142 and summarized by M Engelhart, 'Compliance with the EPPO Regulation. Study Results on the "Implementation" of Council Regulation (EU) 2017/1939 in the Member States' (2024) *eucrim* 54.

the EPPO faces today and which require legislative actions.[13] Taking inspiration from a keynote by the European Chief Prosecutor Laura Codruta Kövesi, three sections focused on distinct areas that require critical review and potential updates of the EPPO's normative framework.

Firstly, the material competence of the EPPO (Article 22 EPPO Regulation) is clearly the result of a political compromise, where some political blockade could only be overcome once the ECJ had issued a judgment on the link between VAT fraud and EU financial interests.[14] From the perspective of the Member States, additional safeguards have been added to the EPPO Regulation by excluding 'criminal offences in respect of national direct taxes including offences inextricably linked thereto' from the EPPO's material competence (Article 22(4) EPPO Regulation), by limiting the exercise of the material competence (Article 25 EPPO Regulation, also in conjunction with Article 27 EPPO Regulation), and by tasking national authorities to decide on conflicts of competence (Article 25(6) EPPO Regulation). Moreover, the focus on specific offences, including inextricably linked ones (Article 22(3) EPPO Regulation), instead of the broader context under investigation leads to friction in the daily operation of the EPPO. In view of this, there is not only a need to discuss whether, when and to what extent the EPPO's competence should be expanded to other fields of criminality, such as violations of restrictive measures,[15] but also how the distribution of competence within the field of PIF offences may be clarified.[16]

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13 For a summary of the conference, see L Jakobi and G Theodorakakou 'Notes on a conference at Villa Vigoni, Lake Como, Italy, 31 March – 2 April 2025 (2025) *eucrim*, at https://eucrim.eu/news/strengthening-the-future-of-the-eppo-conference-report/.

14 ECJ, Case C-105/14 *Taricco et al.*, ECLI:EU:C:2015:555, paras 49 ff., in particular para 52.

15 See the contribution by *Petzsche* in this volume; see additionally A Seebon, 'Europäische Staatsanwaltschaft – Zuständigkeit auch für die Verfolgung von Verstößen gegen restriktive Maßnahmen der Europäischen Union?' (2024) *Kriminalpolitische Zeitschrift* 431; J Fontaine, 'L'extension de la compétence matérielle du Parquet européen aux infractions environnementales : une fausse bonne idée?' (2023) *Revue pénale luxembourgeoise* 19.

16 See, among others, L Bachmaier Winter, 'EPPO versus national prosecution office. A conflicting case of competence with broader dimensions' in M Luchtman (ed) (n 8) 515; B Márton, 'The Conflict of Competence between the European Public Prosecutor's Office and Spanish Prosecutors – Lessons Learned' (2022) *eucrim* 286; L Neumann, 'The EPPO's Material Competence and the Misconception of „inextricably linked offences"' (2022) 12 *European Criminal Law Review* 235; T Gut, 'EPPO's

The unique design of how investigations encompassing several participating Member States are handled within the EPPO has gained much interest,[17] also in the wake of the first ECJ judgment on the EPPO Regulation in *G.K. and Others*.[18] Considering the 'Single Office' approach of the Regulation, it becomes terminologically difficult to consider such investigations to be 'cross-border', as the heading of Article 31 of the EPPO Regulation stipulates. Yet from the viewpoint of national criminal justice systems, and, in particular, from the viewpoint of the national courts tasked with adjudicating offences prosecuted by the EPPO, they oftentimes have to handle and use evidence obtained in a different national criminal justice system and acquired (at least partly) on the basis of 'foreign' codes of criminal procedure. Moreover, the ECJ decided against a 'single judicial authorization' in the current design of Article 31 of the EPPO Regulation. Therefore, the legislative choices underpinning the 'cross-border' acquisition of evidence, the free flow of evidence (Article 37 EPPO Regulation), but also the effects the EPPO's powers have on defence rights (cf. Article

material competence and its exercise: a critical appraisal of the EPPO Regulation after the first year of operations' (2023) 23 *ERA Forum* 283.

17 See, among others, M Caianiello, 'Sometimes the More is Less. Transnational Investigations in the EPPO System After the Judgment of the EU Court of Justice' (2024) 32 *European Journal of Crime, Criminal Law and Criminal Justice* 87; N Franssen, 'The judgment in G.K. e.a. (parquet européen) brought the EPPO a pre-Christmas tiding of comfort and joy but will that feeling last?' (European Law Blog, 15 January 2024), at https://www.europeanlawblog.eu/pub/the-judgment-in-g-k-e-a-parquet-europee n-brought-the-eppo-a-pre-christmas-tiding-of-comfort-and-joy-but-will-that-feelin g-last/release/1; H-H Herrnfeld, 'Efficiency contra legem? Remarks on the Advocate General's Opinion Delivered on 22 June 2023 in Case C-281/22 G.K. and Others (Parquet européen)' (2023) *eucrim* 229; A Mosna 'Effective judicial protection as a central issue in EPPO cross-border investigations: The ECJ's first ruling in *G.K. an Others*' (2024) 61 *Common Market Law Review* 1345; J Öberg, 'Judicial Cooperation between European Prosecutors and the Incomplete Federalisation of EU Criminal Procedure CJEU ruling in G. K. e.a. (Parquet européen)' (2024) 189 *EU Law Live* 1; I Zerbes, 'Beweiserhebung und Beweisverwertung in EUStA-Verfahren – Dogmatische Probleme des Beweismitteltransfers' in T Niedernhuber (ed), *Die neue Europäische Staatsanwaltschaft. Bedeutung, Herausforderungen und erste Erfahrungen* (Nomos 2023) 69; R Zerbst, 'Judicial Authorisation of Cross-border Investigation Measures Conducted by the European Public Prosecutor's Office: A Comment on the Grand Chamber of the Court of Justice of the European Union's Judgment in the Case C-281/22' (2024) 14 *European Criminal Law Review* 94.

18 ECJ, Case C-281/22 *G.K. and Others (Parquet européen)*, ECLI:EU:C:2023:1018.

41 EPPO Regulation) warrant closer analysis, same as the distinct design of legal review prescribed by Article 42 of the EPPO Regulation.[19]

On a more structural level, the EPPO and its future success as a cornerstone of the protection of the rule of law in the AFSJ require that its independence is upheld, yet it remains accountable. At the same time, its legislative framework as well as its daily operation is highly dependent on Member States.[20] This becomes most prominent in the European Delegated Prosecutors (EDPs), who are recruited from national criminal justice systems, whose numbers are to be negotiated with the Member States (Article 13(2) EPPO Regulation), and who depend on support from local staff. Budgetary constraints, both at the Union and at the Member States' level, further affect the EPPO's ability to fulfil its tasks. To safeguard the EPPO's success in the future, it is important to guarantee sufficient resources for the EPPO, yet without overburdening Member States and their criminal justice systems that face resource and recruiting problems themselves. No less important is balancing the EPPO's independence with parliamentary oversight and a strong legal review of its actions. In view of this, the low number of decisions the ECJ had yet to take on EPPO-related matters is striking.

3 Overview of the contributions

This volume builds upon impulses presented and discussions held in the aforementioned workshops at Villa Vigoni. It brings together contributions from practitioners, regulators, and academics analysing EPPO's construction, and aimed at strengthening EPPO's role in the European Area of Freedom, Security and Justice.

The first section takes up the theme of the first workshop: Has the EPPO become a motor for transformation in the European 'Area of Freedom, Security and Justice'? **Luca Pressacco** gives '*an introduction to the EPPO's prospects: expectations, status quo and potential*', focusing on the competences and their exercise as well as on the construction of the EPPO, and how the EU is moving towards a 'federalised' criminal justice system.

19 On Art 42, see also the recent judgment ECJ, Case C-292/23 *I.R.O. and F.J.L.R.*, ECLI:EU:C:2025:255.

20 See, among others, B Márton 'Independence of the European Public Prosecutor's Office in the context of the appointment procedures' (2024) 15 *New Journal of European Criminal Law* 146.

Taking up another of the core themes of the first workshop, **Gabriella Di Paolo** analyses '*the EPPO's transformative powers on criminal justice in the Member States*'. She discerns three modes of transformation: amendments to or reforms of Member States' laws, re-interpretations of existing norms, and a cultural shift, where 'the EPPO's operations may foster a new mindset and way of thinking'. Along the same lines, **Petra Vítková** shares her reflections as an EDP in her contribution titled '*The EPPO's transformative power on criminal justice in the Member States – experiences of a European Delegated Prosecutor of the Czech Republic*'. In particular, she emphasises that the EPPO does not only transform norms but also minds. In his comment on '*the EPPO Permanent Chambers: a new right on the horizon?*', **Andrea Venegoni** reflects on the legislative history, structure and functioning of the unique feature of EPPO's operation that its investigations involve Permanent Chambers consisting of three European Prosecutors (EPs) or the European Chief Prosecutor (ECP) from different Member States than the one where the investigation is being handled. Therefore, according to him, its decisions synthesise European law, (various) national laws and 'common sense'. The section concludes with a comment by **Liane Wörner** on how the EPPO's role model can – and should – extend to the protection of the rule of law and the rights of the accused: '*Future model or pipe dream – European transnational investigation being both effective and safeguarding fundamental rights of the accused*'.

The next three sections take a more concrete view on the state of the EPPO Regulation, surrounding legislative frameworks, and options for reform. In relation to EPPO's 'jurisdiction' *ratione materiae*, **Anneke Petzsche** raises the question on the '*competences of the EPPO: Is it time for an expansion?*'. In her analysis, she discusses the criteria to be used in deciding on an expansion of the EPPO's competences, and on why violations of restrictive measures meet these criteria, but terrorist offences do not. In view of the overlapping competences and the need to resolve '*conflicts of competences between the EPPO and national prosecution authorities*', **Luca Pressacco** highlights that this topic goes beyond 'merely dividing the working load between offices performing the same functions' and discusses three approaches on how to address the conflicts arising from the current design of the EPPO Regulation.

Under the heading of '*acquisition and use of evidence in EPPO proceedings*', **Hans-Holger Herrnfeld** shows that regarding Article 31 of the EPPO Regulation, which concerns the '*Cross-border acquisition of evidence*', sever-

al questions of interpretation are still unresolved, in spite of the ECJ's judgment in *G.K. and Others*.[21] Taking the ECJ's objections against a 'single judicial authorisation' into account, he proposes concrete amendments to this and surrounding provisions of the EPPO Regulation. In '*rethinking Article 37 of the EPPO Regulation: toward a coherent EU approach to evidence admissibility and exclusion*', **Michele Caianiello & Isadora Neroni Rezende** consider that this provision currently takes a minimalist approach. In order to strengthen the legitimacy of EPPO proceedings, in particular in cross-border criminal proceedings, they discuss various approaches on how this provision could be strengthened. In their contribution on '*Article 41 of the EPPO Regulation setting common standards on cross-border EPPO investigations – needs for reform*', **Liane Wörner & Luis Jakobi** highlight that the Europeanisation of the prosecution must also be balanced with a Europeanisation of defence rights. They show that EPPO proceedings serve as a 'problem amplifier' for fundamental rights issues surrounding cross-border investigations, and call – in the long run – for the introduction of a European investigating judge to determine the lawfulness of European investigation measures. In her contribution titled '*between national procedural law and Union oversight: Article 42 of the EPPO Regulation and the emerging jurisprudence of national and EU courts*', **Katalin Ligeti** reflects on potential gaps in judicial protection based on first jurisprudence on EPPO investigations and prosecutions on the national and EU level. While she sees 'currently insufficient evidence either that national courts are incapable of reviewing the EPPO's procedural acts […] or that they interpret EU law adequately', she voices concern that, so far, very few EPPO-related references for a preliminary ruling have reached the Court of Justice.[22]

The last section discusses **EPPO's institutional independence and sustainability.** In his contribution on the '*(in-)dependency of the EPPO on national resources*', **Lorenzo Salazar** discusses how the institutional design of the EPPO guarantees its independency, but also how its accountability can and must be maintained, in particular vis-à-vis the EU institutions. However, he concludes that some recalibration is needed to further strengthen both independency and accountability, such as on budgetary autonomy, the status of EDPs and (local) support staff. These latter questions are ex-

21 ECJ, Case C-281/22 *G.K. and Others (Parquet européen)*, ECLI:EU:C:2023:1018.

22 Besides ECJ, Case C-281/22 *G.K. and Others (Parquet européen)*, ECLI:EU:C:2023:1018, and ECJ, Case C-292/23 *EPPO v I.R.O. and F.J.L.R.*, ECLI:EU:C:2025:255, recently Case C-407/25 became pending, which addresses the consequences of a failure to notify a case to the EPPO.

plored in greater depth in **Garonne Bezjak**'s reflections on the '*institutional independence and sustainability: selection, status and number of EDPs and support staff*'. Considering the EPPO's hybrid structure and necessary links between Member States and the EPPO, she puts particular emphasis on the status of the EDPs as 'Special Advisors' and whether this should be changed to 'Temporary Agents' of the EU, but also on the tensions surrounding demands for an increase in support staff. A different perspective on the same underlying relationship between independence and responsibility is taken by **Marius Bulancea**. In his contribution on '*the EPPO's institutional responsibility: the annual report as a strategic cornerstone in the EU's anti-fraud architecture*', he sets out how the accountability of the EPPO, but also policy making in European and national settings is improved by the obligations set out in Article 7 of the EPPO Regulation. Besides the Annual Report, the role of the European Chief Prosecutor is highlighted in this context. A chapter by **Dominik Brodowski** on '*judicial review in view of EPPO's independence*' concludes this volume and focuses on the interrelation between these two concepts – and how legislative amendments may strengthen them.

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The EPPO as motor for transformation in the European 'Area of Freedom, Security and Justice'?

An introduction to EPPO's prospects: expectations, status quo and potential

Luca Pressacco[*]

This paper reviews the current status and future perspectives of the European Public Prosecutor's Office (EPPO), noting that its establishment – following twenty years of negotiations – was by no means guaranteed. The author emphasises the importance of complementing technical and legal analysis with an interdisciplinary and practical approach. Taking this viewpoint, the article examines issues relating to the EPPO's material competence, its controversial institutional structure and the highly fragmented procedural framework. The structural and operational difficulties of the new office are considered in the context of the long-standing tension between supranationalism and intergovernmentalism within the European Area of Freedom, Security and Justice. It ends by suggesting that establishing the EPPO and dealing with its operational difficulties in its early years represents a major challenge and an outstanding opportunity for the legal community to engage in institutional innovation and implementation of a real European criminal justice system.

1 Eppur si muove – EPPO si muove

On the topic of 'Prospects: expectations, status quo and potential', I will be giving only some brief remarks and would like to begin with a little personal anecdote. The first time I heard someone talking about the European Public Prosecutor's Office (EPPO), I was sitting in the office of a prominent legal scholar, looking for some suggestions about my graduation thesis. It was 2014, and the European Commission had just released the draft regulation on the establishment of the EPPO.[1] When I suggested

* Author's note: This contribution is based on the presentation given on 17 October 2023; the narrative style was maintained.

1 European Commission, 'Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office', COM(2013) 534 final.

analysing this document, the reaction was rather cold. I remember the Professor's comment: 'It will probably never be approved'.

This anecdote reminds us that, despite the numerous challenges encountered during its twenty-year genesis (1997–2017), the EPPO yet moves ('*Eppur si muove*', to paraphrase the Italian mathematician, physicist, and philosopher Galileo Galilei). At the same time, it shows how difficult it is to make predictions about the complex legal and institutional developments that are unfolding, which leads us back to the topic of our session.

2 The EPPO at a critical juncture

Setting aside jokes and personal memories, I fully share the perspective on how the debate on the EPPO should progress at this critical juncture.

First of all, a purely technical analysis of legal texts alone does not seem sufficient to fully understand the changes occurring in the 'Area of Freedom, Security and Justice'. Indeed, we are witnessing a pivotal moment in the harmonisation and integration of European criminal law and criminal procedure, which obliges us to share our analyses with other disciplines, such as economics, sociology, and political science. For instance, it might be difficult to understand the complex structure of the EPPO and its operational practices, if we merely identify the different bodies that make up the Office (both at the centralised and decentralised levels) and their respective powers. The full picture only emerges when we keep in mind the never-ending contrast between supranationalism and intergovernmentalism within the European institutions and, particularly, the debate on the 'new intergovernmentalism' in the Area of Freedom, Security and Justice after the Treaty of Lisbon.[2]

Secondly, I strongly commend the approach of blending theoretical studies with practical experience, by bringing together academics who specialise in this field and European Delegated Prosecutors (EDPs) who work at the EPPO. Since law comes to life through legal practice, I do not deem it possible to develop sound theories without evaluating the practical consequences of our interpretations. Similarly, I believe it is important for legal practitioners to be fully aware of the systematic implications of their deci-

2 For more on this institutional perspective on EPPO, see J Öberg, 'The European Public Prosecutor: Quintessential supranational criminal law?' (2021) 28 *Maastricht Journal of European and Comparative Law* 164.

sions, while preserving their freedom to proceed in the way they consider most appropriate, according to the rule of law and the circumstances of the case. I think this is especially relevant for the EPPO, since the practice of the Office is evolving in real time.

3 The EPPO's competences

After the methodological premises, we can now focus on the topic of '*expectations, status quo and potential*' of the Office. In particular, the first question we need to address concerns the EPPO's competences: 'What can, and what should the EPPO do?'. The question itself presents two distinct angles.

3.1 Material competences

On its face, the question refers to crimes falling within the jurisdiction of the EPPO and to those that might follow the same path in the future. This is a sensitive topic, not only from a legal perspective but also from a political one.

We are aware that the decision to limit the EPPO's scope to crimes affecting the EU's financial interests has been met with criticism from academia and civil society.[3] Critics argue that this choice associates this type of offences with the idea of a purely economic and financial Union, paying little attention to the fundamental rights and security of its citizens.

We know, however, that this criticism is at least partly misguided, since the EPPO's primary competence can only focus on the protection of genuine European interests, in accordance with the principles of subsidiarity and proportionality.[4]

Moreover, we could add that protecting the European Union's budget means safeguarding taxpayer's money and fighting against the persisting

3 See S Manacorda, 'Il pubblico ministero europeo e le questioni aperte di diritto penale sostanziale' (2017) *Diritto penale e processo* 660, 663, where the author wonders whether crimes against the European Union's financial interests might have become a new form of '*crimen lesae maiestatis*'.

4 On this matter see – among others – F Madsen and T Elholm, 'The EPPO and the Principle of Subsidiarity', in P Asp (ed), *The European Public Prosecutor's Office. Legal and Criminal Policy Perspectives* (Stiftelsen Skrifter utgivna av Juridiska fakulteten vid Stockholms universitet 2015) 31.

and ever-growing inequalities, as highlighted by Thomas Piketty in his monumental book 'Capital in the Twenty-First Century' (2013).

In any case, Article 86(4) of the Treaty on the Functioning of the European Union (TFEU) allows the potential extension of the EPPO's competence to encompass other serious forms of transnational crime.[5] Bearing in mind that history is a guide to the present, it is worth recalling that in many countries of the European continent the public prosecution service was created and originally developed with the aim of protecting the fiscal and property interests of the Crown in the emerging nation-states.[6] These historical roots remain evident even in the names that the Public Prosecutor's Office took in different countries (*Procureur fiscal* or *Procureur du Roi* in the French language, *Fiskalat* in the German world, *Ministerio fiscal* or *Fiscalia* in Spanish-speaking dominions).

I am not suggesting that history is governed by general rules – to quote the German philosopher and epistemologist Carl Gustav Hempel – and thus is destined to repeat itself, albeit in different shapes and forms. However, in order to understand the alternatives available to us today, we need to be aware of the institutional and power dynamics that occurred in the past.

Be that as it may, it is important to acknowledge that establishing a highly specialised body focused on financial investigations, with specific expertise in crimes against the public administration, is one thing, while developing an office with general competence to combat evolving transnational organised crime is quite another. These are different projects with different challenges.

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5 It is no coincidence that several authors suggested extending the EPPO's competence to encompass other forms of serious transnational crime, including terrorism, human trafficking, environmental crimes, and so forth. See A Juszczak and E Sason, 'Fighting Terrorism through the European Public Prosecutor's Office (EPPO)? What future for the EPPO in the EU's Criminal Policy?' (2019) *eucrim* 66, 66; C Di Francesco Maesa, 'EPPO and environmental crime: may the EPPO ensure a more effective protection of the environment in the EU?' (2018) 9 *New Journal of European Criminal Law* 191. See also European Commission, 'Communication from the Commission to the European Parliament and the European Council. A Europe that protects: an initiative to extend the competences of the European Public Prosecutor's Office to cross-border terrorist crimes', COM(2018) 641 final.

6 See M Panzavolta, 'Lo statuto del pubblico ministero europeo (ovvero, ologramma di un accusatore continentale)' in MG Coppetta (ed), *Profili del processo penale nella Costituzione europea*, (Giappichelli 2005) 179, 215; R Orlandi, 'Qualche rilievo intorno alla vagheggiata figura di un pubblico ministero europeo' in L Picotti (ed), *Possibilità e limiti di un diritto penale dell'Unione europea* (Giuffrè 1999) 209, 210.

3.1.2 Exercise of the competences

The second aspect implied by the original question pertains to the way in which the EPPO exercises its powers. There are several specific issues to be considered, which will be explored in more detail in the following contributions. Yet, a number of interpretive issues central to the overall design of the EPPO stand out. For the sake of simplicity, I will only select a few of these that arise at different stages of the criminal proceeding.

Regarding the beginning of the investigation, one may wonder, for example, whether Article 27 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) requires the EPPO to exercise its competence to take over an ongoing investigation at the national level (if the offence is deemed within its competence), or whether, on the contrary, the Office has a margin of discretion in this respect.[7] This question is clearly related to the principle of legality which, according to Recitals 66 and 81 of the EPPO Regulation, should inspire the decision of whether to prosecute or not.

As far as the progress of investigations is concerned, one of the most delicate issues is the so-called 'ancillary competence' of the EPPO. Recital 54 of the EPPO Regulation refers to respect for the *ne bis in idem* principle to justify the extension of the EPPO's powers beyond the PIF area. The problem arises not when multiple offences are committed by a single act (or omission), but rather when certain offences are linked to others, i.e. when they are committed to perpetrate or conceal other crimes.

In other words, the question is whether the "inextricably linked offence" clause – provided by Article 22(3) of the EPPO Regulation – should be interpreted broadly or narrowly. On this point, there has already been a strong dispute between the EPPO and the Spanish national anti-corruption authority,[8] highlighting the sensitivity of this issue both for Member States and for national judicial authorities. It is easy to predict that the question

7 See H-H Herrnfeld, 'Article 27' in H-H Herrnfeld, D Brodowski and C Burchard (eds), *European Public Prosecutor's Office: Article-by-Article Commentary* (Nomos 2021) mn 8.

8 For further reference on the first positive conflict between the EPPO and national judicial authorities, see B Márton, 'The Conflict of Competence between the European Public Prosecutor's Office and Spanish Prosecutors – Lessons Learned' (2022) *eucrim* 286; L Pressacco, 'I «conflitti di competenza» tra il pubblico ministero europeo e gli organi requirenti nazionali' in G Di Paolo, L Pressacco, R Belfiore and T Rafaraci

will (sooner or later) end up before the European Court of Justice (ECJ), as provided for in Article 42(2)(c) of the EPPO Regulation.[9] In the meantime, however, the EPPO will have to better determine the scope and implications of its ancillary competence.

At the end of the investigation, the greatest confusion concerns access to the simplified procedures, whose models vary considerably between Member States, raising concerns about forum shopping. The question remains whether the EPPO's guidelines are sufficient to ensure a degree of uniformity and equal treatment of defendants across the Union, as EDPs are still bound by their national laws.[10] A somewhat similar problem concerns the grounds for dismissal, given the ambiguous wording of Article 39 of the EPPO Regulation. In particular, it needs to be clarified whether the EPPO can rely on national provisions that provide reasons for dismissal which do not appear to be listed in the EPPO Regulation.[11]

Finally, a crucial aspect in understanding the role and, I would say, the identity of the EPPO in the criminal justice system lies in the admission of evidence in court.[12] This is one of the factors that characterises contemporary criminal proceedings as either largely accusatorial or inquisitorial. I am referring, of course, to the separation between preliminary investigations and trial, with the consequent impossibility for the judge to use out-of-court statements, unilaterally gathered by the parties. If this barrier were to collapse, the EPPO would risk retaining only the name of an accuser, but in

(eds), *L'attuazione della Procura europea. I nuovi assetti dello spazio europeo di libertà, sicurezza e giustizia* (Editoriale Scientifica 2022) 161, 185.

9 On this point, however, 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/thinktank/en/events/details/study-presentation-compatibility-of-nati/20240118EOT08142 79–81.

10 See J Della Torre, *La giustizia penale negoziata in Europa. Miti, realtà, prospettive* (CEDAM 2019) 585–594.

11 On this matter, see L Luparia and J Della Torre, 'Profili dell'azione penale (e dell'inazione) nel sistema della Procura Europea' (2023) *Rivista Italiana di Diritto e Procedura Penale* 347, 367; R Belfiore, 'L'esercizio dell'azione penale da parte dell'EPPO tra legalità e margini di discrezionalità' (2022) *Cassazione penale* 3677, 3684; D Brodowski, 'Article 39' in Herrnfeld, Brodowski and Burchard (eds) (n 7) mn 11-12.

12 For further discussion, see D Brodowski 'Admissibility of Evidence in EPPO Proceedings' (2023) 14 *New Journal of European Criminal Law* 34.

substance being transformed into a real investigating judge, with the power to collect evidence, especially abroad.

3.2 The construction of the EPPO

The second fundamental question that needs to be addressed regards the construction of the EPPO, specifically whether the system outlined in the EPPO Regulation is 'slowing down its potential' (or not). This refers to the remarkable changes that occurred during the negotiations on the establishment of the EPPO within the Council of the European Union, as compared to the structure originally envisaged in the draft proposal presented by the Commission.

As we all know, there has been a significant shift from a vertical, top-down organisation, led by the Chief Prosecutor, to a structure in which collegial bodies – in particular the College and the Permanent Chambers (PCs) – play a decisive role. Moreover, the original vision of treating the territories of the Member States as a 'single legal area' has been set aside, with numerous references to national laws on criminal procedure as a consequence.[13]

That being said, the interpretation of these changes varies among academics and practitioners. For some, it is a deeply misguided choice, dictated by the Member States' fierce opposition to a truly supranational body, which they believe jeopardises the EPPO's ability to pursue its main objective, i.e. strengthening and harmonising the prosecution of crimes affecting the European Union's budget in different countries. Others, however, believe that this choice is the result of a wise compromise, in line with the current stage of development of the Union and the broader goals pursued by European legislators.

We should not forget that Article 86 TFEU does not permit the establishment of a federal judicial system within the Union, as the EPPO conducts criminal proceedings before courts and tribunals of the Member States. Consequently, the decision to establish an integrated judicial system, in which EDPs take on double roles (the so-called 'double-hat model') and

13 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, 7; M Panzavolta, 'Responsabilità e concetti: il regime normative e la scelta della giurisdizione nelle indagini dell'EPPO in cerca di orientamento' in G Di Paolo, L Pressacco, R Belfiore and T Rafaraci (eds) (n 8) 93, 101.

work primarily on the basis of national legislation, appears both logical and, at least to some extent, necessary.

In my opinion, from a pragmatic perspective, this contrast has lost at least part of its original meaning. Without dismissing any concern, it must be recognised that the European Union has demonstrated its ability to manage and coordinate complex structures. On the other hand, the EDPs need the trust and cooperation with police forces and magistrates in all Member States, without which they could not fulfil their mandate.

I believe that, even in this instance, the problem can be observed from a dual perspective.

On the one hand, we can refer to the structure of the EPPO, as outlined in the EPPO Regulation. Several scholars have underlined that it is too complicated and bureaucratic, unable to make swift decisions necessary for conducting complex investigations. Recently, however, new concerns have emerged, regarding the effectiveness of the PCs in crucial coordination tasks, issuing directives, and resolving disagreements on the conduct of investigations by the EDPs. In particular, some scholars have observed that European Prosecutors sitting in the College and the PCs, while supervising the investigations of the EDPs, run the risk of being 'captured' by their national interests or, at least, struggling to detach themselves from the practices and legal culture rooted in their own legal systems.[14] If this was the case, obviously, the PCs would lose much of their authority and their ability to effectively guide the EPPO's activities, ensuring the uniformity and coherence of its strategies and directions.

A second level of the discussion revolves around the regulatory context in which the EPPO carries out its functions. The key question is whether the EPPO can effectively fulfil its institutional tasks, without a strong harmonisation of procedural rules across Member States, which currently seems an unachievable goal. This question becomes particularly intriguing in relation to transnational investigations, which present several regulatory challenges.

At the time of this presentation, a preliminary ruling is currently pending before the ECJ on this very issue, to define the type of control that falls within the jurisdiction of the State where the EDP responsible for providing assistance is based.[15]

14 On this matter, see Öberg (n 2) 177.

15 The ECJ has since ruled on the issue with its judgment of 21 December 2023 in ECJ, Case C-281/22 *G. K. and Others (Parquet européen)*, ECLI:EU:C:2023:1018.

Even in this case, we must consider the broader implications of this matter. The mechanisms of transnational investigative assistance within the EPPO must be compared, on the one hand, with those typical of the European Investigation Order, and, on the other hand, with the concept of a 'federal' type of operational practice, which should ideally go beyond the dynamics of mutual recognition of judicial decisions. These issues are clearly of paramount importance for the future configuration of the European Area of Freedom, Security and Justice.

Once again, I remain particularly curious about the interaction between theoretical reflections and practical perspectives, because institutions 'walk' on the 'legs' of individuals. It will therefore be especially interesting to observe the behaviours of the judges of the ECJ, the members of the EPPO, as well as the reactions of lawyers and legal scholars. We are no longer in the era of large-scale scientific projects, like the past efforts aimed at drafting the *Corpus Juris* or the *Model Rules on Criminal Procedure*. Yet, the legal community faces a great challenge. If we are ready to embrace it with energy and enthusiasm, we will have the opportunity to contribute, each in their own small way, to the construction of a great common enterprise.

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The EPPO's transformative powers on criminal justice in the Member States

Gabriella Di Paolo[*]

This article analyses the transformative role of the European Public Prosecutor's Office (EPPO) within national criminal justice systems. Despite its supranational nature, the EPPO relies heavily on domestic legal frameworks, producing potential tensions between Regulation 2017/1939 and the intricate legal features of Member States. These frictions illustrate its impact on three levels: legislative reforms, interpretative adjustments of national rules, and cultural change among practitioners. By embedding itself in national systems while reshaping them, the EPPO not only safeguards the Union's financial interests but also acts as a driver of convergence in European criminal justice.

1 Introduction: the integration of the European Prosecutor within national criminal justice systems and the interaction between the EPPO Regulation and national law

To understand whether, and to what extent, the European Public Prosecutor's Office (EPPO) can trigger transformations of Member States' criminal justice systems, it is useful to point out that this body is fully embedded in national legal systems, despite its supranational nature as a body of the European Union.

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* Author's note: This contribution is based on a presentation given on 18 October 2023 at the conference 'The European Public Prosecutor's Office as Motor for Transformation in the European Area of Freedom, Security and Justice', at Villa Vigoni, Menaggio (Italy). The narrative style was maintained.
This contribution also formed the basis for further reflections, which were developed in subsequent work. G. Di Paolo, 'The EPPO's Transformative Powers on Criminal Justice in the Member States: The Impact of International and European Law on Criminal Procedure', Studia Iuridica Lublinensia, Vol. 55, No. 5, Special Issue (December 2024), pp. 31–44.

This organic and operational integration within the national systems derives first and foremost from the Lisbon Treaty. Article 86(2) of the Treaty on the Functioning of the European Union (TFEU) states that the EPPO shall be responsible for investigating, prosecuting, and bringing to judgment the perpetrators of offences against the Union's financial interests (known as PIF offences, from the French acronym for '*protection des intérêts financiers*')[1] committed in participating Member States. Additionally, it states that the EPPO shall perform the functions of public prosecutors before the competent courts. Consequently, the trial stage shall necessarily take place in national courts.

Furthermore, Member States are still reluctant to give up their sovereignty in criminal matters. Therefore, the EPPO Regulation[2] was only adopted, after heated debates, through an enhanced cooperation procedure, and it significantly diverges from the Commission's 2013 proposal:[3] the structure of the EPPO as eventually adopted is more decentralised and collegial than the one originally proposed by the Commission.[4]

Moreover, and above all, the EPPO Regulation encompasses a significant number of references to national law, totalling approximately 80 references across its recitals and operative provisions.[5] The result is a highly intricate legal framework that heavily relies on the support or integration of national norms (both substantive and procedural rules).[6]

1 PIF crimes, as defined in 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), not only affect the Union's financial interests but they also harm its reputation and credibility. Therefore, these crimes include not only fraud related to the EU budget or large-scale VAT frauds affecting more than one State, but also corruption, misappropriation of assets committed by a public official, and money laundering involving property derived from those crimes.

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

3 ML Wade, 'The European Public Prosecutor: Controversy Expressed in Structural Form' in T Rafaraci and R Belfiore (eds), *EU Criminal Justice. Fundamental Rights, Transnational Proceedings and the European Public Prosecutor's Office* (Springer 2019) 165.

4 T Rafaraci, 'Brief Notes on the European Public Prosecutor's Office: Ideas, Project and Fulfilment' in Rafaraci and Belfiore (eds) (n 3) 157, 159.

5 L De Matteis, 'The EPPO's Legislative Framework: Navigating through EU Law, National Law and Soft Law' (2023) 14 *NJECL* 6, 7.

6 M Panzavolta 'Responsabilità e concetti: il regime normativo e la scelta della giurisdizione nelle indagini EPPO in cerca di orientamento' in G Di Paolo, L Pressacco, T Rafaraci and R Belfiore (eds), *L'attuazione della Procura europea. I nuovi assetti dello spazio europeo di libertà, sicurezza e giustizia* (Editoriale Scientifica 2022) 93, 94.

This is one of the reasons why Article 117 of the EPPO Regulation imposes an obligation, on participating Member States, to notify the EPPO (and other Union institutions) of several critical matters:

1) the list of national authorities responsible for implementing the EPPO Regulation;
2) an extensive catalogue of, *inter alia*, national criminal law provisions applicable to the offences outlined in the PIF Directive; and
3) any other relevant national law, including procedural laws.[7]

This comprehensive reporting obligation confirms the relevance of national law in complementing the provisions of the EPPO founding Regulation.

Finally, it should be noted that each participating Member State has already enacted laws or other legal measures amending its national criminal justice system to reflect the existence (and functioning) of the EPPO. In other words, it created an appropriate legal environment to 'host' the EPPO. These legislative amendments concern criminal law, criminal procedure, the relationship with law enforcement agencies, and, in some instances, the digitalisation of justice systems. This last point is crucial to ensuring connection and exchanges between the EPPO's Case Management System (CMS) and national databases and file management systems. These adaptive measures also serve as a 'litmus test' gauging the degree of resistance or adaptation of Member States to the novel challenges introduced by the establishment of the EPPO.

2 Challenges in the interaction between the EPPO Regulation and the national law of the Member States

Most of the complex legal framework (comprising Union law and applicable national law, including specific rules of implementation) that governs the EPPO's activities remains largely untested in practice, either before

7 Member States have fulfilled their notification obligation under Art 117 of the EPPO Regulation in various ways. Some States, such as Slovenia, have taken a broad approach and included in their notification the entire text of their criminal code. Others, like Luxembourg and Latvia, have opted for a more limited approach, only listing provisions of substantive criminal law related to the implementation of the PIF Directive and the competent national authorities deemed relevant for the corresponding articles of the EPPO Regulation. See De Matteis (n 5) 8.

the competent courts[8] or within the EPPO structure itself. This refers to the Permanent Chambers (PCs), which play a pivotal role in the EPPO's decision-making process, combining the common sense of its members with legal considerations.[9]

However, pinpointing specific instances where potential tension between the EPPO Regulation and the intricate legal features of Member States arises, or where ambiguous references to national law leave ample room for divergent interpretations, may be useful to suggest a possible categorisation of the EPPO's transformative powers in the national criminal justice systems. Identifying compliance issues between national laws and the EPPO Regulation can also help understand and anticipate the challenges ahead for improvement that will likely be on the agenda in the coming years.

2.1 The 'model' of criminal investigations

If we follow the typical flow of a criminal case (investigations, decisions on prosecution, simplified procedures, trial, and appeals) the first example of potential tension between the EPPO Regulation and its implementing measures arises in the 'model of criminal investigations' adopted by the Lisbon Treaty (Article 86 TFEU) and the EPPO Regulation (Article 4).

These provisions reveal a clear political preference for a model in which criminal investigations are solely in the hands (and under the responsibility) of the prosecutor: Pursuant to Article 4, '*[t]he EPPO shall undertake investigations, and carry out acts of prosecution, and shall also exercise the function of prosecutor in the competent national courts, until the case has been finally disposed of*.

8 The reference is to national courts and the European Court of Justice (ECJ). After the drafting of this contribution for the Conference held at Villa Vigoni in October 2023, the ECJ delivered its first ruling on the EPPO system, on judicial authorisation in cross-border criminal cases (ECJ, Case C-281/22 *G.K. and Others (Parquet européen),* ECLI:EU:C:2023:1018).

9 In the EPPO system, the Chambers should balance due respect of national law and national features with unionwide coherency. Only once the EPPO starts to function, it will be appropriate to assess whether the members of the PCs will only uphold national interests or whether they will be able to detach themselves from their sense of justice and develop a true supranational 'European mindset'. See T Elholm, 'EPPO and a Common Sense of Justice' (2021) 28 *Maastricht Journal of European and Comparative Law* 212, 218.

This model of criminal investigation is similar to the Italian and German models. However, comparative law studies show that many European countries have a legal tradition characterised by the presence of a *'juge d'instruction'* (investigating judge), who plays a crucial role in overseeing investigations and prosecutorial decisions.
Given this distinctive specificity, it is legitimate to question whether jurisdictions that provide for the cohabitation between a prosecutor and a *'juge d'instruction'* – during the investigative phase – comply with the EPPO Regulation and the EPPO responsibilities as defined in the Lisbon Treaty (Article 86 TFEU). Indeed, it could be argued that such jurisdictions are transferring a portion of the control of investigations from the European Delegated Prosecutor (EDP) handling the case to another authority (a national one) and that such a shift could not be deemed acceptable in light of the EPPO Regulation.[10]

2.2 Investigative measures affecting fundamental rights

Another possible area of tension – and therefore another need to adapt national systems – concerns intrusive investigative measures and the minimum safeguards to be provided in the event of serious interferences with fundamental rights.

Article 30(1) of the EPPO Regulation merely requires Member States to enable the EDP to order or request a list of investigative measures in instances where the offence under investigation is punishable by up to 4 years of imprisonment. However, the ECJ, in its first judgment delivered on the

10 See De Matteis (n 5) 14; Panzavolta (n 6) 116 ff. After the drafting of this contribution for the Conference held at Villa Vigoni in October 2023, the European Commission released a first compliance assessment (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/thinktank/en/events/details/study-presentation-compatibility-of-nati/20240118EOT08142). According to this study, 'Member States took different approaches regarding the role of investigative judges and other national authorities. Depending on the approach taken, some Member States were found to not be fully compliant where investigative judges and other national authorities, in certain cases, retain the powers to investigate or prosecute PIF offences, conflicting with the general objectives and tasks of the EPPO' (11, 31).

EPPO system, concerning judicial authorisation in cross-border cases,[11] has added an interesting new element: the requirement that specific categories of (intrusive) investigative measures – such as searches of private dwellings (home searches), conservatory measures relating to personal property, and asset freezing – will need *ex ante* judicial authorisation in the State of the handling EDP.[12] The requirement for prior judicial authorisation in the handling State for measures that significantly affect fundamental rights, and the express reference to home searches, seem to raise compliance issues in those countries – such as Italy – that do not mandate this practice. In the Italian legal system, a prosecutorial decree is enough to carry out searches and conservatory measures to preserve evidence, which may conflict with the new judicial authorisation requirement.[13]

11 ECJ, Case C-281/22 *G.K. and Others (Parquet européen)*, ECLI:EU:C:2023:1018. For a comment, see T Wahl, 'Ruling on the Exercise of Judicial Review in EPPO's Cross-Border Investigations' (2023) *eucrim* 319; N Franssen, 'The judgment in G.K. e.a. (parquet européen) brought the EPPO a pre-Christmas tiding of comfort and joy but will that feeling last?' (European Law Blog, 15 January 2024), at https://www.europeanlawblog.eu/pub/the-judgment-in-g-k-e-a-parquet-europeen-brought-the-eppo-a-pre-christmas-tiding-of-comfort-and-joy-but-will-that-feeling-last/release/1.

12 In ECJ, Case C-281/22 *G.K. and Others (Parquet européen)*, ECLI:EU:C:2023:1018, the judges of Luxembourg drew parallels between the cooperation mechanism in Arts 31, 32 of the EPPO Regulation and the scheme of judicial cooperation within the EU based on the principles of mutual trust and mutual recognition, stating that the system of judicial cooperation in the EU is based on a division of competences between issuing and executing judicial authorities. As a consequence, also in the EPPO system, the ECJ established a division of work between national courts, in order to ensure effective judicial protection: it is up to the court of the handling EDP's State to exercise prior judicial review of the conditions relating to justification and adoption of the assigned investigation measures (para 73); it is up to the court of the assisting EDP's State to review matters concerning the enforcement of the measure (para 72). On top of that, the Court also clarified that '[a]s regards investigation measures which seriously interfere with those fundamental rights, such as searches of private homes, conservatory measures relating to personal property and asset freezing, which are referred to in Article 30(1)(a) and (d) of Regulation 2017/1939, it is for the Member State of the handling European Delegated Prosecutor to provide, in national law, for adequate and sufficient safeguards, such as a prior judicial review, in order to ensure the legality and necessity of such measures' (para 75).

13 According to Franssen (n 11), 'it is highly unlikely that the implementing legislation in all participating Member States is fully in conformity with the ECJ's judgment. It is, therefore, safe to assume that all these Member States will have to urgently review their legislation; Member States, like Germany and Austria, that had foreseen a full judicial review by a court in the Member State of the assisting EDP, will probably have to face up to the new reality and limit that role to the enforcement of the investigation measure. In the same vein, these same Member States will somehow

2.3 Prosecution decisions

Another example of potential tension between national laws and the EPPO Regulation concerns decisions on the prosecution: the dismissal of the case, on the one hand; simplified procedures, on the other hand.

2.3.1 The dismissal of the case

Regarding the dismissal of cases, two different issues require attention. The first one arises from the interpretation of the EPPO Regulation (Article 39), since it is unclear whether the EPPO Regulation, at the European level, is the sole authority for establishing grounds for dismissing a case, or if it may be integrated by national laws.[14] Additionally, it is left unclear whether the EPPO Regulation permits merely discretionary evaluations or not (referring to the well-known distinction between legality principle, or mandatory prosecution, and opportunity principle, or discretionary prosecution).[15]

The second issue concerns the extent of judicial review on the EPPO's decision to dismiss the case, in light of Article 42 of the EPPO Regulation.

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have to ensure that the *ex ante* judicial review undertaken in the Member State of the handling EDP is recognised as an adequate, trustworthy form of judicial control on the merits of the case at that stage of the investigation, thus allowing the assigned investigation measure to be carried out on their territory. Conversely, those Member States that had not foreseen ex ante judicial control in cross-border EPPO cases may well need to introduce this, leaving aside the previous question as to which judicial authority is best placed to undertake it. Additionally, all Member States may have to try and offer clarity to courts as to which elements concerning the enforcement of the investigation measure, they can take into consideration when they review the assigned measure. Whether this will actually be possible or even desirable without some degree of guidance at the EU level is doubtful.'.

14 See, on this point, R Belfiore, 'L'esercizio dell'azione penale da parte dell'EPPO tra legalità e margini di discrezionalità', (2022) *Cassazione penale* 3677, 3684; D Brodowski, 'Article 39' in H-H Herrnfeld, D Brodowski and C Burchard (eds), *European Public Prosecutor's Office: Article-by-Article Commentary* (Nomos 2021) 359 ff.

15 In favour of the legality principle (more specifically, of a limited legality principle) see, *inter alia*, L Luparia and J Della Torre, 'Profili dell'azione penale (e dell'inazione) nel sistema della Procura Europea' (2023) *Rivista Italiana di Diritto e Procedura Penale* 347, 354, 355 and 367. By contrast, according to M Caianiello, 'The Decision to Drop the Case: *Res Iudicata* or Transfer of Competence' in L Bachmaier Winter (ed), *The European Public Prosecutor's Office. The Challenges Ahead* (Springer 2018) 103, 113, the EPPO Regulation depicts a limited discretionary principle, in which the margin of consideration left to the EPPO is rather broad, even though it is still subject to the oversight of a collegial body.

This provision stipulates that the procedural acts of the EPPO producing legal effect *vis-à-vis* the parties are subject to judicial review by the competent national court, in accordance with requirements and procedural rules laid down by national laws. It follows that judicial review falls within the purview of national courts.[16]

In the Italian legal order, the constitutional principle of mandatory prosecution (Article 112 of the Constitution) implies that decisions to waive prosecution are generally subject to judicial review by the judge for preliminary investigations ('*GIP*'). The GIP has the power to direct the prosecutor to conduct further investigations, or even to bring the case to trial, filing an indictment, when the GIP determines there are sufficient grounds for doing so.

What about EPPO cases? Do judges for preliminary investigations have the same powers they would have in ordinary cases? Or should national provisions be interpreted in such a way as to limit (or exclude) the powers of the judge, to preserve the EPPO's responsibilities and powers, as uniformly defined by Union law at the Treaty level? Scholars have a variety of views on this issue, reflecting differing views on the balance between national judicial oversight and the EPPO's autonomy.[17]

16 Pursuant to Recital 89, the provision of the EPPO 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. This namely refers to decisions not taken in the performance of its functions of investigating, prosecuting, or bringing to judgement. The EPPO Regulation does not preclude 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 Art 263(2) TFEU and Art 265(1) TFEU, and infringement proceedings under Arts 258, 259 TFEU.

17 According to Panzavolta (n 6) 120, judicial control must never go so far as to interfere with the strategic and discretionary decisions of the EPPO. Thus, the responsibility conferred to the EPPO in relation to prosecution means that there can be no external interference in these decisions. This does not mean that judicial review of the decision is excluded (which is clear from Art 42(1) of the EPPO Regulation and even more so from Art 42(3)), but it does mean that judicial powers of intervention beyond verifying the legitimacy of the decisions taken, such as the obligation to conduct certain investigations or to bring charges, are excluded. To return to the Italian example, it follows that domestic law should not be completely abandoned, but, at the same time, it cannot be applied without some adaptation to the EPPO regime. In practice, it appears from a series of informal interviews that Italian EDPs have moved towards asking the GIP for dismissal of the case, but this practice leads to an overlap between the PC and the judge for preliminary investigations. It remains to be seen who has the final say in the event of a disagreement.

2.3.2 Simplified procedures, trial, and appellate remedies

As anticipated, another example of challenging references to national laws is the application of simplified procedures (Article 40 EPPO Regulation), based on an agreement with the suspect (in cases where the application of sanctions is at stake). The Italian system includes such a procedure, known as '*patteggiamento*' (plea bargaining), which is available at all stages of criminal proceedings, i.e. both during the preliminary investigations and after the indictment – at the trial stage – if the accused requests it. This scenario raises several questions, in particular regarding the scope of judicial review in EPPO cases.

For example – and *inter alia* – Article 444 of the Italian Code of Criminal Procedure[18] governs the judicial review of the so-called '*patteggiamento*' based on criteria that partially diverge from those established in the EPPO College's guidelines[19]. According to the latter, in addition to the legality and proportionality criteria, the PC (and, before its decision, the EDP handling the case) also carries out an assessment based on opportunity, which is not provided for in the aforementioned Italian provision. Can the national court disagree with the decision of the PC and reject the '*patteggiamento*' on national law grounds, or is it bound by the PC's decision? Ultimately, who has the final say in the event of conflicting assessments?

Moreover, Italian national rules require prosecutors to justify their rejection of a defendant's proposal of '*patteggiamento*'. Because of this obliga-

18 Art 444(2) Code of Criminal Procedure: 'If the party who has not submitted the request agrees with the request and delivery of the judgment of dismissal is not required in line with Article 129, the court shall order the application of the punishment by issuing a judgment, stating, in its operative part, that the parties have submitted the request. The judgment on the application of the punishment shall be delivered only if, based on the available elements of evidence, the court believes the *legal definition of the criminal act, the application and comparison of the circumstances adduced by the parties are correct and the requested punishment is adequate* [*in the light of the constitutional principle of the re-education of the convicted person*]. If a civil party has joined the criminal proceedings, the court shall not decide on his request for compensation; the accused shall in any case be ordered to pay the costs incurred by the civil party, unless there are valid grounds for full or partial setoff. […]' For this translation (and for an unofficial translation of the CPP, updated to 5th July 2017) see M Gialuz, L Luparia and F Scarpa (eds), *The Italian code of criminal procedure. Critical Essays and English Translation* (Wolters Kluwer Italia 2017) 116–565.

19 Decision 029/2021 of the College of the European Public Prosecutors's Office of 21 April 2021 Adopting operational guidelines on investigation, evocation and referral of cases as amended by Decision 007/2022 of 7 February 2022 of the College of the EPPO.

tion, the court has the power, at the end of the trial, and in the event of a conviction, to review the lawfulness of the prosecutors' denial of consent and to apply the reduced sentence originally requested by the defendant. What about EPPO cases? Has the trial court the same powers as in national cases? Or does the interaction between national provisions, the EPPO Regulation, and the College Guidelines radically transform the judicial review of national courts on '*patteggiamento*' in European cases?

Similar challenges or possible transformations can also arise at the trial stage, particularly during the sentencing phase. In the event of a conviction, the EPPO could try to influence the sanctions and the sentence, seeking a certain degree of repression to achieve coherence at the Union level, triggering a possible transformation of the sentencing criteria.[20]

Finally, the EPPO should be able to perform its functions across the entire criminal proceeding, from the preliminary investigation to the trial at first instance and through to the appeal phase. However, in some States, such as France and Italy, the EDP may be prevented from participating in hearings before higher courts, such as the Court of Cassation, due to specific legal constraints. These limitations on the EPPO's prerogatives are hard to reconcile with the EPPO Regulation, suggesting the need for amendments to enable the EPPO to fully exercise its powers at all levels of the various appeal systems within the EPPO's scope of competence. This shall include cases where the sole matter for adjudication is the correct application of the law. To this end, Italy signed a supplementary agreement for the appointment of two additional EPPO prosecutors at the Prosecutor General's Office working with the Court of Cassation and is awaiting their appointment by the Superior Council of the Judiciary (CSM).[21]

2.4 Basic principles of the EPPO's activities and data protection

The final example of possible transformative factors concerns the basic principles guiding the EPPO's activities according to the EPPO Regulation (Article 5: the principle of proportionality and the impartiality of the Prosecutor) and the great emphasis on data protection (more than 40 pro-

20 According to Elholm (n 9) 224, the EPPO might try to influence the sentencing level by demanding a specific sanction/sentence or presenting the court with guidelines and legal practice from other Member States and ECJ case law in EU fraud cases.

21 R Belfiore, 'L'articolazione funzionale e territoriale della Procura europea in Italia' in Di Paolo, Pressacco, Rafaraci and Belfiore (eds) (n 6) 47, 54.

visions). These principles are (largely) unknown in many Member States, but it is reasonable to anticipate that, in the long term, these innovations will influence the mindset of practitioners and lawmakers well beyond the EPPO cases, affecting the daily work in ordinary, non-European cases as well.

3 Final remarks

Coming back to the title of this paper, the examples outlined above suggest that the EPPO's transformative powers on Member States' criminal justice systems manifest on three distinct levels.

The first transformation is very visible at the normative level. As previously mentioned, each participating Member State has enacted laws or other legal measures to adjust its national criminal justice system, to accommodate the EPPO, but some improvements are still possible and necessary.

The second, less visible, level concerns the interpretation of national rules. Although the national (written) provisions remain the same, they must be reshaped through interpretation, to align with the prerogatives and powers of the EPPO as a Union body. The metaphor of 'old wine in new bottles' is not appropriate in the EPPO system: in the EPPO's new bottle, the old (national) rules will have to change their content.

The third level is the cultural level: given the structural integration with national systems, many innovations brought about by the EPPO will likely have an impact on the way practitioners perform their daily work, even in ordinary cases beyond the scope of the EPPO's material competence. Over time, the EPPO's operations may foster a new mindset and way of thinking, which could be another possible added value of this supranational body as it becomes more established.

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The EPPO's transformative power on criminal justice in the Member States – experiences of a European Delegated Prosecutor of the Czech Republic

Petra Vítková

I am fully aware of the fact that articles of experts are written in a very serious manner, with numerous references to various sources and reputable literature. However, I would like to use the opportunity given to me by the editors to approach readers in a slightly different way, to share my personal view on the topic in question: The European Public Prosecutor´s Office´s (EPPO) transformative power on criminal justice (not only) in the Member States.

1 Introduction

Finding a way to fight cross-border crime without interfering much with the sovereignty of the individual states is one of the biggest challenges in the field of international police and judicial cooperation. Every authority tasked with conducting criminal proceedings has to respect borders. International crime, however, does not. The perpetrators do not have to respect any of the strict rules binding the official authorities. Instead, they are able to take advantage of the formal duties imposed upon officials. To be able to face the situation effectively, those fighting crime need the international cooperation to be as intensive as possible. The EPPO represents the most institutionalised form of such a cooperation in the area of criminal justice.

Every new office has to be prepared to face many problems, and there is no exception for the EPPO. One of the main issues are the diverging opinions on the need for such an office, both in the participating as well as the non-participating Member States. The establishment of the EPPO was followed by passionate discussions, various questions were asked. This particular one was repeated over and over again: Is it really within the powers

of the new office to investigate relevant crimes[1] and to bring perpetrators to judgement in a more effective way? In other words: Will it significantly influence the future of criminal justice all over Europe? I was not sure about the answers in the past. I am pretty sure now, after a few years of the EPPO's operation.

The aim of this article is not to present the structure of the EPPO. But for the purpose of further explanation, I would like to summarise the following: The EPPO is composed of two levels, the central one and the decentralised one.[2] The central level encompasses the European Chief Prosecutor (ECP), one European Prosecutor per participating Member State (EP, two of which are Deputies of the ECP), the Administrative Director, and dedicated technical, investigative and support staff. The decentralised level comprises the European Delegated Prosecutors (EDPs) located in the individual participating Member States. To put it very simply, EDPs are the persons who handle investigations and prosecutions in their Member State of origin, under the supervision of a European Prosecutor from the same Member State, on behalf of the competent Permanent Chamber (PC) (which monitors and directs the investigations and prosecutions conducted by the EDPs). The European Chief Prosecutor supervises it all. As to the international judicial cooperation, the EDPs are acting in close cooperation by assisting and regularly consulting each other in cross-border cases under the rules set out in Article 31 of the EPPO Regulation. How does it work and why has their cooperation proved to be successful?

2 Cross-border investigations within the EPPO

Before I get to the advantages, I would like to describe an undesired side effect of using the usual instruments of mutual judicial cooperation: No matter whether the European Investigation Order (EIO)[3] or Mutual Legal Assistance (MLA) is used, the documents (concerning a similar request for assistance in criminal matters) end up – provided the right national office

1 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.

2 Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor`s Office (EPPO Regulation), especially Chapter III.

3 Established by Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.

is reached out to – on the table of a foreign public prosecutor, in order to be executed sooner or later. Such a prosecutor is very often a specialist for international legal cooperation, not an expert for investigating serious economic crimes. Even if they are (by chance) a specialist for both disciplines, they have no other information about the case itself other than those summarised in the request. Trying to do their best, they have only limited knowledge about the background of the criminal conduct under investigation. Such information may be distorted or actually lost in translation. They may contact a colleague abroad if necessary. But a language barrier on both sides often prevents effective communication. Even if the requested investigative measures are successfully executed, the handling prosecutor sees the results with a significant delay in time, including translations. Only then are they able to consider whether any other assistance is needed in the very same state.

The situation within the EPPO is fundamentally different. EDPs assist each other in cross-border cases via a measure called the *Assignment*, set out in Article 31(1) of the EPPO Regulation:

> *The European Delegated Prosecutors shall act in close cooperation by assisting and regularly consulting each other in cross-border cases. Where a measure needs to be undertaken in a Member State other than the Member State of the handling European Delegated Prosecutor, the latter European Delegated Prosecutor shall decide on the adoption of the necessary measure and assign it to a European Delegated Prosecutor located in the Member State where the measure needs to be carried out.*

But what does this provision really mean in practice?

All EDPs located in different states have the very same specialisation: they are experts in serious economic crimes and also have experience in the field of international cooperation in criminal matters. There is no language barrier – the working language inside the office is English.[4] They have a common understanding of the issue, and they understand the special needs of investigations linked to 'white collar' crimes. They have a very good knowledge of the background of the case, which is provided to them by the

4 Art 107(2) EPPO Regulation; Decision 002/2020 of the College of the European Public Prosecutor's Office (EPPO) of 30 September 2020 on internal language arrangements, Art 1(1) The working language for the operational and administrative activities of the EPPO shall be English. (2) French shall be used along with English in the relations with the Court of Justice of the European Union.

colleague not only in the *Assignment*. They may also arrange a call anytime or contact each other via other secure communication channels. They are allowed and obliged to discuss the case in which they are assisting, with the aim to assist each other in the most efficient and quick way, protecting the human rights at the same time.[5]

Being legal experts, they are able to provide quick feedback related to the executed measures, and to advise other steps if needed according to the progress of the investigation in the assisting state. They are able to react 'on line' to such a progress. They understand the result of the measures executed in their own state without a need of translation, and, moreover, are able to translate it quickly and operatively to the colleague who is handling the case. The assisting EDP may ask for supplementary materials, for an explanation of the situation in the state of the handling EDP, and to be able to see the case overview. All results are provided to the colleague very quickly via the electronic case management system.[6]

During this communication, not only the primary objective is achieved (the execution of the requested measures) but also the secondary one: Both interested sides are gaining knowledge about the foreign legal provisions, about the legal measures available to a colleague for the same purpose. They have sufficient expertise to be able to compare different legal backgrounds, to understand advantages and/or disadvantages of different legal provisions. They may avoid an unsuccessful practice if it is identified. They may inspire each other by using the very same provision in a different way. They are not only capable but also willing to try to use a new investigative method if they see its practical impact on the progress of the investigation.

3 The influence of the EPPO being a 'single Office'

The aforementioned secondary objective is also achieved by the communication between the EDP and the PC monitoring and directing the investigation and prosecution conducted by the EDP.[7] EPs appointed to the individual chambers are very skilled experts in the same field, too. By exercising their powers of supervision, they offer a fresh perspective on known topics, a new approach to the entrenched steps taken in individual

5 An alternative but less invasive measure achieving the same result in the state of the assisting EDP may be used if the situation requires it, Art 31(5) EPPO Regulation.
6 Art 44 EPPO Regulation.
7 Art 10 EPPO Regulation.

investigations. This also applies to communication with the staff supporting the investigation on the central level.

Everything mentioned above is influenced by the policy of one single Office,[8] which means a shared responsibility for the success of cases entrusted to the EPPO, no matter who is in charge of the investigation.

The results of such an intense cooperation are also reflected in the following possibilities of the people involved: By sharing the best practice leading to more efficient investigations, EPs and EDPs are able to explain the reasons for necessary changes in national legislation in an understandable way. They are able to demonstrate the usefulness of legislative changes needed in their Member States based on individual examples and real cases. They are able to demonstrate corresponding numbers. Last but not least, successful investigation of serious cross-border economic crimes means a more effective protection of the money of European tax payers. In that situation, every proposed change of legislation is more likely to succeed, even more so if it is supported by successful judgements.

After a few years of operations, the EPPO has proved itself to be an office strong enough to be heard,[9] to be taken seriously. That is the reason why the EPPO is in an easier position for gaining political support on the national level, also by gradually gaining credibility in all of society's perception.

4 The EPPO's transformative power

However, the EPPO's transformative power should not only be seen in how it changes the legislation, but also especially in how it changes minds. Being an EDP, I have been facing many challenges. It was not easy for the experienced and the independent public prosecutors to start listening to PCs, to seriously consider recommendations, to obey orders. It was not easy to start communicating with colleagues in the same position, to start explaining the situation in the Czech Republic to them, to try to understand the individual needs of 'foreign' investigations, to stay open to different approaches to similar problems. Being a public prosecutor requires a lot of self-confidence, of course with respect to all legal rules and other legal pro-

8 Art 8(1) EPPO Regulation.

9 See more in: European Public Prosecutor's Office, 'Annual Report 2022' (Luxembourg, 2023), at https://www.eppo.europa.eu/sites/default/files/2023-02/EPPO_2022_Annual_Report_EN_WEB.pdf.

fessions. A public prosecutor is a so called 'dominus litis'. They supervise the work of police officers, they have the decisive word determining the progress or the closure of the case. Joining the EPPO meant to step aside a little bit, it meant to start considering more seriously other people's opinion during the exercising of one's own competences. But it seems to work.

In spite of some cultural barriers which were not mentioned up until now, not only is an effort to assist each other in the best way recognisable within the EPPO, but also an effort to challenge prejudices, to learn from one another, to get to know each other better. To appreciate the power of the EPPO means to appreciate the power of the people who joined this historically groundbreaking project.

Speaking for myself, the discussions mentioned above enriched my professional approach to tasks entrusted to me, broadened my horizons and changed my mindset in a fresh way, by letting it open up to new methods (not only) of combatting serious economic crimes. I am convinced that this is the way how to change – step by step – the mindsets of the others, police officers and judges at first, in order to win a battle but hopefully also the war against international organised crime – starting in the area of economic crime.

We are living in an uneasy Europe today. Nationalists' and other extremists' tendencies are growing stronger. The voices of many populists are heard aloud, trying to hide their own goals pretending to advocate public interest. I believe it is necessary to counterbalance such tendencies by setting good examples showing that European Union nations do have more in common than they do not. The EPPO might become an indicator showing that it makes sense to cooperate and not to enclose ourselves in our own borders, both territorial and mental. That could be the EPPO's 'super power' – in addition or even beyond its transformative power on criminal justice in the Member States.

The EPPO Permanent Chambers: a new right on the horizon?

Andrea Venegoni

Over the last twenty years, at least, a lot was written on the European Public Prosecutor's Office (EPPO). Before any legislative text existed, the contributions consisted essentially of theoretical analysis of the possible structure and functioning of the Office, starting from the legal bases, which the amendments to the European primary law introduced through the Treaty of Lisbon. Following the presentation of the proposal for a regulation by the European Commission in 2013, and over the following years in which the legislative process progressed, many analyses concerned the text and the legislative negotiation's developments. Following the adoption of the EPPO Regulation in 2017,[1] the focus shifted to commenting on the final text, of which, to date, there is a single article by article commentary[2], and a very large number of other contributions in the legal literature of the various European States.

Today, a few years after the start of the EPPO's operations, we can start reflecting about the structure and functioning of the Office in practice, analysing their first outcomes, commenting on the facts based on operational experience.

Among all possible aspects, I would like to focus this text on one of the topics that, in the theoretical comments, had raised several doubts and perplexities: the Permanent Chambers (PCs).

1 The Permanent Chambers shall: structure and organisation

The insertion of the PCs in the text of the EPPO Regulation took place only during the negotiations in the Council of the EU and its bodies. They were

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

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

not provided for in the proposal for a regulation submitted by the European Commission in July 2013.

Their introduction was the natural consequence of another innovation resulting from the legislative negotiations: the creation of the College and the provision that a European Prosecutor (EP) from each participating Member State would be present at central level.

The Commission proposal provided for a very simple but very operational central structure with a Chief Prosecutor, three deputies, but also a group of investigators who could conduct investigations directly from the central level of the Office, in addition to the ordinary possibility of conducting investigations at a decentralised level. The Member States, on the other hand, preferred the possibility of a collegiate body, composed of a prosecutor from each State, without the provision of *European* investigators. Moreover, in addition to being part of the Office's College dealing with policy issues, the EPs also play an operational role through membership in the PCs.

Indeed, each EP is part of one or more PCs, which are a kind of *mini-panels*, each composed of three EPs, who take some key decisions in the proceedings dealt with by the European Delegated Prosecutors (EDPs).

As of 2023, there are 15 PCs, with three EPs each. A prosecutor may be a member of more than one PC. In particular, according to Article 10(3) of the EPPO Regulation, the PCs decide on the following issues:

'(a) to bring a case to judgment in accordance with Article 36(1), (3) and (4);
(b) to dismiss a case in accordance with point (a) to (g) of Article 39(1);
(c) to apply a simplified prosecution procedure and to instruct the European Delegated Prosecutor to act with a view to final disposal of the case in accordance with Article 40;
(d) to refer a case to the national authorities in accordance with Article 34(1), (2), (3) or (6);
(e) to reopen an investigation in accordance with Article 39(2)'.

Moreover, where necessary, the PCs shall also take the following decisions according to Article 10(4) of the EPPO Regulation:

'(a) to instruct the European Delegated Prosecutor to initiate an investigation in accordance with the rules in Article 26(1) to (4) where no investigation has been initiated;

(b) to instruct the European Delegated Prosecutor to exercise the right of evocation in accordance with Article 27(6) where the case has not been evoked;
(c) to refer to the College strategic matters or general issues arising from individual cases in accordance with Article 9(2);
(d) to be allocated to a case in accordance with Article 26(3);
(e) to be reallocated to a case in accordance with Article 26(5) or 28(3);
(f) to adopt the decision of a European Prosecutor to conduct the investigation himself or herself in accordance with Article 28(4)'.

Unlike in many national systems, where it is the same prosecutor who deals with the case to assess and decide on its conclusion – possibly with a request to the judge, but always on the basis of an assessment made by the individual prosecutor – the handling EDP in the EPPO procedure cannot assess and take certain decisions on the case on their own, but must submit a proposal to the PC, and the latter has the final word.

Another particular feature of this system is that the three members of the PC must be prosecutors from a State other than that of the prosecutor dealing with the case. It is worth mentioning that the expression 'prosecutor coming from a different State' is purely geographical and describes the origin of the prosecutor from a specific national system, but it does not indicate the role and the function of the prosecutor, who remains European, and not a representative of the State or expression of any national interest.

The question that arises from this system spontaneously is how is it possible that three prosecutors from legal systems other than that in which the investigation was conducted by the EDP may take important decisions in it, in particular when it comes to decisions which requires knowledge of the national system. This consideration deserves a further introduction.

The EPPO is a single office in its structure. However, it is not a single office with respect to the law applicable to investigations. Therefore, as provided for in the Regulation, the national law of the Member State in which the investigation is opened applies to the investigation, although it is no longer a national but a European investigation handled by the EPPO. As a result, the role of the law and principles of national criminal procedures remains very significant in EPPO investigations. This, *a fortiori*, reiterates the ratio of the question above, as to how it is possible for a PC of three prosecutors from national systems other than that of the investigation taking *fair decisions* in cases which have unfolded in accordance with legislations unrelated to them.

The answer to this question can be found in the primary and secondary rules governing the EPPO.[3] In essence, it is expected, and in practice happens, that the meetings of the Chambers will also be attended by the EP from the national system in which the case under discussion has been opened. In this way, they can ensure that the case complies with national principles, as provided for in the Regulation. To illustrate the sensitivity of this matter in practical terms, a good example to explain the subject would be the application of the legal principles for the prosecution of a case.

In some States, the principle of mandatory prosecution may be applied in the absence of clear evidence showing the innocence of suspect. In other States, the principle can be expressed in the sense that, on the contrary, prosecution can only be carried out if there is reasonable evidence of the guilt of suspect. Two different principles which, if applied incorrectly, may have serious consequences for the suspect, and lead to a negative conclusion of the case for the EPPO.

For that reason, the role of the 'Supervising European Prosecutor', coming from the national legal system of the case, is intended to ensure that the PC, composed of three prosecutors from different systems, takes a decision as much as possible in line with the principles of national law of the EDP handling the case.

This system is showing a clear practical consequence. As foreseeable, practical experience shows that the workload of pending cases in the EPPO varies between the participating Member States. The consequence of this situation is that supervisors from States with a high number of EPPO cases will have to participate frequently in meetings of the various PCs to discuss related issues, while supervisors from States with a lower number of EPPO cases will be 'guests' of the PCs less frequently.

On the other hand, in order to avoid workload imbalances, the latter are members of more than one PC, and thus constantly engaged in that quality, more than in the quality of 'Supervising Prosecutor invited to the Permanent Chamber meeting'.

The role of the PCs is therefore crucial. This holds true, moreover, not only from a decisive point of view in the investigation, but also as a

3 'Secondary rules' refers to the internal rules of procedure adopted by the EPPO on the basis of Article 10(8) of the EPPO Regulation: Internal Rules of Procedure of the European Public Prosecutor's Office as adopted by Decision 003/2020 of 12 October 2020 of the College of the EPPO and amended and supplemented by Decision 085/2021 of 11 August 2021, 026/2022 of 29 June 2022 and 010/2024 of 7 February 2024 of the College of the EPPO.

visible expression of the autonomy and independence of the office. Since the decision in the investigation is taken by three prosecutors from different legal systems and Member States other than the one in which the investigation was conducted, autonomy of judgment, independence and complete impartiality are, in fact, guaranteed.

It is very important to affirm these principles, and it is very important for the legitimacy of the EPPO itself, which has acquired authority from this procedure.

2 The functioning of the Permanent Chambers

After this broad outline of the composition of the PCs, their functioning is governed in detail by the secondary rules of the EPPO. The Internal Rules of Procedure[4] and a Decision of the College[5], in particular, govern the system for allocating cases to the Chambers, the possibility of reallocating a case from one Chamber to another and the voting rules.

In my view, based on the concrete experience, the most interesting aspect of the decisions of the PCs is that of the decision-making dynamics, highlighted by the functioning of the PCs.

It is true that, as stated above, decisions must be in line with the national law of the State in which the trial is taking place, but the dynamics of the decision are more complex. Although the supervisor can explain the national legal principles applicable to the individual case, it is clear that this is still a simplified, extremely brief exposure.

It is then, at this stage, that a very interesting dynamic of the decision emerges: the Chamber certainly relies on the explanations provided by the Supervising EP, but each member also transposes them in the light of their own national principles, mixed with EU law when necessary, adding a component of what could simply be called 'common sense'. The latter can be defined as the apparent reasonableness of the decision according to a generally acceptable opinion, without excluding an assessment also in the light of European law, namely the specific rules of the EPPO, when it comes to the case in question.

4 Internal Rules of Procedure of the EPPO (n 2).

5 Decision on the Permanent Chambers as adopted by Decision 015/2020 of 25 November 2020 of the College of the EPPO and adopted by Decision 085/2021 of 11 August 2021.

It can therefore be said that, in many cases, the decision of the Chamber is the result of a synthesis of at least three components: national law, European law, and, to a certain extent – perhaps not predominant, but none the less important – common sense. This creates a very interesting phenomenon, establishing a completely new decision-making practice, of which only now, after three years, the main features emerge and whose analysis would be very useful in the future. Of course, this is not the case law of a court, since the PCs are not an external adjudicating body; they are part of the EPPO and therefore the decision is always the result of an internal analysis at the prosecution's office. However, although internal, these decisions are always taken in a collegiate form which can be analysed further in the coming years.

The influence of European law in these decisions is also very interesting. Although it has been stated that the decision is predominantly adopted under national law, as provided for in the Regulation, there are certain situations in which the presence of European law is decisive.

An example for all: among the few provisions of the Regulation which attempt to regulate a procedural institution at European level, Article 39 on the dismissal of proceedings is one of the most important ones. The EPPO Regulation was intended to create a 'closed' system of dismissal, established at European level. This question is, however, more complex as there are ways in the national systems to dispose of criminal proceedings which are not easily framed under Article 39. In these cases, it is the task of the PCs to find a 'sum' of national and European law. It must therefore be noted that, in the European context, measures resulting from the combination of three components are starting to be introduced: national law, European law and, to a certain extent, common sense or, if so, fairness.

Does it make such decisions less 'legal' than those taken based on strict national law? This does not seem to be the case. Rather, the question arises whether this is the beginning of a 'new' European law, a truly common right which is the sum of principles of national law that have been revised or, at least, interpreted in the light of written European law and, may seem strange to say, of a certain amount of what we could define as 'fair'.

This has important consequences. Of course, it is worth reiterating that the assessments of the PCs are made internally within the EPPO; the decisions on the outcome of the proceedings are taken by the national courts, on the basis of national law and, where appropriate, European law. However, the process of how decisions of the EPPO are 'ripening' is interesting.

In this sense, the EPPO confirms itself to be an innovator of European law in this respect; a laboratory of new ideas and experiences, which are merged and summarised.

Future model or pipe dream – European transnational investigation being both effective and safeguarding fundamental rights of the accused

Liane Wörner

The following short contribution is only a concise written analysis of a thought experiment. Its aim is therefore not to compile and/or present the full state of opinion, but simply to pose forward-looking, partly open questions. This does not mean that these questions have not already been asked elsewhere or are not currently being asked. The paper is in no way intended to slow down current developments that are immensely important for the further Europeanisation of criminal justice. After all, we are witnessing the creation and consolidation of a new model of European criminal prosecution that goes far beyond the transnational level under the decisive leadership of the European Public Prosecutor's Office (EPPO). Nevertheless, as a scientist, I cannot help myself: a *stress test* is to be performed from a theoretical point of view, as the introduction of criminal prosecution procedures designed at a European level and structured exclusively on a European basis, with the establishment of direct investigatory powers in all Member States involved in the proceedings, makes it considerably more difficult for the defence to verify that the rights of the accused are being safeguarded.

1 Introduction – Future model or pipe dream

The Europeanisation of criminal justice has improved and continues to improve with a lot: harmonisation now extends not only to contractual relationships between private parties and fundamental rights, but above all to the basis of criminal prosecution. Instead of a multitude of different standards of proof and evidence, and different investigative powers in all states, the EU has already enacted some uniform standards and uniformly

regulated rights of the accused apply to every citizen within the Union,[1] and may still go further. A beautiful vision of the future.

But how far away are we from achieving this goal? At present, the European Union has 27 Member States, including Denmark with a special status, and associations and forms of cooperation with other states such as Norway, Switzerland as well as the United Kingdom. This results in a total of 27.5 different national criminal jurisdictions, all of which differ – to varying degrees – from one another and each of which has its own structures for enforcing the law in theory and in practice.[2]

The good news is that, despite all state sovereignty, the EPPO has been created and started its work in a thoroughly structured and well-designed framework.[3] While political and societal expectations remain high, the EPPO does serve as *a* – if not *the* – decisive 'role model' within the European Union and beyond.[4] That already stems from it being the first of its kind. European Prosecutors (EPs) convene in the College, a Permanent Chamber (PC) monitors, supervises, and directs investigations and files operational decisions, from bringing a case to judgement, dismissing a case, to applying simplified proceedings. European Delegated Prosecutors (EDPs) handle and assist the cases nationally.[5] The entire system is performing well despite the absence of its own European criminal justice system, without a

1 In this direction already M Jahn, 'Fair trial als strafprozessuales Leitprinzip im Mehrebenensystem' (2015) 127 *Zeitschrift für die gesamte Strafrechtswissenschaft* 549, 615.

2 See hereto only M Böse, 'Die Europäische Ermittlungsanordnung – Beweistransfer nach neuen Regeln?' (2014) *Zeitschrift für Internationale Strafrechtsdogmatik* 152, 158; T Elholm, 'EPPO and a common sense of justice' (2021) 28 *Maastricht Journal of European and Comparative Law* 212, 216; VC Ramos, 'The EPPO and the equality of arms between the prosecutor and the defence' (2023) 14 *New Journal of European Criminal Law* 43, 43.

3 A Ritter, 'Grenzüberschreitende Strafverfahren der EuStA – Erste Einblicke in die Praxis' in T Niedernhuber (ed), *Die neue Europäische Staatsanwaltschaft. Bedeutung, Herausforderungen und erste Erfahrungen* (Nomos 2023) 15, 15 f.; A Mosna, 'Europäische Ermittlungsanordnung und Europäische Staatsanwaltschaft: Die Regelung grenzüberschreitender Ermittlungen in der EU' (2019) 131 *Zeitschrift für die gesamte Strafrechtswissenschaft* 808, 834; I Zerbes, 'Beweiserhebung und Beweisverwertung in EUStA-Verfahren' in Niedernhuber (ed) 70.

4 D Brodowski, 'Strafverfolgung im Namen Europas. Die Europäische Staatsanwaltschaft als Meilenstein supranationaler Kriminalpolitik' (2022) *Goltdammer's Archiv für Strafrecht* 421, 422.

5 Mosna (n 3) 834; E Duesberg, 'Europäische Strafverteidigung – Ausgewogene Kräfteverhältnisse in transnationalen Strafverfahren' (2022) *Neue Juristische Wochenschrift* 596, 596 f.

European Criminal Code or Code of Criminal Procedure, and without a European Criminal Court.[6] Let's mark it, the EPPO's pole position is safe.

However, scientific discussion is necessary because, as always, a pole position is not enough. But if the EPPO is a role model not only as it is a supranational body first of its kind, but also as a *guardian of the rule of law,* it is also well positioned for the future.

2 Guardian of the rule of law

Indeed, the instalment of the EPPO changed the entire idea of cross-border cooperation, of cross-border investigation and prosecution, and of national criminal investigation and prosecution in cases with a European dimension.[7] The vision of one European criminal procedure, as *Venegoni* stressed at Villa Vigoni, must be the driver, because the entire structure of European criminal justice is built on cross-border cooperation and communication.[8] In other words, the system of connections between the EPs in the College, in the PCs, and to and between EDPs in the Member States is oriented towards creating and building a community based on both practical and convincing rules of conduct and of fair and just prosecution. In this respect, the EPPO is based on the simple, but central, idea of working together directly on the basis of clear competences and responsibilities – as if one were sitting in a single office under one governmental jurisdiction – even across several national borders.

From the point of view of legal theory, the question arises whether such a sophisticated and differentiated system of cooperation and mutual control naturally grows into a, so to speak, self-generated procedural model in which the EPPO naturally functions as the guardian of the rule of law. The disappointing answer is: 'No'.

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6 L Bachmaier Winter, 'Cross-Border Investigations Under the EPPO Proceedings and the Quest for Balance' in L Bachmaier Winter (ed), *The European Public Prosecutor's Office. The Challenges Ahead* (Springer 2018) 121.

7 A Ritter, 'Grußwort von Andrés Ritter zur Eröffnung der Tagungsveranstaltung' in Niedernhuber (ed) (n 3) 11, 12; Bachmaier Winter (n 6) 1.

8 See A Venegoni and H-H Herrnfeld in this volume. See also: A Peters, 'Die Europäische Staatsanwaltschaft – Eine Gefahr für den fair trial-Grundsatz?' (Verfassungsblog, 20 February 2014), at https://verfassungsblog.de/europaeische-staatsanwaltschaft-gefahr-fuer-fair-trial-grundsatz/; A Ritter (n 3) 16 f.

In the following, I raise two questions for future discussion and then propose strategic directions resp. recommendations for further developments in order to maintain the EPPO's pole position.

3 Area 1 – The functioning of the Permanent Chamber

The independence of the EPPO is ensured, among others, by the supervising and monitoring procedures of its PCs.[9] I can fully see the uniqueness of this new, true European procedural element and how it brings added value to (criminal) investigation and proceedings, as well as to the further development of regulations within the EU. The necessary case-related discussions between the PC members broaden the perspective beyond the national level and enable genuine transnational solutions.[10] From a comparative law point of view, I must say that the PC is a great source of inspiration and a 'cooking pot' of criminal law comparison. That indeed comes with the structural problem and some dangers to be aware of:

The PC may exercise equitable jurisdiction while maintaining its inherent discretionary abilities to address new forms of injustice.[11] This could contribute to the development of a separate case law based on decisions of the PCs. However, it is not common law or anything similar and should not be considered as such. The findings of the PC remain the internal findings of the EPPO. Decisions and findings may serve as interpretation guidelines for future decisions of the EPPO. Since the PC may bring discussions to the College, findings may also initiate the possible further adoption or amendment of EPPO-internal regulations, such as the Internal Rules of Procedure. Through their monitoring and supervising function, the PC develop, indeed, 'quasi law in the making'. As much as I am pleased to see a truly transnational decision-making process – taking into account Europeanised and strengthened fundamental rights positions – in which the national perspective (in plenary) is completely disregarded, this exclusively transnational decision-making process is very far removed from the accused, especially in the highly sensitive area of criminal proceedings. This goes hand in hand with the risk of a lack of predictability of the proceedings and of procedural decisions for the accused in the application

9 D Brodowski (in this volume); see also Zerbes (n 3) 70; Mosna (n 3) 834.
10 See in addition Elholm (n 2) 215.
11 Duesberg (n 5) 598; Elholm (n 2) 215.

of the rules and their consequences.[12] The more a decision-making process is therefore geared towards the PC, the more accessible its decision-making operations must be for the accused.

It is true that a judicial body that is part of the systematic structure of the entire authority – in this case the EPPO – can play a decisive role in drawing up and implementing the authority's rules of procedure and in shaping a strong instrument of internal legal control.[13] From a purely internal perspective, however, it cannot define the principles and limits of equity and justice and, at least not alone, develop what is or should be common practice. Legal control, especially over possible infringements of highly sensitive individual rights, can only be carried out by a body outside the authority itself. Equality of arms and fairness cannot be achieved if the protection of the rights and interests of the accused is entrusted solely to the prosecuting authority.[14] If the EPPO does not want to run the constant risk of awaiting European Court of Justice (ECJ) decisions on the possibilities of certain legal interpretations 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) – it must be open to other procedural safeguards.

4 Area 2 – The Article 31 problem

That takes us to question area No 2. At its core, cross-border cooperation in transnational criminal proceedings depends on the correct interpretation of Article 31 of the EPPO Regulation, titled 'cross-border investigations'. Controversial since its entry into force,[15] by no surprise, this provision was at the centre of the first EPPO-related case the ECJ had to deal with in the case *G.K. and Others*.[16] The case raised questions concerning the very details of the interpretation of Article 31(1) and (2) in correlation with (3). The core underlying question of the Higher Regional Court of Vienna was whether the substantive *ex ante* review to be undertaken in the course of

12 See only Peters (n 8).

13 On the strong internal legal control of the EPPO Brodowski (n 4) 426.

14 Ramos (n 2) 44 f.

15 H-H Herrnfeld, 'Article 31' in H-H Herrnfeld, D Brodowski and C Burchard (eds), *European Public Prosecutor's Office: Article-by-Article Commentary* (Nomos 2021) mn 6.

16 The paper was presented when the case was still pending, see now: ECJ, Case C-281/22 *G.K. and Others (Parquet européen)*, ECLI:EU:C:2023:1018.

a required judicial authorisation is a competence belonging to the court or judge in the Member State of the handling EDP – where the investigation proceedings are being conducted – or of the court or judge in the Member State of the assisting EDP – where the required measure is to be enforced.

I am, however, interested in another point – which may yet be a pipe dream. After experiences with the European Arrest Warrant since 2003, the European Evidence Order, and the European Investigation Order, *once again* the (more abstract) question at stake here is the substantive review of the case within the handling state or within the state where the required measure is to be enforced. To make the long story short, it is about the idea of cross-border investigation based on mutual recognition and mutual trust. Measures of investigation carried out in one state shall be accepted within the other. That allows effective proceedings.[17]

But, while mutual trust in civil (private) law expands the possibilities of any contract design and, thus, expands the freedoms of the contracting parties, in criminal law the same trust regime operates to the detriment of third parties,[18] the third party being the accused. And at this stage, indeed, the EPPO proceeding is endangering the rights of the accused.

If in *G.K. and Others*[19], the handling German EDP had not applied for national authorisation (by a national court) as it would have been necessary in a comparable domestic case, and if at the same time, the assisting Austrian EDP had only applied for a national authorisation where only the 'formal requirements' are reviewed, a search and seizure warrant would have been issued and executed without any review of the substance of the case and without determining the proportionality of the measure. A search and seizure warrant remains one of the easiest scenarios in this respect, since most of the Member States do have comparable, if not similar, regulations for such warrants. In light of warrants on wiretapping, undercover investigation, online searches, residential surveillance, long-term observation, or dragnet searches, that may look very different. This analysis does not ignore the fact that the price is high, which is one major reason for the outcome of Article 31 of the EPPO Regulation as it is right now.[20]

17 M Lenk, 'Das Prinzip der gegenseitigen Anerkennung im Strafrecht' (2024) 136 *Zeitschrift für die gesamte Strafrechtswissenschaft* 348, 359 with further references.

18 On the development of the principle of mutual recognition see in addition with further references: Lenk (n 17) 349 f.

19 ECJ, Case C-281/22 *G.K. and Others (Parquet européen)*, ECLI:EU:C:2023:1018.

20 Herrnfeld (n 15) mn 5.

A substantive review within the assisting Member State may require full translations and explanations of the case and of evidential needs.

However, this does not mean that the requirements of the rule of law and the subjective rights of the person concerned could not also be secured in the issuing state – in this case by the handling EDP. After all, Article 31 of the EPPO Regulation aims to ensure that all requirements are fulfilled in the state conducting the proceedings and that they are subject to the corresponding reservation by the judge. But in the case of transnational measures, the territory of the Member State where the investigation and prosecution take place is not affected. However, this territorial bond may be decisive: the state conducting the proceeding can determine the criteria of proportionality only in a more abstract manner than the state where the concrete measure is to be executed, as generally only here one is aware of the concrete situation of the persons concerned, such as the accused.[21]

In other words, the current situation of the law, and its various possible interpretations, provokes the need for involving the ECJ. As a consequence, the prosecution office will be awaiting decisions by the court. It should be emphasized that the problem is not mistrust in the prosecutors' cooperative work, including the EPPO's involvement and investigations conducted by handling and assisting EDPs. The critical consideration is, however, that the individual rights of the accused may be jeopardized in this particular case scenario.[22] *I wonder, why not think about alternatives.*

With the rules it sets out, Article 31 of the EPPO Regulation tries to merge the two worlds. From the perspective of the Member States and the EU, that is understandable. In order to fulfill the task and state duty to conduct criminal proceedings most effectively, proceedings with cross-border dimensions need to show that they are able to work with both harmonised standards and fewer national barriers.[23] If the cooperation within the EU and between Member States is to be based on the concept of mutual trust, this may as such call for increasing harmonised standards and for less double checks due to this trust.[24]

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21 Ramos (n 2) 65.

22 Duesberg (n 5) 596.

23 M Böse, 'Ein europäischer Ermittlungsrichter – Perspektiven des präventiven Rechtsschutzes bei Errichtung einer Europäischen Staatsanwaltschaft' (2012) *Zeitschrift für rechtswissenschaftliche Forschung* 172, 173 f.

24 See in addition and with further references C Burchard, *Die Konstitutionalisierung der gegenseitigen Anerkennung. Die justizielle Zusammenarbeit in Strafsachen in Europa im Lichte des Unionsverfassungsrechts* (Vittorio Klostermann 2019).

Drawing various outlines of possible alternatives, a proposed solution that (full) judicial authorisation should, in any case, be obtained in the Member State of the assisting EDP is indeed too cumbersome and overly time-consuming, because it will require presentation of the full case file, obtained evidence, the state of investigation and investigative needs (at least in some cases), and will normally include a (partly to full) translation of many documents. The *alternative* of the constant involvement of courts in two Member States would make the system, again, overly cumbersome and time-consuming. There is a clear need that there should always be only one judicial authorisation (cf. Recital 72 EPPO Regulation). Another *alternative* of substantive review within the handling state only may often put the rights of the accused at risk.

The structural problem remains the nationality of criminal law and criminal jurisdictions. Nationally empowered officials lose their authority at state borders. Definitions of crime and linguistics differ, the scope of review and competence differ, as does an understanding of proportionality.[25]

In Germany, there exists a common saying 'hope dies last'. I would like to change it to 'hope is what we've got'. And there are lots of reasons for hope. So, do not let me remain very reserved and only critical, but draw a line into the future which points into another direction: Based on the foundation we already have, we must take responsibility for carefully developing structural rules that are effective for state investigations, when criminals act transnationally. To achieve this, we have to harmonise what is necessary while allowing differences in the judicial systems and respecting various cultures. That includes the necessity to carefully carry out proportionality checks for the parties involved in the proceedings without endangering the functionality and effectiveness of the procedure as well as defendants' rights. The effectiveness of the European administration of criminal justice depends, to a large extent, on the courage of those involved in the proceedings to accept the regulatory diversity of the 27 Member States and to respect the EU-fundamental rights considerations. Those go hand in hand in an overall picture of the Member States' loyalty to the Union and its firmness in terms of fundamental rights.[26] In other words, the concept of handling and assisting EDPs in the recognition of different procedural systems cannot be reconciled with the full enforcement of criminal procedural law in the leading trial state only vis-à-vis the assisting state.

25 Duesberg (n 5) 596; Elholm (n 2) 215.
26 Bachmaier Winter (n 6) 134; Elholm (n 2) 217.

5 Alternatives

This thinking 'out of the box' leads to the following conclusions:

Liberty cannot be developed by a few on behalf of others, nor does it emerge naturally out of practice. Liberty, rule of law, and democracy for all are only to be developed based on commonly constituted basic rights and rules by all parties involved. That necessarily includes the Member States, the prosecuting authorities, but also the accused and the defence, as well as the victims of crime.

Criminal justice is not all about efficiency, but also about the protection of rights[27] on which the EPPO can build safeguards and models, always asserting that criminal justice is not only about efficiency of criminal investigations and its advantages for the state, but also about the rule of law and the protections it provides on the citizens of Europe.

In view of this, a number of consequences should be considered: First, the PCs should publish their findings when investigations are not jeopardised. Transparency allows trust to build.[28] Second, clear procedural safeguards should be installed, and decision-making powers and procedures should be clarified so that the EPPO is less dependent on decisions of the ECJ. Third, the process of cooperation with the ECJ should be accelerated: this would allow both greater effectiveness of proceedings and safeguard the rights of accused in early stages of the procedure, in particular as the ECJ is a supervisory institution outside the EPPO.

Clearly, this includes the introduction of the system of a 'European investigating judge' at the ECJ which acts as a truly European Court and supervises the investigative actions of the EPPO from the outside, parallel to the PC from the inside.[29]

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27 Duesberg (n 5) 600.
28 Ramos (n 2) 45.
29 Böse (n 23) 196.

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EPPO's competences and the exercise of its competences – conflicts, clarifications, and extensions?

Competences of the EPPO: Is it time for an expansion?

Anneke Petzsche

There are few superlatives that have not been used in connection with the creation of the European Public Prosecutor's Office (EPPO). The term 'milestone'[1] was used time and again. Expectations were clearly high. It is therefore not surprising that even before the EPPO began its work, a proposal was made to extend its powers. So far, this has not happened, but after about four years of work, it is worth considering the future of the EPPO and its potential for a European Area of Freedom, Security and Justice (AFSJ) by answering the question: Is it time to extend the EPPO's competences? To answer this question, this paper focuses on the material scope of competence of the EPPO, set out in Article 22 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 its possible extension, leaving aside the territorial and personal competence of the EPPO (Article 23 EPPO Regulation).

1 The Competences of the EPPO

Before assessing the possible extension of competences, it is first necessary to examine the status quo. To this end, I will provide a brief overview of the status quo regarding the existing material scope of the EPPO's competences and of the legal basis for an extension.

1 D Brodowski, 'Strafverfolgung im Namen Europas. Die Europäische Staatsanwaltschaft als Meilenstein supranationaler Kriminalpolitik' (2022) *Goltdammer's Archiv für Strafrecht* 421, 424; E Schramm, 'Auf dem Weg zur Europäischen Staatsanwaltschaft' (2014) 69 *JuristenZeitung* 749, 757; MA Zöller and S Bock, '§ 22 Europäische Staatsanwaltschaft' in M Böse (ed), *Enzyklopädie Europarecht, Bd. 11 – Europäisches Strafrecht* (2nd edn, Nomos 2021) mn 51.

1.1 Material scope of competence

The material scope of competence of the EPPO is currently limited to the protection of the European Union's (EU) financial interests. This follows not only from Article 22 of the EPPO Regulation but is already anchored in its primary law, finding its legal basis in Article 86(1) of the Treaty on the Functioning of the European Union (TFEU). What the 'protection of the EU`s financial interests' covers is set out in detail in Article 22 of the EPPO Regulation.[2] Without going into further detail, in principle, in addition to the offences provided for in 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 (so-called PIF Directive, see Article 22(1) EPPO Regulation in conjunction with Article 3, Article 4(2) and (3) PIF Directive), certain offences in the context of criminal organisations whose focus is the commission of offences affecting the financial interests of the EU and 'inextricably linked' offences are covered. This signifies that the EPPO was conceived from the outset as a financial protection agency[3] prosecuting in the interests of the EU. The financial interests of the EU are a self-interest of the EU. Thus, a genuine European legal interest or '*Rechtsgut*' is being protected.[4]

1.2 The legal basis for expansion

Given the hopes placed in the way that the EPPO would provide 'added value' within the EU architecture and serve as the first truly supranational

2 For an in-depth analysis see D Brodowski, 'Article 22' in H-H Herrnfeld, D Brodowski and C Burchard (eds), *European Public Prosecutor's Office: Article-by-Article Commentary* (Nomos 2021) mn 1 ff; H-H Herrnfeld and D Brodowski, '§ 5 Zuständigkeiten der EuStA' in H-H Herrnfeld and R Esser (eds), *Europäische Staatsanwaltschaft. Handbuch* (Nomos 2022); 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, esp. 32 ff; T Gut, 'EPPO's material competence and its exercise: a critical appraisal of the EPPO Regulation after the first year of operations' (2023) 23 *ERA Forum* 283, 284 ff.

3 Zöller and Bock (n 1) mn 3 ff; S Pohlmann, 'Perspektiven einer Kompetenzerweiterung der Europäischen Staatsanwaltschaft: Wird die Europäische Staatsanwaltschaft bald für Sanktionsverstöße zuständig sein?' (2023) *Kriminalpolitische Zeitschrift* 396, 400.

4 Brodowski (n 1) 423.

law enforcement agency, it is not surprising that there were early proposals and discussions about a possible extension of its material competence;[5] especially since the mothers and fathers of the Lisbon Treaty, who created the competence for the establishment of the EPPO, already foresaw the possible need or desire for an extension and provided a legal basis for it.

The legal basis for such an extension is Article 86(4) TFEU. An extension to serious cross-border crime ('to include serious crime having a cross-border dimension') is explicitly provided for, referring implicitly to the areas of crime listed in Article 83(1) TFEU. These areas of crime include terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.[6] Other crimes may be included if, in addition to the cross-border dimension, the seriousness of the crime requirement is met.[7]

However, the competence of the EPPO can only be extended beyond Article 86(1) and (2) TFEU by means of a simplified Treaty amendment.[8] This requires the unanimous adoption of a decision by the European

5 See for example European Commission, 'Communication from the Commission to the European Parliament and the European Council. A Europe that protects: an initiative to extend the competences of the European Public Prosecutor's Office to cross-border terrorist crimes', COM(2018) 641 final; É Dupond-Moretti and M Buschmann, 'Verstöße gegen EU-Sanktionen im Russlandkontext. Europäische Staatsanwaltschaft muss Strafverfolgung übernehmen' (LTO, 28 November 2022) at https://www.lto.de/recht/hintergruende/h/justizminister-deutschland-frankreich-eu-staatsanwaltschaft-russland-ukraine-sanktionen/.

6 This list has now been expanded by Council Decision (EU) 2022/2332 of 28 November 2022 on identifying the violation of Union restrictive measures as an area of crime that meets the criteria specified in Article 83(1) of the Treaty on the Functioning of the European Union to include 'violations of restrictive measures', see below 2.4.1.

7 Zöller and Bock (n 1) mn 27. Such an extension was done by Council Decision (EU) 2022/2332, that qualified the violation of restrictive measures of the Union as a criminal area within the meaning of Art 83(1) TFEU.

8 See also Grasso, Sicurella and Giuffrida (n 2) 33. Interestingly, an indirect extension could occur if European Commission, Proposal for a Directive of the European Parliament and of the Council on combating corruption, replacing Council Framework Decision 2003/568/JHA and the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union and amending Directive (EU) 2017/1371 of the European Parliament and of the Council, COM(2023) 234 final, were to enter into force. The planned amendments to Directive (EU) 2017/1371, which include an extension of criminal liability for bribery offences, etc., would affect and extend the EPPO's jurisdiction by virtue of the dynamic reference in Art 22(1) of the EPPO Regulation. However, this raises the question of competence for such an indirect extension.

Council pursuant to Article 86(4) TFEU, which means that all Member States (including those not [yet] participating in the EPPO) have to agree. Additionally, a corresponding regulation pursuant to Article 86(1) TFEU, which makes use of the extension of competences provided by EU primary law, will have to be adopted.

So far, this extension has not been used and there seems to be a certain scepticism not only among legal scholars but also, and in particular, among the Member States involved.[9] Nevertheless, in the following sections, this potential of the EPPO will be examined by evaluating the case for expansion.

2 The case for expansion

In order to assess the potential of the EPPO in terms of expansion, first, the advantages of and obstacles to an expansion of the EPPO's powers are examined; second, the requirements an area of expansion would have to meet are outlined; before, finally, examining two possible areas of expansion – Russia sanctions and terrorist offences – as examples.

2.1 Advantages of extending the EPPO's competences

The general benefits of extending the EPPO's powers are inextricably linked to the benefits of a (well-functioning) EPPO itself, which aims to effectively prosecute crimes against the EU's financial interests.[10] In its work to date, the EPPO has already achieved some significant successes,[11] though, of course, there also remain structural difficulties.[12] It is a pan-

9 F Meyer, '§ 3 Aufgaben der EUStA – Rolle im System europäischer Strafverfolgung' in Herrnfeld and Esser (eds) (n 2) mn 22.

10 This idea was already the basis of the original concept in the Green Paper, see H Radtke, 'Die Europäische Staatsanwaltschaft. Ein Modell für Strafverfolgung in Europa mit Zukunft?' (2004) *Goltdammer's Archiv für Strafrecht* 1, 9.

11 European Public Prosecutor`s Office, 'Annual Report 2024' (Luxembourg, 2025), at https://www.eppo.europa.eu/assets/annual-report-2024/index.html; Pohlmann (n 3) 397.

12 Particularly with regard to the EPPO`s competences R Sicurella, 'The EPPO's material scope of competence and non-conformity of national implementations' (2023) 14 *New Journal of European Criminal Law* 18.

European law enforcement agency, established as an independent body[13] with strong internal legal control.[14] It benefits from its decentralised, hybrid and transnational structure of European cooperation[15] and provides effective enforcement, especially in a previously under-investigated and under-prosecuted area. It can therefore compensate for enforcement deficits at Member State level, inter alia, through the pooling of knowledge in the EPPO and its more effective cross-border prosecution possibilities.

It ensures effective action at different levels:

2.1.1 Detection

Through regulated reporting mechanisms, partly based on obligations where national and other European actors are concerned, a broad and efficient detection is ensured. Of course, there is still room for improvement, but the EPPO figures show that the mechanisms put in place are already working quite well.[16] Moreover, as the EPPO becomes better known and more visible in the Member States, it can be expected that not only the national authorities but also the public will contribute even more to the detection of these crimes.[17] As these mechanisms are already in place, an area of expansion would benefit from them.

2.1.2 Investigation and prosecution

The EPPO aims to redress the structural imbalance between crime and crime control in a Europe of free borders.[18] While criminals benefit from free movement between Member States, national law enforcement authori-

13 Unlike, for example, German prosecutors; see Art 6(1) 1 EPPO Regulation.

14 See Arts 12 and 13 EPPO Regulation; however, on the still existing weaknesses see MJ Antunes and N Brandão, 'EPPO Independence and Accountability' in Ligeti, Antunes and Giuffrida (eds) (n 2) *The European Public Prosecutor's Office at Launch. Adapting National Systems, Transforming EU Criminal Law* (CEDAM 2020) 17.

15 Brodowski (n 1) 426 ff.

16 European Public Prosecutor`s Office (n 11).

17 Interestingly, according to the EPPO's Annual Report 2024 (n 11), 70 % of the cases came from private parties, p. 5, which might indicate a high level of public acceptance of the EPPO's activities.

18 See L Strauch, 'Die Europäische Staatsanwaltschaft – Rechtliche Einordnung der ersten supranationalen Strafverfolgungsbehörde' (2021) *Zeitschrift für Europarechtliche Studien* 683, 689.

ties are limited to their national competences within their own territory. The EPPO architecture aims to remedy this situation by providing effective tools, in particular for cross-border investigations. To take just one key example: The EPPO was created to overcome the limitations and obstacles of traditional mutual legal assistance.[19] In practice, Article 31 of the EPPO Regulation provides the basis for achieving (more) speed and efficiency.[20] In a recent judgement, the European Court of Justice (ECJ), in response to a reference for a preliminary ruling from the Oberlandesgericht Wien (Higher Regional Court, Vienna),[21] confirmed an interpretation of Article 31 of the EPPO Regulation which ensures that Article 31 of the EPPO Regulation continues to provide the basis for a fast and efficient system of cooperation between the participating Member States.[22] In principle, the powers of the EPPO are geared towards effective cross-border investigations and prosecutions, as set out, inter alia, in Article 37(1) of the EPPO Regulation, which makes it clear that the admission of evidence in a criminal proceeding in one Member State cannot be refused on the sole ground that the evidence was gathered in another Member State. To be clear, although there certainly is room for improvement, the EPPO provides real added value in the prosecution of transnational crime, as demonstrated by its work to date. Furthermore, in terms of efficiency, it should be stressed that the EPPO's work helps to prevent parallel and unconnected investigations at national

19 Strauch (n 18) 689.

20 A Ritter, 'Grenzüberschreitende Strafverfahren der EuStA – Erste Einblicke in die Praxis' in T Niedernhuber (ed), *Die neue Europäische Staatsanwaltschaft. Bedeutung, Herausforderungen und erste Erfahrungen* (Nomos 2023) 15, 17.

21 ECJ, Case C-281/22 *G.K. and Others (Parquet européen),* ECLI:EU:C:2023:1018. For an in-depth analysis see H-H Herrnfeld, 'Efficiency contra legem? Remarks on the Advocate General's Opinion Delivered on 22 June 2023 in Case C-281/22 G.K. and Others (Parquet européen)' (2023) *eucrim* 229.

22 ECJ, Case C-281/22 *G.K. and Others (Parquet européen),* ECLI:EU:C:2023:1018. In its decision, the ECJ clarified that the substantive reasons for justifying and adopting the investigative measure must be assessed solely in accordance with the law of the Member State of the executing EDP, while judicial review by a court in the Member State of the assisting EDP must be limited to the elements relating to the execution of that measure; see also N Franssen, 'The judgment in G.K. e.a. (parquet européen) brought the EPPO a pre-Christmas tiding of comfort and joy but will that feeling last?' (European Law Blog, 15 January 2024), at https://www.europeanlawblog.eu/pub/the-judgment-in-g-k-e-a-parquet-europeen-brought-the-eppo-a-pre-christmas-tiding-of-comfort-and-joy-but-will-that-feeling-last/release/1.

level, thanks to the regulated reporting obligations and the rules governing the exercise of its powers.[23]

2.1.3 Cooperation

The EPPO's work is also based on clear rules on reporting and cooperation obligations. The EPPO therefore provides for a tried and tested system of cooperation with Member States' authorities, non-participating Member States and other third parties, as underlined by the many working arrangements already concluded.[24] Any additional area of competence would also benefit from these structures.

2.1.4 Structure of the EPPO

Two structural aspects of the EPPO are also beneficial: its independence and its standard-setting function. The importance of the EPPO's independence is underlined by the prominent placement of Article 6 at the beginning of the EPPO Regulation. The structure allows for complete independence, which is a clear advantage over national prosecutors who may be subject to various forms of legal or political pressure that might compromise their independence. The EPPO may also facilitate the uniform application of European law and has (at least potential) standard-setting power,[25] which would benefit any other incorporated area.

In conclusion, although it is still early to give a definitive and complete answer to the question of the EPPO's added value, and although there certainly is room for improvement, the EPPO has already proved its worth. It must also be recognised that some things can indeed be better dealt with at a European level. An extension of the EPPO's powers could therefore help to overcome Member States' inertia or reluctance to prosecute certain crimes[26] and the limitations of a national law enforcement response to the problems posed by modern, transnational crime by overcoming the obstacles to cooperation posed by national borders (e.g. mutual legal

23 Ritter (n 20) 16; on structural deficits see Grasso, Sicurella and Giuffrida (n 2).
24 See European Public Prosecutor's Office, 'International Cooperation' at https://www.eppo.europa.eu/en/about/international-cooperation.
25 Meyer (n 9) mn 21.
26 Strauch (n 17) 690.

assistance[27]), and it can help to approximate the level of prosecution and sanctions in the different Member States. Provided that sufficient resources are made available, all this would also have a beneficial effect in each new area.

2.2 Obstacles

However, it must be recognised that there are also some obstacles to such an extension:

2.2.1 Feasibility

First of all, there is the question of feasibility: The 24 Member States participating in enhanced cooperation cannot extend the EPPO`s competences on their own, because the simplified Treaty amendment procedure requires unanimity (Article 86(4) TFEU). Although in theory such a unanimous decision could be achieved by convincing the non-participating Member States[28] to vote in favour, in practice this is unlikely to happen any time soon because of the existing scepticism of (at least some of) these Member States, which is manifested in their reluctance to participate.[29] This raises the question of whether the first immediate objective should not be to get all or as many members as possible to join.[30] The case of Poland, which immediately joined the EPPO after a general election and subsequent change of government, shows that this can be an appropriate and viable way forward.[31]

27 Strauch (n 17) 689.

28 Denmark, Ireland and Hungary would have to agree without being part of it; while with regard to Denmark and Ireland, their special role has to be taken into account, as they have opted out of the AFSJ (in the case of Ireland, with the possibility of opting in on certain initiatives if it so wishes). This leaves Hungary (at least under the current government) as the most likely candidate not only to refrain from joining the EPPO but also to prevent further expansion.

29 Whether the principle of sincere cooperation (Art 4(3) Treaty on European Union [TEU]) would require such a support in case all participating members would agree is, due to the nature of treaty amendment, more than questionable.

30 See further below, 3.1. Both Poland and Sweden have recently joined, demonstrating the potential for persuading other members to join.

31 Its participation in the EPPO was confirmed on 29 February 2024 by the Commission, see European Commission, 'Commission Decision (EU) 2024/807 of 29 Febru-

2.2.2 Structural barriers

There exist three further structural obstacles. The EPPO runs the risk of being overwhelmed by an extension of its powers due to limited resources. This would not only jeopardise its effectiveness in prosecuting cases but would also call into question its legitimacy.[32] In this context, it should not be forgotten that added value is also a fundamental condition for the exercise of the Union's non-exclusive powers.[33] While this obstacle could be overcome by providing sufficient resources, the political reality is that (financial) resources are finite.

Moreover, the EPPO is still conceived and structured as a 'special body for financial offences'[34], which requires special knowledge and expertise. Consequently, many provisions of the EPPO Regulation are tailored to the prosecution of PIF-offences.[35] This focus cannot easily be transferred to all other areas of cross-border crime; hence, their prosecution would require restructuring the EPPO.

Finally, the question of whether this structural change towards a supranational law enforcement agency has been adequately reflected on the 'defence side' and whether the rights of the accused have been sufficiently taken into account has been raised and often negated.[36] There are various proposals to institutionalise the defence (e.g. Eurodefensor, Ombudsperson).[37] Though the extent to which institutionalisation is desirable or re-

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ary 2024 confirming the participation of Poland in the enhanced cooperation on the establishment of the European Public Prosecutor's Office', C(2024) 1444 final.

32 This also concerns the capacity of the Union in general and is thus linked to the claim to legitimacy vis-à-vis the citizens of the Union, Meyer (n 9) mn 2.

33 As required by the principle of subsidiarity, Art 5(3) TEU.

34 Meyer (n. 9) mn 13; Pohlmann (n 3) 398.

35 H-H Herrnfeld, '§ 2 Entstehungsgeschichte – Rechtsgrundlage – Errichtung der EuStA' in Herrnfeld and Esser (eds) (n 2) mn 13.

36 R Esser, 'Transnationalität der Strafverfolgung durch die EUStA als Herausforderung für die Strafverteidigung' in Niedernhuber (ed) (n 20) 89; B Schünemann, 'Grundzüge eines Alternativ-Entwurfs zur europäischen Strafverfolgung' (2004) 116 *Zeitschrift für die gesamte Strafrechtswissenschaft* 376; T Wahl, 'The European Public Prosecutor's Office and the Fragmentation of Defence Rights' in Ligeti, Antunes and Giuffrida (eds) (n 2) 85, 95 ff.

37 P Asp, E Bacigalupo Zapater, N Bitzilekis, Á Farkas, D Frände, H Fuchs, R Hefendehl, A von Hirsch, M Kaiafa-Gbandi, V Militello, C Nestler, H Satzger, B Schünemann, E Symeonidou-Kastanidou and A Szwarc, 'Proposal for the Regulation of Transnational Criminal Proceedings in the European Union' in B Schünemann (ed), *Ein Gesamtkonzept für eine Europäische Strafrechtspflege. A Programme for European Criminal Justice* (Heymanns 2006) 255, 301 ff; Schünemann (n. 36) 388 ff; M Kaiafa-Gbani,

quired is disputed,[38] within the current legal framework, there clearly exist some structural deficits due to the inherent fragmentation of the defence's rights[39]. Any extension of competence therefore, threatens to (further) undermine the rights of the accused.[40] There has not been enough time to see whether the EPPO will find its role as 'guarantor of the rule of law in criminal proceedings'[41] to counter this threat.

2.3 Preconditions

Given that there certainly are advantages as well as obstacles to expansion, and that expansion clearly cannot take place in an unstructured and capricious manner with respect to every possible crime, there are, in my view, some basic preconditions that need to be met for expansion. Some of these are inherent in the structure of the Union itself, and some are simply sensible in terms of maintaining an effective law enforcement agency at European level. *Brodowski* has already proposed three such preconditions,[42] on which the following model is based and which will be developed in more detail here.

2.3.1 A European interest

First, a new area must concern a European interest. This can be inferred from Article 86 TFEU, which only allows for an extension to 'serious crime with a cross-border dimension', which refers to crimes whose cross-border

'The Establishment of an EPPO and the Rights of Suspects and Defendants: Reflections upon the Commission`s 2013 Proposal and the Council`s Amendments' in P Asp (ed), *The European public prosecutor's office. Legal and criminal policy perspectives* (Stiftelsen Skrifter utgivna av Juridiska fakulteten vid Stockholms universitet 2015) 234, 252; F Meyer and S van der Stroom, 'Die Europäische Staatsanwaltschaft. Funktionsweise und Perspektive' (2018) *Zeitschrift für Europarecht* 40, 64.

38 Even defence attornies themselves seem to be critical, J Arnold, *Grenzüberschreitende Strafverteidigung in Europa. Praktische Erfahrungen und theoretische Überlegungen anhand von Interviews mit Strafverteidigerinnen und Strafverteidigern* (Berliner Wissenschafts-Verlag 2015) 187 ff; see also Wahl (n 36) 112.

39 Wahl (n 36) 95 ff; F Falletti, 'The European Public Prosecutor's Office and the Principle of Equality' (2017) *eucrim* 25, 26.

40 On the practical difficulties the defence is faced with in EPPO-proceedings Esser (n 36) 93 ff.

41 Brodowski (n 1) 426.

42 Brodowski (n 1) 430: a pan-European interest, added value, coherence is maintained.

dimension – as can be seen in conjunction with Article 83(1) TFEU – results from their nature or effects or from a particular need to combat them on a common basis. They therefore concern the Union as a whole.

This European interest can be based on different criteria. First, it can be based on a genuinely European, and therefore supranational, legal interest or, in the German terminology, '*Rechtsgut*'. This includes the protection of interests that affect the Union in a particular way, such as the Union's financial interests.[43] A genuinely European nature of the legal interest[44] is required, so that protection by a European institution is already indicated by the factual connection. An example would be a comprehensive and genuine criminal liability of European officials,[45] going beyond the already existing mandate on corruption in Article 22 TFEU in conjunction with Article 4(2) of the PIF Directive.[46]

However, a European interest justifying the extension of the powers of the EPPO is not limited to genuine European legal interests but can also be derived from the Union's need for uniform criminal prosecution in a specific area.[47] This need may be based on several factors, such as disparities in the national application of laws or in national sanctions. Since these two justifications differ in the degree to which the Union's interests are affected, depending on the nature of the interest at stake, a distinction must be made as to the form of the extension.[48]

2.3.2 An added benefit

Secondly, derived from the principle of subsidiarity (Article 5(3) TEU), the EPPO must, in any case, provide added value through its activities in the specified area. This presupposes that only the EPPO as a supranational body can effectively and efficiently combat the relevant offences in terms of their nature and extent. The following circumstances may indicate such a need, as they represent conditions that compensate for the frictional losses that inevitably occur due to the involvement of another level and the interaction of the EPPO with the national level: An enforcement deficit at the national level, (political) pressure on national law enforcement actors

43 Pohlmann (n 3) 398.
44 Meyer (n 9) mn 2.
45 On the significance and necessity Schünemann (n 36) 379.
46 Brodowski (n 2), mn 67 ff.
47 Meyer (n 9) mn 22.
48 See further below, 3.2.

due to the national state's own political interests that can be prevented or alleviated by a transfer to the supranational level, the necessity and effectiveness of an external view and/or an effectively functioning supranational law enforcement agency, that is, due to its competences and functioning, able to compensate for structural deficits at the national level, such as those concerning the cross-border collection and use of evidence.

2.3.3 Structural requirements

Thirdly, there are some structural requirements to be met. First, there must be a structural basis for such an extension, which requires at least a suitable degree of harmonisation of the specific area. This can be based on a regulation (if and when the Union's competences allow for such criminalisation) or – as in the case of the protection of the EU's financial interests – on a directive setting out minimum requirements for criminalisation in the Member States, to which a – reformed – EPPO Regulation could refer.

In addition, such an extension must fit into the overall structure of the Union, which requires, inter alia, that the coherence of the interwoven criminal prosecution systems at Union and national level be maintained.[49] The structural suitability of the EPPO to become active in this area must be required and ensured.

2.4 Areas for possible expansion

Once these necessary conditions have been established, they can be used to examine specific areas. In the following sections, the focus is laid on two areas that have already been proposed by various actors: first, the extension to Russia sanctions, and second, to terrorism offences. The second was proposed by the European Commission in 2018[50], the first, more recently, by the French and German justice ministers at the end of 2022[51].

49 See Brodowski (n 1) 431.
50 Communication COM(2018) 641 final (n 5).
51 Dupond-Moretti and Buschmann (n 5).

2.4.1 Russia sanctions

In response to Russia's invasion of Ukraine, the European Union imposed a series of sanctions, including in Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine[52], which has been continuously adapted to date, covering various areas such as travel bans and asset freezes. It was also agreed that, in order to ensure effective enforcement, violations should be punished as criminal offences throughout the EU territory. Against this background, the German and French justice ministers proposed in 2022 that sanctions violations should not only be jointly sanctioned, but also jointly prosecuted – through the EPPO.[53]

The term 'sanctions violations' refers to violations of restrictive measures that the EU can impose based on Articles 21(1), 23, 28(1) TEU in conjunction with Article 215 TFEU to enforce fundamental values such as democracy, the rule of law, human rights and fundamental freedoms at the international level. By Council Decision (EU) 2022/2332, the violation of restrictive measures of the Union was qualified as a criminal area within the meaning of Article 83(1) TFEU. A Directive on the definition of criminal offences and sanctions for the violation of restrictive measures of the Union has entered into force in May 2024.[54]

The argument in favour of such an extension in this particular case is that it meets the conditions set out above. There is a genuine European legal interest in protecting the enforcement of European restrictive measures. An additional benefit is to be expected, as it stands to reason that the involvement of the EPPO can contribute to improved prosecution of violations and thus to better enforcement of these sanctions. As noted in the Draft Directive, there have been inconsistencies in national enforcement

52 That imposes restrictive measures against natural and legal persons as well as groups and non-state entities in connection with the Russian war of aggression on Ukraine.

53 Dupond-Moretti and Buschmann (n 5).

54 Directive (EU) 2024/1226 of the European Parliament and of the Council of 24 April 2024 on the definition of criminal offences and penalties for the violation of Union restrictive measures and amending Directive (EU) 2018/1673 was published in the Official Journal on 29 April 2024 and enters into effect on 19 May 2024; it had to be transposed by May 20th 2025.

or a general lack thereof.[55] In addition, this is an area where the EPPO's expertise in financial crime[56] can be put to good use. Furthermore, the EPPO has an advantage over traditional mutual legal assistance, particularly in the case of complex financial flows and structures or entities consisting of companies operating in several EU Member States.[57] These circumstances consequently point to a clear added value in the prosecution of violations of restrictive measures. Finally, the structural requirements will be met once the basis has been established through the transposition of the Directive (EU) 2024/1226. Nor are there likely to be any problems of coherence.

What speaks against such an expansion are general considerations. It would mean a redesign and alteration of the EPPO's basic structures with possible detrimental effects on its work and the obstacles described above, so that the question would have to be answered politically whether such a change of role is desirable.

2.4.2 Terrorism

An extension to terrorism offences has already been proposed by the Commission and has been supported by the European Parliament,[58] which clearly saw the advantage of such an extension. So far, however, the Council has not taken up the idea. What cannot be denied is that it would make the Union a new and stronger security actor. However, if one takes the developed criteria as a basis for extending the EPPO`s powers, one comes to the conclusion that there is cause for doubt.[59]

The first criterion is the common European interest in the subject of the extended competence. Although, unlike in the case of the Russia sanctions, no genuine European legal interest is affected, there is indeed a European interest at stake, since terrorist acts affect all of us as Europeans[60] and

55 European Commission, 'Proposal for a Directive of the European Parliament and of the Council on the definition of criminal offences and penalties for the violation of Union restrictive measures', COM(2022) 684 final, 1 f.

56 Pohlmann (n 3) 399.

57 Pohlmann (n 3) 399.

58 European Parliamentary Research Service, 'Briefing – Understanding EU counter-terrorism policy' (10 March 2023), at https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/739395/EPRS_BRI(2023)739395_EN.pdf 10.

59 It is viewed predominantly critically in principle, see Meyer (n 9) mn 22; Herrnfeld (n 35) mn 12; Brodowski (n 1) 430 f.

60 Brodowski (n 1) 430.

terrorist activities today often have a transnational character. Moreover, such an interest could be based on the Union's need for (more) uniform prosecution, since this is an area that is very much shaped by national structures and is still governed by national peculiarities of the legal systems, which have led to major differences in implementation and, in particular, in the penalties provided for by national laws and imposed by national courts.[61]

The second criterion, being the added value, has been highlighted and presented in the Commission's initiative, which underlines that although criminal investigations and prosecutions in this area are generally considered a high priority by Member States, the authorities often take a national perspective due to the link with national security aspects.[62] It also complained that the complexity and/or cross-border nature of such cases is not always properly taken into account in national investigations.[63] Challenges also remain regarding the timely exchange of information[64] and the exchange of sensitive information.[65] The Commission, therefore, clearly expects less inefficiency from the involvement of the EPPO.[66]

However, this assessment can be questioned. It should be borne in mind that terrorist attacks are often highly dynamic events that can develop in unpredictable patterns. This makes frictional losses, which are likely to be caused by a transfer to the European level, highly problematic.[67] Moreover, this is also an area where national law enforcement agencies are highly motivated, so there is definitely no enforcement deficit to be expected. There are also high-ranking competing national interests. Where there are national victims affected, it will be very difficult for a Member State and its agencies to accept that they are not allowed to prosecute those responsible.

61 A Petzsche, *Strafrecht und Terrorismusbekämpfung. Eine vergleichende Untersuchung der Bekämpfung terroristischer Vorbereitungshandlungen in Deutschland, Großbritannien und Spanien* (Nomos 2013) 425 ff; M Cancio Meliá, *Los delitos de terrorismo: Estructura típica e injusto* (Editorial Reus 2010) 151 ff; A Cornford and A Petzsche, 'Terrorism Offences' in K Ambos, A Duff, J Roberts and T Weigend (eds), *Core concepts in criminal law and criminal justice. Volume I* (Cambridge University Press 2020) 172, 175 ff; A Petzsche and C Coenen, 'Terrorismus und Recht' in L Rothenberger, J Krause, J Jost and K Frankenthal (eds), in *Terrorismusforschung. Interdisziplinäres Handbuch für Wissenschaft und Praxis* (Nomos 2022) 461, 463 ff.

62 Communication COM(2018) 641 final (n 5) 5.

63 Communication COM(2018) 641 final (n 5) 5.

64 Communication COM(2018) 641 final (n 5) 5.

65 Communication COM(2018) 641 final (n 5) 6.

66 As indicated in Communication COM(2018) 641 final (n 5) 8.

67 Brodowski (n 1) 431.

Finally, there are other European agencies, namely Europol and Eurojust, which can assist in cross-border investigations of terrorist activities. The Commission's assessment of the added value of expansion in this area is therefore less positive.

And, crucially in my view, there are many structural problems that would erode the promise of the added value: First, although this is a partially harmonised area, European law does not contain an adequate definition of terrorism that can be used as a basis for criminal prosecution, since the definition contained in the Directive is subjective in nature.[68] Secondly, the close link with crime prevention and the avoidance of imminent dangers raises the question of coherence. In the case of terrorism, the real objective of national actors (legislation, law enforcement, police, national security agencies, etc.) is prevention – to prevent a terrorist attack from taking place –, and if it occurs nonetheless, to limit its harm. This area is clearly the domain of the Member States. All this argues against an extension for the time being.

To sum up, while the prosecution of breaches of the Union's restrictive measures, such as the sanctions against Russia, is a viable avenue for expansion once the Directive (EU) 2024/1226 is transposed, the extension to cross-border terrorism offences seems to be more problematic. There are certainly areas that are more obviously suited to such an extension, and which meet the conditions described above. Economic crime and, in particular, environmental crime[69] come to mind. These are examples of areas that should be looked at first when considering expansion. This leaves open the question of whether and how such an extension should take place.

3 Ensuring effective expansion

Bearing in mind the significant challenges and chances of an expansion, my view is that the EPPO will stand or fall depending on whether it effectively fulfils the tasks allocated to it, and whether it succeeds in not disappointing the hopes placed in it. In this respect, it is essential to ensure the effectiveness of the EPPO in the event of an extension of its competences. For its success also affects the performance of the European Union as a whole

68 Herrnfeld (n 35) mn 12.
69 Brodowski (n 1) 431; Meyer (n 9) mn 23.

and is therefore linked to its claim to legitimacy before the citizens of the Union.[70]

3.1 Time for consolidation

The risk of expansion that is brought too early and too far must be recognized. Premature expansion would jeopardise the achievements of the EPPO, so it is crucial to ensure effective expansion. We can distinguish between expansion in general and expansion now or in the near future. Most of the risks and disadvantages can be mitigated over time and, on the other hand, the EPPO itself can actually strengthen the case for expansion by working effectively.

To ensure effective expansion, consolidation should come first. It should not be forgotten that the work of the EPPO started only about four and a half years ago (on June 1st, 2021), which translates into only about four and a half years of experience. So, it makes sense to first consolidate what has been achieved. Consolidation is needed both internally, for example by strengthening and developing further cooperation with national authorities[71] and seeking necessary reforms of the EPPO Regulation[72] and the EPPO´s rules of procedure, and externally, by expanding cooperation with non-participating Member States and other relevant third parties.

To give some examples of this needed consolidation: There are a number of challenges[73] that need to be addressed and resolved, such as the flow of information, equivalent investigative powers in the national legal order,

70 Meyer (n 9) mn 2.

71 Ritter (n 20) 15–20; F Zimmermann, 'Die Zuständigkeit der EUStA im Ermittlungsverfahren und der Grundsatz "ne bis in idem"' in Niedernhuber (ed) (n 20) 21, 24 ff; on problems with regard to Art 30 see A Schneider, 'Die Zusammenarbeit der Europäischen Staatsanwaltschaft mit nationalen Ermittlungsbehörden' in Niedernhuber (ed) (n 20) 39, 44 ff; I Zerbes, 'Beweiserhebung und Beweisverwertung in EUStA-Verfahren – Dogmatische Probleme des Beweismitteltransfers' in Niedernhuber (ed) (n 20) 69, 82 ff.

72 On problems regarding Art 25 see Ritter (n 20) 18–19; Gut (n 2). An opportunity to address them is the forthcoming review and reform of the EPPO Regulation, as provided for in Art 119 of the EPPO Regulation.

73 J Vervaele, 'Outlook on the European Public Prosecutor's Office: A Giant with National Clay Feet?' in M Luchtman, K Ligeti, J Vervaele (eds), *EU Enforcement Authorities. Punitive Law Enforcement in a Composite Legal Order* (Hart Publishing 2023) 322, 323–326.

transnational investigations, etc. To focus on just one of these areas: The work of the EPPO relies heavily on the flow of information from and the willingness of national enforcement authorities to inform and cooperate.[74] This needs to be (further) established and secured. The importance of this can be illustrated by an example: The conclusion of a working arrangement with the Italian Antimafia and Counterterrorism Directorate (DNA)[75] was necessary because the Italian implementing legislation for the EPPO Regulation[76] did not include the EPPO (and its EDPs) within the scope of Article 371-bis of the Italian Code of Criminal Procedure, which governs the relationship between the Italian Antimafia prosecutors and other enforcement authorities.[77] The working arrangement now in place remedies this by providing for proper consultation, coordination and mutual support.[78] It is to be expected that more such problems will arise, but that they too can be resolved through working arrangements.

Time would also allow the EPPO to further demonstrate its value and legitimacy,[79] and would allow countries with a more disrupted system[80] to find a workable way of integrating the EPPO.[81] This will also allow more time to encourage non-participating Member States to join.[82]

74 Vervaele (n 73) 323.

75 European Public Prosecutor's Office, 'Working arrangement between the European Public Prosecutor's Office (EPPO) and the National Antimafia and Counter Terrorism Directorate (DNA)' (Rome, 24 May 2021), at https://www.eppo.europa.eu/sites/default/files/2021-12/WA%20%28EN%29%20EPPO%20-%20The%20National%20Antimafia%20and%20Counter%20Terrorism%20Directorate%20%28DNA%29.pdf.

76 Decreto Legislativo 2 febbraio 2021, n. 9. 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». (21G00012), GU n.30 del 5–2–2021.

77 Vervaele (n 73) 319.

78 This problem exists due to the referral in the Regulation because it follows that the myriad of national enforcement authorities that are labelled in the Regulation as competent national authorities for information exchange and for cooperation with the EDPs concerning certain operations are defined by national law.

79 That is already questioned by some, Vervaele Office (n 73) 328.

80 Such as France with the normal centrality of the investigating judge, see on the ensuing problems M Slimani, 'The influence of the European Public Prosecutor's Office on French criminal law' (2023) 14 *New Journal of European Criminal Law* 294, 298 ff.

81 On the changes in French Criminal Law Slimani (n 80) 296 ff.

82 As has happened in the case of Poland after a change in government, see European Public Prosecutor's Office, 'Polish delegation visits the EPPO in Luxembourg' (31

On the one hand, given the short time that EPPO has been operational, it still makes sense to focus on consolidation, especially considering that the political level is decisive, since expansion is only possible with unanimity. On the other hand, in view of the forthcoming evaluation and possible reform based on Article 119 of the EPPO Regulation, there is an opportunity for expansion. It may therefore be time to make a (political) push for an extension to include violations of restrictive measures. At the same time, the work of and on the EPPO must continue to support this political push. It makes sense to build on the EPPO's own achievements. The time until a (possible) reform of the Regulation must be used to assess which (further) problems may arise and which may already be solvable. It should also be used for further research into the matter and perhaps new ideas on how and in which areas expansion would be best.

3.2 A possible way into the future

Given the complex political background of the European Union and the national interests that have to be taken into account, one way forward when considering further expansion is to differentiate. For this, the European interest behind the area of expansion is decisive. Where there is a genuine European interest, such as the financial interest of the EU or the violation of European restrictive measures, expansion can be prioritized and comprehensive. Although competing national interests may be affected, in such cases, the European interest prevails. The subsidiarity principle and the sovereignty interest of the Member States therefore do not argue against or for only limited expansion in these cases.

However, if the European interest is justified in other ways, as in the case of terrorism offences, for example, a more sparing approach is indicated. Due to the very pronounced domestic interests in individual cases, an extension is more problematic here. One avenue would be to simply extend the possibility for Member States to consent to an investigation and prosecution by the EPPO, as already provided for in Article 25(4) of the EPPO Regulation. However, leaving an extended competence to the mere discretion of the Member States may not be sufficient to provide for any real added value.

January 2024), at https://www.eppo.europa.eu/en/news/polish-delegation-visits-eppo-luxembourg.

Another possibility for a conservative approach that balances national and European interests offers the application of the complementarity principle[83] familiar from international criminal law, in particular Articles 1 and 17 of the Rome Statute.[84] According to this principle, the EPPO would be responsible for other specific areas that do not concern a genuine European legal interest only if the respective national states concerned were unwilling or unable to ensure effective criminal prosecution on their own.[85] This would safeguard the sovereign right of the Member States to deal with such cases through their national prosecuting authorities rather than through the EPPO.[86] It would also clearly reflect the principles of subsidiarity and proportionality, which are particularly important at the European level,[87] as well as the aspiration to respect the sovereignty of EU Member States and national sensitivities.[88] An additional advantage is that it not only allows Member States to have a decisive influence, since it is in their hands to ensure effective prosecution, but also creates an incentive for them to do so, in order to avoid intervention from the European level.[89]

The difficulties of assessing the willingness or ability of Member States at the early investigative stage of proceedings may be more challenging than the situation faced by the International Criminal Court in determining its

83 On the complexities of the principle MM El Zeidy, *The Principle of Complementarity in International Criminal Law. Origin, Development, and Practice* (Brill 2008) 157 ff; G Werle and F Jeßberger, *Principles of international criminal law* (4th edn, Oxford University Press 2020); see also F Razesberger, *The International Criminal Court. The Principle of Complementarity* (Peter Lang 2006).

84 H Satzger, 'Die potentielle Errichtung einer Europäischen Staatsanwaltschaft – Plädoyer für ein Komplementaritätsmodell' (2013) *Neue Zeitschrift für Strafrecht* 206 already argued in 2013 in favour of introducing the principle as the general basis for the EPPO, which had not yet been created at the time; also favouring such a solution K Ambos, *Internationales Strafrecht. Strafanwendungsrecht, Völkerstrafrecht, Europäisches Strafrecht, Rechtshilfe* (5th edn, CH Beck 2018) § 13 mn 26.

85 The application of this principle would of course produce some challenges that would need to be resolved in the reformation process.

86 Satzger (n 84) 210–211.

87 See further P de Hert and I Wieczorek, 'Testing the Principle of Subsidiarity in EU Criminal Policy: The Omitted Exercise in the Recent EU Documents on Principles for Substantive European Criminal Law' (2012) 3 *New Journal of European Criminal Law* 394; H Kaptein, 'Toward marginalisation of European Criminal Law: Proportionality, Subsidiarity and Principled Public Policy Priorities in Protecting Human Life and Rights' in JB Banach-Gutierrez and C Harding (eds), *EU Criminal Law and Policy. Values, Principles and Methods* (Routledge 2017) 70.

88 Satzger (n 84) 210.

89 See Satzger (n 85) 211 on further arguments for a general principle of subsidiarity.

jurisdiction under Article 17 of the Rome Statute. However, it is not impossible to assess, even at an early stage, whether the national investigation for a particular case does not meet the criteria of willingness and ability. For example, if it appears that the national authorities are shielding a person from criminal proceedings or are not pursuing them seriously, the EPPO could and should take up the case on the basis of this 'unwillingness'. Or if the national legislator has failed to provide an adequate legal basis for prosecuting a particular case or is unable to prosecute effectively for procedural reasons, e.g., because of a lack of effective mutual legal assistance instruments, this would constitute 'inability'.

For this to work, however, it would be necessary to decide which legal remedies could be used to resolve a jurisdictional dispute. It is questionable whether the current model of a decision by national authorities, as provided for in Article 25(6) of the EPPO Regulation, would work here. Rather, a competence of the ECJ seems to be indicated.[90] However, this would mean that the Court would have to be expanded in order to be able to deal adequately with the additional burdens associated with an extension of its competences. In addition, because of the (then to be expected) growing workload, the EPPO would also need structural reforms to ensure continued effective functioning and accountability. Such an expansion would thus imply a restructuring of several institutions at the European level (including the EPPO), which may be possible in the future, but not at this stage.

Therefore, to ensure an effective expansion in the future, it makes sense to first concentrate on the areas that deal with genuine European legal interests as a basis for expansion, since expansion here would mean that the same basic framework already in use could be applied. For a possible further expansion based on the principle of complementarity, the structures of the EPPO and other European institutions would have to be adapted in order to allow for a distribution mechanism that can resolve the question of whether a particular Member State is unwilling or unable to prosecute a particular case.

4 Conclusion

The EPPO has great potential as a European and truly supranational criminal justice actor, but it should not be overburdened by asking for too much

90 Similar Satzger (n 84) 212.

too soon. To answer the question posed above: Is it time to extend the EPPO's competences? The answer given in this chapter is not clear-cut due to the unique political background of the EU. While it is still necessary to focus on the consolidation of the EPPO's work and its firmer establishment, the forthcoming evaluation and possible reform based on Article 119 of the EPPO Regulation could provide a window of opportunity for a (political) push towards expansion. Expansion should, however, only be considered for areas that meet the above-mentioned conditions to ensure an effective expansion. The inclusion of violations of restrictive measures could be a logical first step, as it fulfils the criteria developed above and also fits into the current structure of the EPPO as a financial protection agency. At the same time, given the political uncertainties of an actual expansion, future expansion should be prepared for by optimising the current work, by seeking support and by conducting research into the preconditions and possible areas of expansion.

If we consider further expansion in the future, we should focus on areas that meet the preconditions developed above and are suitable for such an expansion. Again, with regard to the examples examined here, only the Union's restrictive measures, but not terrorism offences, seem suitable. However, a distinction also needs to be made between areas that concern genuine European legal interests, where an expansion can build upon the current framework, and other areas, where a more sparing approach is needed – one that could be based on the principle of complementarity known from international criminal law.

Finally, it should not be forgotten that any further extension would change the nature of the EPPO towards a comprehensively responsible supranational law enforcement agency. There is still a long way to go to arrive at a truly European law enforcement agency to protect the area of freedom, security and justice – a way that should not be rushed.

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Conflicts of competence between the EPPO and national prosecution authorities

Luca Pressacco[*]

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-

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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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Acquisition and use of evidence in EPPO proceedings

Cross-border acquisition of evidence

Hans-Holger Herrnfeld

The first preliminary ruling by the European Court of Justice on the interpretation of the EPPO Regulation concerned provisions of Article 31 on the question of judicial authorisation of cross-border investigation measures. The ECJ judgment may largely be welcomed as it may improve the efficiency of the procedures for undertaking cross-border investigations within the EPPO territory. Nevertheless, the Court's conclusions are difficult to reconcile with the intentions of the legislator as expressed in the wording of the provisions of Article 31, and the judgment leaves certain issues unresolved and raises new questions. The EU legislator may thus be called upon to reconsider and revise the wording of Article 31. This contribution makes some specific suggestions in this respect.

1 Introduction

The negotiations on Article 31 of the EPPO Regulation[1] had been particularly controversial in the Council and the resulting text of Article 31 was not very convincing.[2] The major question heavily debated at the time was whether a required judicial authorisation of an investigation measure in a cross-border setting should be obtained from a court/judge in the Member State where the investigation is being conducted or in the Member State where the requested investigation measure is to be undertaken. While the EPPO has been conceived as a 'single office' (Article 8(1) EPPO Regulation), it nevertheless operates on the basis of national criminal procedural law (cf. Article 5(3) EPPO Regulation) and thus not in a 'single legal area'[3]. The rules on cross-border investigation measures by the EPPO thus

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

2 For more details see: H-H Herrnfeld, 'Article 31' in H-H Herrnfeld, D Brodowski and C Burchard (eds), *European Public Prosecutor's Office: Article-by-Article Commentary* (Nomos 2021) mn 4 ff., 38 ff.

3 Herrnfeld (n 2) mn 4.

need to clarify which national legal regime applies and in which Member State judicial authorisation is to be obtained. After lengthy negotiations in the Council Working Group COPEN a compromise solution for the provision of Article 31 was found, which, however, soon created difficulties for the EPPO in practice.[4] In the course of a preliminary ruling procedure under Article 267 of the Treaty on the Functioning of the European Union (TFEU), the Grand Chamber of the European Court of Justice (ECJ), in December 2023, provided an interpretation of certain provisions of Article 31.[5] And while it is questionable whether the interpretation now given by the ECJ is truly reconcilable with the wording and contextual relationship of its provisions, the judgment by the ECJ may – in substance – be largely welcomed.[6] Nevertheless, the judgment leaves certain questions unanswered, which the ECJ may have to answer in future requests for preliminary rulings unless the Council decides to amend the provisions of Article 31 of the EPPO Regulation in order to better clarify its intentions and provide answers to the unresolved questions.

2 Current wording of Article 31 of the EPPO Regulation and its legislative history

2.1 Adoption, assignment and enforcement of cross-border measures

Article 31 contains procedural rules for investigations which require an investigation measure or other measure, as referred to in Article 30 of the EPPO Regulation, to be undertaken in a different Member State than the Member State whose European Delegated Prosecutor (EDP) is undertaking the investigation ('handling EDP' as opposed to the 'assisting EDP' who is requested to undertake the measure in that other Member State).[7] The title of Article 31 as well as its substance are a recognition of the fact that the

4 See the first version of the Decision 006/2022 of the College of the European Public Prosecutor's Office of 26 January 2022 Adopting Guidelines of the College of the EPPO on the Application of Article 31 of Regulation (EU) 2017/1939, published at: https://epp o-lex.eu/cdn_01/.

5 ECJ, Case C-281/22 *G.K. and Others (Parquet européen),* ECLI:EU:C:2023:1018.

6 For an analysis see: H-H Herrnfeld, 'Yes Indeed, Efficiency Prevails. A Commentary on the Remarkable Judgment of the European Court of Justice in Case C-281/22 G.K. and Others' (2023) *eucrim* 370.

7 Cf. the definition in Art 2 No 5 and 6 EPPO Regulation.

EPPO still needs to observe the borders between Member States. Thus, an investigation undertaken by an EDP in one of the participating Member States may require cross-border investigation (or other)[8] measures to be undertaken in one or more of the other participating Member States. In accordance with Article 13(1) of the EPPO Regulation, the EDPs can only act on behalf of the EPPO 'in their respective Member State', and thus it is only in 'their' Member State where EDPs can conduct an investigation and undertake investigation measures themselves (cf. Article 28(1) EPPO Regulation). Where the handling EDP considers that an investigation measure needs to be taken in another (participating) Member State, he/she will have to revert to Article 31 and 'assign' the ordered measure to an EDP of the Member State where the investigation measure is to take place – see Article 31(1). In accordance with Article 31(2), the handling EDP may assign any measures which are available to him/her in accordance with Article 30 of the EPPO Regulation. The justification and adoption of such measures shall be governed by the law of the handling EDP's Member State.

Following the assignment of an investigation measure by the handling EDP it is the responsibility of the assisting EDP to undertake the assigned measure or instruct the competent national authorities of that Member State to do so (cf. Article 31(4)), and the enforcement of the measure shall then take place in accordance with the law of that Member State (cf. Article 32 EPPO Regulation). The assisting EDP has no need or competence to decide on the recognition of the assigned measure. In principle, he/she is expected to undertake (enforce) the measure (on his/her own) as assigned by the handling EDP or instruct the competent national authority to do so (cf. Article 31(4), Article 32). The assisting EDP cannot invoke any grounds for non-recognition such as those set out in Article 11 of the EIO Directive[9] and merely may, if he/she has certain concerns about the possibility to undertake the measure, 'consult' the handling EDP 'in order to resolve the matter bilaterally' (cf. Article 31(5)). Where they cannot agree, the competent Permanent Chamber shall decide (cf. Article 31(7) and (8)).

8 Such as e.g. the freezing of proceeds of crime (see Art 30(1)(d) EPPO Regulation).

9 Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130, 1.5.2014, p. 1.

2.2 Measures which require prior judicial authorisation

2.2.1 In any case, there shall be only a 'single judicial authorisation'

The original Commission proposal for the EPPO Regulation[10] provided in its Article 26 for a list of particularly intrusive investigation measures in respect of which the Member States were to ensure that these measures 'are subject to authorisation by the competent judicial authority of the Member State where they are to be carried out' (Article 26(4) of the original Commission proposal). During the negotiations a majority of Member States did not agree to establish any such harmonising obligation requiring prior judicial authorisation of certain investigation measures. Consequently, Article 30(5) in conjunction with Article 5(3) of the EPPO Regulation now merely refers to 'applicable national law'.

In the case of cross-borders measures this, of course, required specification in which Member State the judicial authorisation should be obtained, and thus which Member State's law determines whether a judicial authorisation is required as well as the applicable procedures. Such a prior judicial authorisation may take the form of a decision by a judge/court to express prior approval of the EDP's decision to order a certain measure; in other cases, depending on Member States' legislation, a judicial authorisation may mean a decision by a judge/court to order an investigation measure as requested by the EPPO. During the negotiations on the EPPO Regulation, Member States did, however, agree, that 'in any case there should be only one authorisation' (cf. Recital 72 EPPO Regulation). In other words: there should be no need for the handling EDP to first obtain a judicial authorisation in his/her own Member States to be followed by an additional judicial authorisation of the recognition/enforcement of the measures to be obtained from a judge/court in the Member States where the measure is to be carried out. Article 31(3) was intended to clarify in which of the Member States the 'single judicial authorisation' is to be obtained.

2.2.2 Judicial authorisation required in both Member States or only in the Member State of the assisting EDP

Where, in accordance with applicable national law, a judicial authorisation is required under the law of the assisting EDP's Member State, the solution

10 European Commission, 'Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office', COM(2013) 534 final.

found in Article 31(3) was to be quite different from a concept of mutual recognition: In such a case, the handling EDP is still empowered to 'adopt' the measure in accordance with the law of his/her Member State and assign it to the assisting EDP (paragraph 2). It was then, however, supposed to be the task of the assisting EDP to obtain the necessary judicial authorisation in accordance with the law of that Member State (paragraph 3, subparagraph 1). In line with the concept of a 'single judicial authorisation', the same was to apply in cases where a judicial authorisation is required under the law of both Member States. Here, too, judicial authorisation should thus be obtained only by the assisting EDP in his/her Member State. In both situations, if the judge/court – for whatever reason – refuses to give judicial authorisation, the handling EDP must withdraw the assigned measure (paragraph 3 subparagraph 2). The judge/court in the assisting EDP's Member State thus was to have full responsibility to decide on the authorisation on the basis of the national law of the assisting EDP's Member State, and that decision was not in any way supposed to be limited by a list of possible 'grounds for non-recognition' as in Article 11 of the EIO Directive.

2.2.3 Judicial authorisation required only in the Member State of the handling EDP

Almost as an afterthought during the negotiations, delegations considered it necessary to also include a provision addressing the possibility that a judicial authorisation for ordering a specific measure is only required under the law of the handling EDP's Member State. The third subparagraph of Article 31(3) provides that in such a case, the judicial authorisation is to be obtained by the handling EDP before assigning the investigation measure to the assisting EDP. As in the situation where no judicial authorisation is required under the law of either Member State (see section 2.1 above), the decision to adopt the measure is taken in accordance with the law of the handling EDP's Member State and the assisting EDP is then expected to undertake (enforce) the assigned measures without any need for a formal act of recognition.

3 Interpretation of Article 31 of the EPPO Regulation following the judgment of the ECJ in Case C-281/22 G.K. and others (Parquet européen)

3.1 The interpretation of Article 31 of the EPPO Regulation by the ECJ

In a remarkable judgment of 21 December 2023, the ECJ, however, gave a different meaning to the provision of the first subparagraph of Article 31(3).

The case essentially concerned the question whether a judicial authorisation for an investigation measure must, where so required by national law, be obtained by the handling EDP from a judge/court in his/her own Member State prior to 'assigning' the measure to the assisting EDP; or whether this authorisation is to be obtained by the assisting EDP from a judge/court in his/her Member State. The first question posed in this case by the Higher Regional Court of Vienna was whether this provision must be interpreted as meaning that the court in the assisting EDP's Member State must examine 'all material aspects, such as criminal liability, suspicion of a criminal offence, necessity and proportionality'. The second question by the referring court was whether the examination to be undertaken by the court in the assisting EDP's Member State should take into account whether or not the admissibility of the measure had already been examined by a court in the Member State of the handling EDP. And, as a third question, the Higher Regional Court of Vienna asked: '[I]n the event that the first question is answered in the negative and/or the second question in the affirmative, to what extent must a judicial review take place in the Member State of the assisting European Delegated Prosecutor'.

The ECJ ruled that the term 'judicial authorisation' used in paragraph 3 is to be understood as referring only to 'matters concerning the enforcement of that measure, to the exclusion of matters concerning the justification and adoption of that measure'.[11] According to the ECJ, any 'prior judicial review' required under the law of the handling EDP's Member State has to be obtained by the handling EDP from a judge/court in his/her Member State in the course of adopting the measure in accordance with Article 31(2).[12] The Court put a strong emphasis on the objectives of the EPPO Regulation, taking into account its Recitals 12, 14, 20, and 60 and drew

11 ECJ, Case C-281/22 *G.K. and Others* (*Parquet européen*), ECLI:EU:C:2023:1018, para 78.

12 ECJ, Case C-281/22 *G.K. and Others (Parquet européen)*, ECLI:EU:C:2023:1018, para 73.

the conclusion that the legislator had 'intended to establish a mechanism ensuring a degree of efficiency of cross-border investigations conducted by the EPPO at least as high as that resulting from the application of the procedures laid down under the system of judicial cooperation in criminal matters between the Member States which is based on the principles of mutual trust and mutual recognition'.[13] Consequently, the ECJ excluded the possibility of interpreting Article 31(3) in such a way as to allow the judge/court in the assisting EDP's Member State to examine 'elements relating to the justification and adoption of the assigned investigation measure concerned' as this 'would, in practice, lead to a system less efficient than that established by such legal instruments and would thus undermine the objective pursued by that regulation'.[14]

While this interpretation by the ECJ may be difficult to reconcile with the wording of Article 31 and its legislative history,[15] it may, indeed, help the efficiency of the procedures for cross-border investigations within the EPPO territory. Be that as it may, it needs to be taken into account now in the interpretation and application of Article 31.

In this judgment, the ECJ went a bit further, however, by answering a question that had not been posed by the Vienna Higher Regional Court: the ECJ not only ruled that any necessary 'prior judicial review of the conditions relating to the justification and adoption of an assigned investigation measure' is within the competence of the authorities of the handling EDP's Member State. It also pointed out that 'matters concerning the justification and adoption of that measure […] must be subject to prior judicial review in the Member State of the handling European Delegated Prosecutor in the event of serious interference with the rights of the person concerned guaranteed by the Charter'.[16] And the ECJ clarified that it considers investigations measures 'such as searches of private homes, conservatory measures relating to personal property and asset freezing, which are referred to in Ar-

13 ECJ, Case C-281/22 *G.K. and Others (Parquet européen),* ECLI:EU:C:2023:1018, para 67.

14 ECJ, Case C-281/22 *G.K. and Others (Parquet européen)*, ECLI:EU:C:2023:1018, para 68.

15 For a detailed analysis see Herrnfeld (n 6).

16 ECJ, Case C-281/22 *G.K. and Others (Parquet européen)*, ECLI:EU:C:2023:1018, para 78.

ticle 30(1)(a) and (d) of Regulation 2017/1939', qualifying as such measures seriously interfering with fundamental rights.[17]

3.2 Questions that are currently unresolved

The interpretation of Article 31(3) by the ECJ does raise several questions which are currently unresolved and may require attention by the Union legislator.

3.2.1 What does the ECJ mean by 'matters concerning the enforcement'?

As mentioned above, the judgment draws a parallel to the EU instruments on mutual recognition. In respect of the EIO Directive, the ECJ specifically recalled its judgment in Case C-724/19, pointing out that the EIO Directive is based 'on a division of competences between the issuing judicial authority and the executing judicial authority, in the context of which it is for the issuing judicial authority to review compliance with the substantive conditions necessary for the issuing of an EIO, and that assessment cannot, in accordance with the principle of mutual recognition, subsequently be reviewed by the executing judicial authority'.[18]

The EIO Directive, however, does provide for numerous 'grounds for non-recognition' (Article 11 EIO Directive). Thus, the question may now arise whether these or similar grounds are to be taken into account when the judge/court in the assisting EDP's Member State is requested to give judicial authorisation in respect of 'matters concerning the enforcement'. The ECJ's judgment in Case C-281/22 does not lean in this direction, not even in respect of the limited list of conditions under which the assisting EDP, in accordance with Article 31(5), can raise concerns about the appropriateness of enforcing the assigned measure. And Advocate General *Ćapeta*, in her opinion delivered on 22 June 2023 in case C-281/22, was quite clear on this question: in her view, there is no room for (non) recognition, as '[T]he EPPO is a single body, ... the assigned measures indeed need not be

17 ECJ, Case C-281/22 *G.K. and Others (Parquet européen)*, ECLI:EU:C:2023:1018, para 75.

18 ECJ, Case C-281/22 *G.K. and Others (Parquet européen)*, ECLI:EU:C:2023:1018, para 63, referring to ECJ, Case C-724/19 *HP (Spetsializirana prokuratura),* ECLI:EU:C:2021:1020, para 53.

recognized but only implemented.'[19] But would that be a proper solution? If that had been the intention of the Council when adopting the EPPO Regulation, why would the Council have refrained from clarifying this in the text of the Regulation? If such 'grounds for non-recognition' cannot be invoked by the judge/court in the assisting EDP's Member State, on what grounds can the judge/court in the assisting EDP's Member State then decide to refuse authorisation as specifically provided for in the second subparagraph of Article 31(3)? Only concerning the 'mode of execution', as has been suggested by the Commission in the present case?[20]

3.2.2 When is a judicial authorisation considered as being 'required'?

Considering the ECJ's interpretation of the first subparagraph of Art. 31(3), another question may be under which circumstances this provision is to apply. If the 'judicial authorisation' prescribed therein may only relate to 'matters concerning the enforcement of the measure', does that mean that this subparagraph also only applies if a judicial authorisation relating to matters concerning the enforcement is required under the law of the assisting EDP's Member State? And what kind of procedures under national law could that apply to? Or is the term 'judicial authorisation' used in the first part of the sentence to be interpreted differently than in the second part of the sentence of Art. 31(3), meaning that judicial authorisation by a judge/court in the assisting EDP's Member State, limited to 'matters of enforcement' is to be obtained whenever the criminal procedure law of that Member State, applicable in domestic cases, requires a full judicial authorisation also on the grounds and justification of the measure?

3.2.3 What is the purpose of the third subparagraph of Article 31(3)?

The third subparagraph of Article 31(3) applies if a judicial authorisation is required only in the Member State of the handling EDP. What could be the purpose of this provision if, according to the interpretation given by

19 Opinion of AG Ćapeta, in Case C-281/22 *G.K. and Others (Parquet européen),* ECLI:EU:C:2023:510, para 101; for an analysis see: H-H Herrnfeld, 'Efficiency contra legem? Remarks on the Advocate General's Opinion Delivered on 22 June 2023 in Case C-281/22 G.K. and Others (Parquet européen)' (2023) *eucrim* 229.

20 See the reflection of the Commission's views in Opinion of AG Ćapeta in Case C-281/22 G.K. and Others *(Parquet européen),* ECLI:EU:C:2023:510, para 53.

the ECJ, judicial authorisation as referred to in the first subparagraph of Article 31(3) can only relate to 'matters concerning the enforcement'? The suggestion, advocated during the oral hearing on 27 February 2023, according to which the authorisation given by the judge/court of the handling EDP's Member State in such situations shall extend to both the 'justification and the execution of the measure',[21] is hardly convincing. Why should the judge/court in the handling EDP's Member State additionally give judicial authorisation relating to 'matters concerning the enforcement' in accordance with the third subparagraph of Article 31(3), in respect of which that same judge/court had already – in line with the interpretation given by the ECJ – exercised 'prior judicial review' in accordance with Article 31(2)? And on what grounds could the judge/court express (additional) judicial authorisation of the enforcement of the measure? On the basis of the law of the handling EDP's Member State? Or the law of the assisting EDP's Member State – in spite of the fact that that law does not require judicial authorisation of the measure?

3.2.4 What are the consequences of the ECJ's judgment in respect of the need to exercise prior judicial review?

The conclusion of the ECJ concerning an obligation on the part of the Member States to provide for a prior judicial review of the conditions relating to the justification and adoption of an investigation measure[22] may have further consequences for the respective legislation of the Member States. The question arises here as to whether it would be appropriate for the EU legislator now – in light of the conclusions drawn by the ECJ in this case – to leave the text of the Regulation as is, thus triggering possible additional preliminary ruling requests to the ECJ asking which other types of investigation measures, aside from those specifically referred to by the ECJ in case C-281/22, require prior judicial authorisation. In particular, this may become an issue in respect of cross-border investigations by the EPPO if judicial authorisation of the assigned measure by a judge/court in the assisting EDP's Member State would be required in national investigations but where the law of the handling EDP's Member State does not require

21 See the views reflected in Opinion of AG Ćapeta in Case C-281/22 G.K. and Others *(Parquet européen)*, ECLI:EU:C:2023:510, para 45.

22 ECJ, Case C-281/22 *G.K. and Others (Parquet européen)*, ECLI:EU:C:2023:1018, para 75.

any prior judicial authorisation – such as could be the case e.g. in respect of searches in office buildings. It may also become a matter of concern if Article 31(3) were to be interpreted as not allowing the judge/court in the assisting EDP's Member State to refuse authorisation on grounds other than those concerning 'the mode of execution' as was proposed by the Commission in the present case (see 3.2.1 above).[23]

4 Proposals for a possible revision of Article 31 of the EPPO Regulation

These questions arise because the ECJ gave an interpretation of Article 31 which does not follow the intention of the legislator when drafting these provisions. The Union legislator should thus consider reviewing and amending the provisions of Article 31, taking into account the considerations of the ECJ – and the EPPO – to ensure efficiency of the mechanism of cross-border investigations by clarifying that, indeed, any necessary (prior) judicial authorisation of an investigation shall be obtained by the handling EDP from a judge/court in his/her Member State in the course of adopting the measure and before assigning it to the assisting EDP.

This could easily be done by slightly amending the second paragraph of Article 31 to read as follows (new text in *italics*):

> (2) The handling European Delegated Prosecutor may assign any measures, which are available to him/her in accordance with Article 30. The justification and adoption of such measures, *including, if so required, a prior judicial authorisation*, shall be governed by the law of the Member State of the handling European Delegated Prosecutor. Where the handling European Delegated Prosecutor […].

Primarily, however, paragraph 3 of Article 31 should be amended to bring the text in line with the conclusions of the ECJ. If the legislator shares the view of the ECJ that the 'review conducted in the Member State of the assisting European Delegated Prosecutor, where an assigned investigation measure requires judicial authorisation in accordance with the law of that

23 Cf. on this, also with further questions: N Franssen, 'The judgment in G.K. e.a. (parquet européen) brought the EPPO a pre-Christmas tiding of comfort and joy but will that feeling last?' (European Law Blog, 15 January 2024), at https://www.europeanlawblog.eu/pub/the-judgment-in-g-k-e-a-parquet-europeen-brought-the-eppo-a-pre-christmas-tiding-of-comfort-and-joy-but-will-that-feeling-last/release/1.

Member State, may relate only to matters concerning the enforcement of that measure, to the exclusion of matters concerning the justification and adoption of that measure',[24] it should be considered to amend the wording of Article 31 paragraph 3 accordingly. The legislator could clarify that such (additional) judicial review in the assisting EDP's Member State may concern (only) the enforcement of the measure, independent on whether or not a judicial authorisation has been given in the Member State of the handling EDP.

It would seem appropriate, however, to also clarify the extent of the review which the judge/court in the assisting EDP's Member State may exercise before pronouncing an authorisation of the enforcement of the measure. In my view, it would be appropriate to specifically allow the judge/court in the assisting EDP's Member State to refuse such authorisation on the same grounds on which the assisting EDP can voice concerns against the assigned measure in accordance with the EPPO-internal procedure set out in Article 31(5), (7) and (8).

Furthermore, in a revision of Article 31(3), the content of its third subparagraph should be deleted as there is no reason why a judge/court in the handling EDP's Member State should – under the circumstances described in current subparagraph 3 – express additional judicial authorisation of the enforcement of the measure (cf. 3.2.3 above).

The text of Article 31(3) thus could be amended as follows (new text in *italics*):

> [1] If *prior* judicial authorisation for ~~the~~ *such* measure*s* 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.~~
> ~~[2] If judicial authorisation for the assigned measure is refused, the handling European Delegated Prosecutor shall withdraw the assignment.~~
> ~~[3] 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~~ *any necessary judicial* authorization *of the enforcement of the measure* shall be obtained by the latter European Delegated Prosecutor ~~and submitted together with the assignment~~ *in accordance with the law of that Member State. Such a judicial authorisation*

24 ECJ, Case C-281/22 *G.K. and Others (Parquet européen)*, ECLI:EU:C:2023:1018, para 78.

> *of the enforcement may only be refused on any of the grounds set out in paragraph 5.*

Obviously, such amendments would no longer be in line with the principle of a 'single judicial authorisation', which had been an important issue for the delegations in the negotiation process and which are reflected in Recital 72 EPPO Regulation. This is, however, already a consequence of the interpretation given by the ECJ to the present text of Article 31.

Finally, the Union legislator could consider addressing as well the findings of the ECJ concerning the obligation of Member States to ensure that matters concerning the justification and adoption of an investigation measure 'must be subject to prior judicial review in the Member State of the handling European Delegated Prosecutor in the event of serious interference with the rights of the person concerned guaranteed by the Charter'[25] (cf. section 3.2.4 above). Presumably this statement of the Court should, however, not only apply to the prior judicial review to be exercised in cross-border investigations in accordance with Art. 31(2) but should also apply to purely domestic investigation measures.

Thus, it could be considered to revise Article 30(5) of the EPPO Regulation as follows (new text in *italics*):

> The European Delegated Prosecutors may only order *or request* the measures referred to in paragraphs 1 and 4 where there are reasonable grounds to believe that the specific measure in question might provide information or evidence useful to the investigation, and where there is no less intrusive measure available which could achieve the same objective. The procedures and the modalities for *ordering, requesting and* taking the measures shall be governed by the applicable national law. *Measures referred to in paragraphs 1 and 4 must be subject to prior judicial authorisation in the event of serious interference with the rights of the person concerned enshrined in the Charter.*

The main point in question here is the additional last sentence, which would merely be a copy-and-paste exercise based on the findings of the ECJ in case C-281/22. Alternatively – and, I believe, preferably – the Council should reconsider its opposition to the original Commission proposal in respect of a list of investigation (and other) measures which do require a prior judicial authorisation.

25 ECJ, Case C-281/22 *G.K. and Others (Parquet européen)*, ECLI:EU:C:2023:1018.

5 Conclusion

As explained above, the interpretation of Article 31 of the EPPO Regulation given by the ECJ in Case C-281/22 may serve to enhance the efficiency of the applicable rules on cross-border investigations. The judgment, however, leaves several questions unresolved.

In order to bring the text of Article 31 more in line with the interpretation given to its current text by the ECJ, the Union legislator should – if the legislator agrees with the underlying considerations of the ECJ – amend the text of Article 31 accordingly. Furthermore, it could serve the interest of justice and the protection of fundamental rights if the Union legislator could, indeed, specify the obligations of the Member States to ensure proper procedures for a necessary prior judicial authorisation of particularly intrusive investigations measures potentially involving a serious interference with the rights of the person concerned guaranteed by the Charter.

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Rethinking Article 37 of the EPPO Regulation: toward a coherent EU approach to evidence admissibility and exclusion

Michele Caianiello & Isadora Neroni Rezende[*]

Article 37 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) governs the admissibility and assessment of evidence in transnational prosecutions by the European Public Prosecutor's Office (EPPO). While it affirms the free evaluation of evidence and non-discrimination of foreign-gathered material, it lacks substantive rules on exclusion in cases of procedural violations. This paper critically examines the evolution, structure, and systemic role of Article 37, drawing on doctrinal analysis and recent case law, and argues that it does not adequately address the fundamental balance between efficiency, equality, and the rule of law. Reform proposals – including introducing minimum exclusionary rules – are discussed as pathways for the European Union (EU) to define its stance on procedural fairness in criminal matters.

1 Introduction

The question of the inadmissibility of evidence in the EPPO system can be considered from two opposing viewpoints. The initial, authoritatively substantiated perspective, asserts that, upon comprehensive evaluation, the existing system functions effectively in its current state.[1] The article's normative scope is limited to preventing the exclusion of evidence presented by the prosecutor or the defence in EPPO proceedings on the mere ground that it was obtained abroad. Although the present version of Article 37 is

* This work is the result of a joint reflection by the authors, in its entirety. For the purposes of formal division, the following authorship is attributed: paragraphs 2 and 3 to Michele Caianiello, and paragraphs 4 and 5 to Isadora Neroni Rezende. In paragraphs 1 and 6, the contributions of the two authors are, to paraphrase the EPPO's Regulation, inextricably linked.

1 D Brodowski, 'Admissibility of Evidence in EPPO Proceedings' (2023) 14 *New Journal of European Criminal Law* 37.

minimalist in many respects, it is argued that it is precisely this conciseness that constitutes its strength.[2] On the one hand, it allows Member States to exercise discretion in determining the most appropriate course of action. On the other hand, this arrangement unquestionably acknowledges national traditions, which remain a significant part of the EU system.

At the same time, Member States' legal systems are not as divergent as often assumed. There is a general reluctance in Europe to exclude evidence in criminal proceedings, and significant consideration is given to how the court assesses it.[3] Based on these accurate observations, the first perspective suggests the system could stay in its current form.[4] This approach has also been adopted by the EPPO, as evidenced by its proposed modifications to Article 37. These amendments appear entirely consistent with the notion that only minor changes to the Regulation are needed or that it can even remain unchanged.[5]

However, if we are to consider a significant improvement in the protection of EU fundamental rights in the medium term, an alternative argument could be proposed. From this standpoint, the present version of Article 37 does not adequately address a crucial issue in any criminal procedural system: namely, the conditions under which the acquisition of knowledge must be foregone to safeguard other essential values of the process, such as the accuracy of fact-finding, the fairness of the procedure, and the integrity of the system.[6]

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2 See Section 3.

3 MR Damaška, *Evidence Law Adrift* (Yale University Press 1997) 21. For an example of this trend in Germany, see e.g. T Weigend, 'The Potential to Secure a Fair Trial Through Evidence Exclusion: A German Perspective' in S Gless and T Richter (eds), *Do Exclusionary Rules Ensure a Fair Trial?* (Cham 2019) 61; regarding Spain, which has progressively reintroduced limitations to its general exclusionary rule, see L Bachmaier Winter, 'Spain: The Constitutional Court's Move from Categorical Exclusion to Limited Balancing' in SC Thaman (ed), *Exclusionary Rules in Comparative Law* (Springer 2013) 209; on the limited impact of the French nullity regime to sanction illegal evidence, see an example from the data retention saga in A Botton, 'Pouvoirs Du Procureur de La République En Matière de Réquisitions de Données Informatiques' (2022) *La Semaine Juridique* 1178.

4 Brodowski (n 1) 37.

5 European Public Prosecutor's Office, 'PROPOSALS REGARDING THE REVISION OF THE EPPO REGULATION', para 14.

6 On the conflicting values underlying the formation of judicial knowledge, see, *inter alia*, Damaška (n 3); AJ Ashworth, 'Excluding Evidence as Protecting Rights' (1977) *Criminal Law Review* 723; HL Ho, *A Philosophy of Evidence Law* (Oxford University Press 2008). More on this in Section 5.

The relevance of the issue of evidence is immediately apparent. Notably, the initial two cases adjudicated by the European Court of Justice (ECJ) about the EPPO involved matters of the rights of evidence and the rules of exclusion.[7] Undeniably, the existence of evidence is a fundamental aspect of the trial process. Irrespective of personal sentiments on the matter, it is inevitable that even the EPPO system – which aims to establish a unique procedural order – will have to address issues related to the exclusion of evidence, sooner or later.[8] The question remains whether this task should be left entirely to the courts (Member States' ones and the ECJ) or whether the legislator can make a positive contribution.

From the perspective advocated in this article, the latter solution is considered optimal for two reasons. The primary contention is that, for the time being, the ECJ has not adopted a consistent and predictable interpretation of the rules of inadmissibility of evidence. Consequently, a (well-drafted) solution by the legislator could probably assist the judges in Luxembourg in formulating more balanced and consistent interpretative solutions for the future.[9] In this sense, it will be argued that introducing flexible exclusionary rules based on the need to ensure the system's integrity (*integrity principle*) and the protection of fundamental rights (*protective principle*) already has solid normative underpinnings in EU law.[10]

To further support the argument, it will be highlighted that an EU legislative intervention in this area could be considered legitimate *vis-à-vis* Member States' national systems. Although national traditions should always be respected, they must not undermine the integrity or overall coherence of the European system. The EU framework could be jeopardised

7 The two cases are ECJ, Case C-281/22 *G. K. and Others (Parquet européen),* ECLI:EU:C:2023:1018, commented *inter alia* by A Mosna, 'Effective Judicial Protection as a Central Issue in EPPO Cross-Border Investigations: The ECJ's First Ruling in G. K. and Others' (2024) 61 *Common Market Law Review* 1345; M Caianiello, 'Sometimes the More Is Less. Transnational Investigations in the Eppo System After the Judgment of the EU Court of Justice' (2024) 32 *European Journal of Crime, Criminal Law and Criminal Justice* 87; H-H Herrnfeld, 'Efficiency Contra Legem?' (2023) *eucrim* 229; N Gibelli, 'Sui Controlli Giurisdizionali Nelle Indagini Transfrontaliere Dell'EPPO: Una Prima Lettura Della Sentenza C-281/22 Della Corte Di Giustizia Dell'Unione Europea' (2024) *Sistema Penale* (3) 31; ECJ, Case C-292/23 *I.R.O. and F.J.L.R.*, ECLI:EU:C:2025:255.

8 K Ligeti, B Garamvölgyi, A Ondrejová and M von Galen, 'Admissibility of Evidence in Criminal Proceedings in the EU' (2020) *eucrim* 203.

9 See Section 4.

10 See Section 5.

by the absence of a harmonised, clearly expressed rule on the exclusion of evidence. This gap has the potential to lead to inconsistent judicial decisions at the national level and tempt relevant actors to engage in forum shopping to select the most favourable jurisdiction (a problem already faced by the EPPO).[11] In this sense, introducing some rules of evidence may concur – contrary to widespread belief – to strengthen EPPO's operations in preserving the integrity of the EU budget.

Considering this, the present study posits that the minimalist approach embraced in Article 37 is becoming increasingly untenable. As the EPPO becomes operational and its actions begin to generate case law, the absence of clear rules on evidence exclusion will likely engender legal uncertainty, fragmentation, and potential breaches of fair trial guarantees. Consequently, re-evaluating Article 37 is imperative to ensure a consistent and rights-conscious approach to cross-border evidence.

2 Article 37: between minimalism and pragmatism

As is well known, Article 37 of the EPPO Regulation comprises two brief paragraphs. The first states that both the EPPO and the defence are entitled to present evidence in EPPO proceedings before a court (this includes any court, not only the trial one). Then it also states – what mostly matters in this paper – that evidence cannot be excluded ('shall not be denied admission') on the mere ground that it was gathered in another Member State. The second paragraph affirms that, at trial, the court shall have the power to freely assess the evidence presented by the parties. This formulation seeks to strike a balance between respecting the diversity of national criminal procedure laws and ensuring functional efficiency within the EPPO's transnational structure.[12] It deliberately avoids imposing common standards on evidence admissibility, departing from earlier proposals that envisioned a more integrated model.

11 C Burchard, 'Article 37' in H-H Herrnfeld, D Brodowski and C Burchard (eds), *European Public Prosecutor's Office: Article-by-Article Commentary* (Nomos 2021) 346; A Mangiaracina, 'Dalle indagini all'ammissione della prova in giudizio' 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* (Università di Trento 2022) 216, at https://iris.unitn.it/retrieve/c56a7998-a154-42f9-8d3b-dc66563637df/procura-europea-DEFper%20IRIS-20.12.22.pdf.

12 Brodowski (n 1) 38.

In particular, the Commission's 2013 draft proposal[13] had included a *sui generis* principle of automatic admissibility, relying on mutual trust and the procedural rule of the *forum actoris* – according to which the laws of the place where the evidence is gathered govern its validity.[14] The draft provision stated that evidence presented by the EPPO to the trial court 'shall 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'. However, this model was abandoned due to criticism that it would risk eroding defence rights and exacerbate procedural asymmetries.[15]

The provision would have compelled Member States to amend their legislation to guarantee the admissibility of evidence presented by the EPPO, irrespective of any specific national laws that might preclude its admission.[16] The Commission's proposal demonstrated a conscientious approach in safeguarding fundamental rights, including those of defence and the fair trial. However, given the broad nature of the statement, it fell short of guaranteeing uniformity in handling cases that were comparable but differed in competence. In fact, in the event of two cases pending before the same jurisdiction, one falling within the competence of the EPPO and the other assigned to the Member State, it could have been argued that evidence gathered by the EPPO and presented to the trial court would have had to be admitted in the EPPO proceedings, and instead be excluded in the national proceedings.[17]

This scenario would have jeopardised the fundamental principle of equality, a tenet of paramount importance within the EU system. Furthermore, the divergent treatment of evidence, which would hypothetically have been

13 European Commission, 'Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office', COM(2013) 534 final.

14 Cf S Allegrezza and A Mosna, 'Cross-Border Criminal Evidence and the Future of European Public Prosecutor. One Step Back on Mutual Recognition?' in L Bachmaier Winter (ed), *The European Public Prosecutor's Office. The Challenges Ahead* (Springer 2018) 145; Burchard (n 11) 349.

15 See, *inter alia,* Allegrezza and Mosna (n 14) 146; S Allegrezza, 'Verso una procura europeaper tutelare gli interessi finanziari dell' unione' (2013) *Diritto Penale Contemporaneo* 7; S Recchione, 'European Public Prosecutor Office. Anche gli entusiasti diventano scettici?' (2014) *Diritto penale contemporaneo* 22.

16 T Elholm, 'EPPO and a Common Sense of Justice' (2021) 28 *Maastricht Journal of European and Comparative Law* 220.

17 A Erbežnik, 'European Public Prosecutor's Office (EPPO) – Too Much, Too Soon, and without Legitimacy?' (2015) 5 *European Criminal Law Review* 218.

admissible in the EPPO case but excluded in a national one, appeared problematic in light of the subtle distinction that exists within the EPPO Regulation between cases falling within the competence of the EPPO and those falling under the jurisdiction of Member States. In this regard, the complex issue of applying this distinction in practice in cases of inextricably linked criminal offences is particularly salient.

Moreover, Article 30 of the Commission's proposal stipulated that evidence 'presented by the EPPO' must be deemed admissible, thus excluding the defence from the benefits of this presumption of admissibility. The only exception to this rule concerned the need to protect the rights of defence and the fair trial, a clause that applied to EPPO evidence instead.

Considering these criticalities, the final text of Article 37 clearly reflects a pragmatic compromise. It avoids mandating automatic admissibility of evidence presented by the EPPO and refrains from setting substantive rules on what constitutes acceptable or unacceptable evidence. In doing so, it essentially defers all such determinations to national trial courts, under the guidance of domestic regulations and within the overarching protection of the Charter of Fundamental Rights of the European Union (the Charter). While this avoids regulatory overreach, it may also result in legal uncertainty and uneven rights protection across Member States, as described more in detail below.

3 The strengths and limits of the current model

The minimalist model of Article 37 is not without merit, if one looks at it from the perspective of the subsidiarity principle, the efficiency of the EPPO's prosecutions, and the enduring logics of horizontal cooperation between Member States.

First, in line with the principle of subsidiarity, the provision offers some flexibility by preserving Member States' procedural autonomy in a domain where they often exercise protective measures, while facilitating the integration of the EPPO in national systems.[18] It also avoids imposing a one-size-fits-all model of admissibility that may not suit diverse legal traditions. When considered in relation to Article 5, Article 37 ultimately entrusts national courts with the responsibility of determining the admissibility of evidence. Consequently, each country adhering to the EPPO will be

18 Brodowski (n 1) 38.

permitted to establish its regulations on evidence exclusion (or admission). Additionally, there is no risk of unjustified differences in treatment between EPPO cases and national ones, since the rules on the admissibility of evidence can remain the same, without changing depending on whether the case falls within the jurisdiction of the EPPO.

Furthermore, by affirming that evidence cannot be excluded solely because it was collected abroad, Article 37 seeks to facilitate cooperation and efficiency in EPPO-led prosecutions. In this sense, it further promotes mutual trust and the tendency, already developed at the level of horizontal cooperation within the European Union, to favour the inclusion rather than the exclusion of evidence gathered abroad. This trend, which dates back at least to the 1990s, is deeply rooted in the logic that has prevailed in judicial cooperation between legally, politically and economically close countries, as is indeed the case with EU Member States.

In EU cross-border cooperation, indeed, there are at least two reasons behind the open attitude of Member States when dealing with evidence gathered elsewhere. Firstly, it is evident that each judge is aware of the fact that, in the event of cross-border acquisition of evidence, a certain degree of compromise must be accepted, given that it is not feasible to demand strict compliance with every rule stipulated by the *lex fori* (i.e. the system in which the evidence is used, assuming that it is different from the one in which it was collected).[19] This assessment remains a relatively straightforward task for countries with divergent regulatory traditions – such as France, Germany and Italy – which adopt a comparable approach when they receive evidence from a court outside their jurisdiction. Generally, these countries tend to admit the evidence rather than exclude it. A salient example of this phenomenon appears in the recent data-driven investigations on the Encrochat and SkyEcc platforms, wherein national States exhibited a marked tendency to acknowledge data transmitted by the authorities that had initially been collected, without giving due consideration to the issue of compliance with the specific regulations on interception and data acquisition within their systems.[20] Overall, compromises are in-

19 Caianiello (n 7) 100. Practitioners even point out that, in many cases, issuing states do not specify the formalities for the execution of the European Investigation Order (EIO), thus allowing executing authorities to use the *lex loci* when executing an EIO, see Ligeti and others (n 8) 205.

20 The light approach taken by the Italian Court of Cassation to the admissibility of cryptophone data gathered and decrypted abroad is a clear example of this phenomenon. By relying on the principle of mutual trust, the Court

evitable in judicial cooperation, where some level of diplomacy is essential. Suppose a state jurisdiction adopts a strict approach to the admission of foreign evidence. In that case, there is a risk that it will receive progressively less support from other jurisdictions, which may get frustrated from the perception that their efforts to cooperate are not yielding results.

At the same time, the minimalist approach of Article 37 is also subject to major practical drawbacks. While the provision exemplifies the EU's restricted approach in evidence matters, namely the prohibition to rule out evidence based solely on its provenance, it remains silent on procedural sanctions for illegally obtained evidence. There is no guidance on the consequences, on the admissibility of evidence, of breaches of procedural rights, which may include, but are not limited to, the failure to provide legal counsel, violations of privacy, and coercion during interrogations.

Consequently, all issues relating to the protection of individual rights and the protection of fair trial are left to case law, an approach that does not seem suitable for constructing an optimal framework. As evidenced by the only two ECJ decisions regarding the EPPO,[21] the issue of evidence is – and will often be – a pivotal one in the activities of the Office. Although the Court has not addressed the matter directly in both cases, the question of the applicability of an exclusionary rule has always lurked in the background. For example, what would happen if a judicial warrant for a cross-border investigative measure was not adopted, or was adopted by an incompetent judge? What consequences should be anticipated if an

considered that the evidence should be presumed to have been obtained in compliance with fundamental rights, unless the defendant successfully makes allegations to the contrary. See Italian Court of Cassation, United Sections, 14 June 2024, nos 23755 / 23756, commented *inter alia* by G Spangher, 'Criptofonini: Sono 'in Gioco' Diritti Fondamentali' (2024) 64 *Cassazione Penale* 173; M Daniele, 'Ordine europeo di indagine penale e comunicazioni criptate: il caso Sky ECC/Encrochat' (11.12.2023) *sistema penale*, at https://www.sistemapenale.it/it/scheda/daniele-ordine-europeo-di-indagine-penale-e-comunicazioni-criptate-il-caso-sky-ecc-encrochat-in-attesa-delle-sezioni-unite?out=print. A similar approach was adopted by the French Court of Cassation, see Cass. Crim., 7 January 2025, no 24–81.941, and Germany, see German Federal Court of Justice, Order of 2 March 2022 – 5 StR 457/21.

21 ECJ, Case C-281/22 *G. K. and Others (Parquet européen),* ECLI:EU:C:2023:1018 concerned the question of which court, in a transnational case, should adopt the authorizing warrant for a cross-border investigative measure under Article 31, while ECJ, Case C-292/23 *I.R.O. and F.J.L.R.*, ECLI:EU:C:2025:255 focused on whether a witness in an EPPO case can challenge the role in which they are asked to answer questions, if they believe they should be heard as a person under investigation.

individual were compelled to respond to questioning, despite disagreeing with their designation as a witness and asserting their right to remain silent as a potential suspect?

These examples, directly taken from the cases discussed before the ECJ, clearly show that it would be unwise to completely ignore the issue of rules of evidence, which are increasingly asserting themselves as a matter of practical urgency in EPPO operations. In this context, sticking to the model designed by Article 37 could undermine legal certainty and consistency in evidence matters across the EU. Diverging national practices can lead to scenarios where the same evidence is excluded in one jurisdiction and admitted in another. This state-of-play would contradict the principle of equality before the law and may erode the legitimacy of EPPO proceedings, especially when sensitive data or intrusive investigatory powers are involved.

4 The insufficiency of case law in addressing the matter

Although it is understandable to think that the EPPO Regulation is adequate in its current form and that case law alone may address cases involving the exclusion of evidence, this argument is subject to criticisms, as outlined above. One additional observation can be added to this, specifically related to how the case law of the ECJ seems to be developing on the issue of the inadmissibility of evidence.

As things stand, the jurisprudence of the two European supranational Courts has yet to develop a coherent set of guidelines on the exclusion of evidence. The primary focus of the ECJ – as evidenced in the *data retention saga* and beyond[22] – is ensuring that the defence can provide effective commentary on evidence collected by breaching procedural rules.[23] This approach reflects the long-standing position of the European Court of Human Rights (ECtHR), which is steady in affirming that the Convention

22 For an example of the application of the overall fairness test by the ECJ, see recently ECJ, Case C-348/21 *HYA and Others* ECLI:EU:C:2022:965, commented by A Cabiale, 'Absent Witnesses and EU Law: A Groundbreaking Ruling by the CJEU in Criminal Matters' (2023) 8 *European Papers* 5566; L Bernardini and G Ancona, 'HYA and Others: Reshaping Participation at Criminal Trials in Europe' (2023) 30 *Maastricht Journal of European and Comparative Law* 312.

23 ECJ, Joined Cases C-511/18, C-512/18 and C-520/18 *La Quadrature du Net and Others*, ECLI:EU:C:2020:791, para 226.

does not enshrine any rules on the admissibility of evidence and often considers that the right to comment on the unlawfully gathered evidence at trial is enough to ensure compliance with Article 6 ECHR.[24] As is known, the ECtHR interprets the concept of fairness holistically, thus often neutralising the relevance of fundamental rights violations during the investigations.[25]

However, this approach appears inadequate, since allowing the defence the possibility of an actual comment cannot always count as an effective remedy.[26] That is the case when, for example, there is a violation of procedural rules that compromises the integrity of the proceedings and the essence of the fair trial.

To further illustrate this point, consider the instances where an individual with a right to silence is compelled to speak or is deceived and induced to respond through improper conduct by the investigating authorities. In these cases, the opportunity afforded to the defence to comment on the previous statements – which would have never been made if the investigators had behaved correctly – appears to be more of a mockery that exacerbates the damage, rather than a remedy for the violation suffered. Paradoxically, the right to clarify the meaning of the prior declarations can even backfire on the defendant, if they refuse to comment on them despite being urged to do so: in such a case, the judge may interpret this silence as an admission of truth, thereby reinforcing the weight of the previous statements.

Given the shortcomings of the current approach of the European jurisprudence to evidence exclusion, it becomes crucial to explain why, in-

24 See, for example ECtHR, *Garcia Ruiz v Spain* App no 30544/96 (21 January 1999) para 28; ECtHR, *Schenk v Switzerland* App no 10862/84 (12 July 1988) paras 45–46; ECtHR, *Miailhe v France (No 2)* App no 18978/91 (26 September 1996) para 43; ECtHR, *Heglas v the Czech Republic* App no 5935/02 (1 March 2007) para 84; ECtHR, *Hümmer v Germany App no 29881/07* (19 July 2012); ECtHR, *Moreira Ferreira v Portugal (No. 2)* App no 19867/12 (11 July 2017) para 83.

25 M Caianiello, 'You Can't Always Counterbalance What You Want' (2017) 25 *European Journal of Crime, Criminal Law and Criminal Justice* 283; JD Jackson and SJ Summers, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions* (Cambridge University Press 2012) 181.

26 For example, it has been pointed out that the rule elaborated in *La Quadrature du Net* would not likely lead to the exclusion of communications metadata, as it does not constitute highly complex expert evidence stemming from a technical field unknown to the judge, see M Panzavolta and E Maes, 'Exclusion of Evidence in Times of Mass Surveillance. In Search of a Principled Approach to Exclusion of Illegally Obtained Evidence in Criminal Cases in the European Union' (2022) 26 *The International Journal of Evidence & Proof* 205.

stead, a legislative intervention would be effective in addressing this issue at the EU level, without generating any cultural backlash from Member States.

In fact, while it is accurate to state that the predominant trend in continental Europe continues to favour the admission of evidence, it is also crucial to acknowledge that most EU Member States have recognised, either through legislative measures or established case law, the need for excluding evidence in specific situations. The rules on the exclusion of evidence have been disseminated across most of the globe, encompassing both national and supranational domains.[27] In particular, the idea of waiving evidence to preserve the legal system's fundamental values and principles has long been accepted in some European States, although with varying forms and methods.[28] Overall, a declaration of inadmissibility of evidence is no longer a contentious issue, even within the continental European context.[29] An EPPO provision that sought to guide interpreters towards a uniform approach to the inadmissibility of evidence would therefore encounter a cultural and regulatory backdrop that, at the national level, is ready and willing to welcome and apply it.

Considering this, it seems unlikely that Member States would reject a sufficiently broad and flexible exclusionary rule as a foreign body to their tradition. As a result, the EPPO system would not become unworkable or experience deadlock.

5 Proposals for reform: a flexible yet structured exclusionary framework

For all the reasons expressed above, it is reasonable to consider an amendment to the current version of Article 37, aimed at including an exclusionary rule. This should be flexible in nature and structured so as to incorporate the essential values that provisions on the inadmissibility of evidence

27 See, in a comparative perspective, the work of Jackson and Summers (n 25). Concerning supranational frameworks, relevant is the example of the ECtHR that has developed an exclusionary rule for evidence obtained in violation of Article 3 ECHR, see ECtHR, *Jalloh v Germany* App no 54810/00 (11 July 11 2006); ECtHR, *Gäfgen v Germany* App no 22978/05 (1 June 2010).

28 See, for example, the Italian case, as outlined in G Illuminati, 'Italy: Statutory Nullities and Non-Usability' in Thaman (ed) (n 3) 260; and the Spanish one M Miranda Estrampes, 'La prueba illícita: la regla de exclusión probatoria y sus excepciones' (2010) *Revista Catalana de Seguretat Publica* 131.

29 Damaška (n 3) 12–17.

typically tend to protect. To achieve this objective, two alternative proposals are presented.

A first – and likely optimal solution – might be *Panzavolta's* proposal to establish a cascade provision that sets out the main rationales upheld in criminal justice to support the exclusion of evidence.[30] The primary concern pertains to the reliability of the evidence that, as famously argued by Bentham, should serve as the fundamental principle governing the fact-finding process in any criminal justice system. To ensure fairness, the decision must build on an accurate reconstruction of the facts. Consequently, a first reason for excluding evidence arises when its credibility is irreparably compromised due to the way it was gathered.

The second proposal pertains to the right to an effective defence, which, in certain circumstances, can be decisive in the admission of evidence (*protective principle*).[31] For instance, a statement extracted under duress should be discredited, as its acceptance infringes upon the defendant's procedural rights. In this regard, it should be underlined that a significant body of EU law already allows for identifying the safeguards that would warrant an exclusion of the evidence in case of a violation. That is the case, for instance, of the Directives on the right to access to a lawyer and the presumption of innocence, which require the relevant guarantees to be accompanied by adequate remedies.[32] The reformulation of Article 37, enabling the judge to exclude evidence obtained in violation of fundamental rights of defence, would therefore be consistent with the EU's *acquis* in the criminal justice domain.

Then, it may be sometimes necessary to withhold information to safeguard the coherence of the judicial system, thus excluding unlawfully gathered evidence that may undermine the moral legitimacy of judicial verdicts.[33] A system abiding by the rule of law, such as the European one,

30 Panzavolta and Maes (n 26) 215–217.

31 On the protective principle, see Ashworth (n 6); Ho (n 6).

32 Art 12 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; Art 10 Directive (EU) 2016/343 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.

33 AAS Zuckerman, *The Principles of Criminal Evidence* (Oxford University Press 1989) 344; A Ashworth, 'Exploring the Integrity Principle in Evidence and Procedure' in P

cannot rely on illegal evidence to enforce its punitive powers without compromising the fairness of the trial. This rationale already has significant normative foundations in EU law like the others. First and foremost is the obligation for the EPPO to adhere to the principle of the rule of law, as set out in Article 5(2) of the EPPO Regulation. The need to respect human dignity, a value protected under Article 1 of the Charter, also weighs in favour of excluding evidence gathered by breaching the essence of the rights protected under EU law. Regarding the cases heard by the ECJ, including those involving the EPPO, such a rule would significantly impact real evidence obtained without judicial authorisation. In the interest of upholding the integrity of the system, specifically, the exclusion of evidence may be warranted in instances of serious violations of the right to private and family life, as well as data protection.

Alternatively, the previous version of Article 30 of the Commission's 2013 proposal could be reinstated. The old text stated that evidence could be admitted where it would not affect the fairness of the procedure or the rights of defence, as set out in Articles 47 and 48 of the Charter. This statement is well suited to summarising all the considerations made so far. However, it is noteworthy that the Court's approach appears to lack an explicit delineation of priorities in the field of evidence, a crucial element in the context of case law, particularly that of the ECJ. To date, the Court's exclusive focus on the right to adversarially examine at trial the illegally obtained evidence has been excessive, since not every procedural violation impairs the right to defence as such, but may endanger other fundamental values with which the fact-finding process interferes (for example privacy). In such instances, the violation – which could compromise the integrity of the process itself – cannot arguably be remedied by the right to comment on the evidence alone.

Of course, as the saying goes, where there is room for the big, there is also room for the small. The proposal drawn up within the EPPO for minor amendments to Article 37 is entirely compatible with the one under discussion here, and it seems reasonable to support it. At present, it consists of two reform measures.[34] The first aims at equating the evidence gathered by European Delegated Prosecutors (EDPs) with that collected by staff assisting the EDPs and the European Prosecutors. This amendment is

Mirfield and R Smith (eds), *Essays for Colin Tapper* (Oxford University Press 2003) 107.

34 European Public Prosecutor's Office (n 5) para 14.

essential for preserving the effective functioning of the EPPO, especially in national systems with few or without appointed EDPs. Although such an intervention may not be necessary from a technical standpoint (after all, a little interpretative ingenuity would suffice to reach the same conclusion), it still helps to clarify an uncertain point. Therefore, the amendment would only make the EPPO's actions more effective, without compromising the system's relevant principles or values.

The second proposal by the Office is that national courts should recognise translations of all the documents carried out by the EPPO as equivalent to those carried out under national law, without any further formalities. In particular, it is proposed that '[t]ranslations of documents contained in a case file which are performed by the EPPO or under its responsibility shall be considered equivalent to those performed in accordance with applicable national law'.[35] Unlike the previous one, this amendment does involve a change to national rules (at present, the Member States have ad hoc provisions on translations implementing the Directive 2010/64/EU on the right to interpretation and translation[36]). However, this modification does not appear to compromise the fundamental principle of equality or defence rights. It is important to note that the EPPO is a recently established EU body that possesses both autonomy and legal personality, often involved in cases of a transnational nature. It therefore seems evident that it will have to deal with translations of documents in many cases, which should reasonably constitute official documents of the proceedings. The right of the accused to an interpreter and a translation of effective quality, as protected by Directive 2010/64/EU, must also not be compromised (and the same applies to the victim's position, according to Directive 2012/29/EU[37]). Subject to fulfilling these conditions, no impediments exist to accepting the reforms proposed by the EPPO. However, they arguably bear minor relevance compared to those advocated in this article.

35 European Public Prosecutor's Office (n 5) para 14.

36 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.

37 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.

6 Conclusion

The current wording of Article 37 of the EPPO Regulation is a compromise solution that reflects institutional caution and political sensitivity. However, with the EPPO coming into operation, its rules of evidence will need to evolve, as the absence of exclusionary rules not only undermines legal certainty but also risks undermining the legitimacy of cross-border criminal proceedings.

Justice systems, particularly in the criminal law field, base their identity on procedural safeguards. These express when the legal order is willing to give up on some information when its inclusion in the fact-finding process would compromise upholding certain fundamental principles for the system. This applies not only to national frameworks but also to the EU.

This article has provided many reasons in support of a more decisive approach, at the EU level, to the issues of admissibility of evidence. Including a structured yet flexible exclusionary rule would strengthen the Union's commitment to fundamental rights, promote mutual trust, and ensure that efficiency does not come at the expense of procedural justice. At the policy level, a similar reform could also be the starting point for adopting a directive on the mutual admissibility of evidence under Article 82 of the Treaty on the Functioning of the European Union (TFEU).

Given the shortcomings of the current ECJ's approach to evidence matters (even beyond the remit of the EPPO's proceedings), a legislative intervention on Article 37 seems the most viable solution to achieve this objective. The proposed changes, however, would neither undermine the need to protect the financial interests of the Union as enshrined in Article 325 TFEU, nor would they generate any cultural backlash by Member States.

The flexible, albeit rationally structured, nature of the proposed provision would leave some margin of appreciation to the courts called upon to rule on the sensitive issue of the exclusion of evidence only in the most serious cases, where the need to protect the fundamental values of the Union cannot be set aside by the punitive requirements linked to the protection of the EU's financial interests. After all, even at the supranational level, the old saying that 'the chase is worth more than the catch' seems to retain all its meaning.

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Article 41 of the EPPO Regulation setting common standards on cross-border EPPO investigations – needs for reform

Liane Wörner & Luis Jakobi

Article 41 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) establishes, as its title indicates, a legal framework for the rights of suspects and defendants in proceedings involving the European Public Prosecutor's Office (EPPO) (I.). The provision aims to achieve the protection of defence rights, with Article 41(1) expressly stating that '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 balance between effective prosecution and safeguarding the interests of the defendant seems to be a general problem of the Europeanisation of criminal law and related cross-border prosecution (II.). However, a closer examination shows that the crucial and undoubtedly necessary introduction of the EPPO in order to make the administration of criminal justice more effective cannot be reconciled with the (comprehensive) protection of suspects and defendants at the same time. Rather, the cross-border nature of not only criminal activities, but also the proceedings to be conducted against the perpetrators in the light of Article 31 of the EPPO Regulation, brings with it new challenges and has the effect of exacerbating existing problems (III.). Currently, this is more likely to be accompanied by a further loss of defendant rights, which Article 41 of the EPPO Regulation, as a merely declaratory provision, can hardly oppose. The demand for the protection of the suspect under national law in actually Europeanised criminal proceedings ultimately remains an empty promise. Rather, there is a need for effective procedural safeguards at the European level as well, be it in the short term through adjustments to the Regulation or in the long term through a system of European investigating judges that would supplement the EPPO and counterbalance its power (IV.).

1 Significance of Article 41 of the EPPO Regulation

Article 41 of the EPPO Regulation is the central norm to set common standards for cross-border EPPO investigations and to ensure defendant rights.

The link to the Charter of Fundamental Rights (CFR) in Article 41(1) of the EPPO Regulation arises from the broad understanding of the implementation of EU law within the meaning of Article 51(1) CFR, regardless of the much-discussed meaning of the wording 'in full compliance'.[1] The link to Union measures under Article 41(2) of the EPPO Regulation also ultimately arises from the transposition of the directives into national law or, subsidiarily, their direct application in favour of the defendant. In this regard, however, it remains essentially the case that the rights of suspects and defendants are governed by the (Europeanised) national criminal procedural law of the state of the handling European Delegated Prosecutor (EDP).[2] One major difference remains: the applicability of the CFR. But simply its applicability does not provide a higher standard of protection, not in relation to the European Convention on Human Rights (ECHR) and not in relation to national constitutions (from a German perspective: to the Basic Law). From the perspective of the defendant, their scope of rights does not differ fundamentally from purely national criminal proceedings; the actual possibilities for criminal defence have even worsened.

2 The balance between effective prosecution and safeguarding the interests of the defendant as a general problem of Europeanisation

To get to the bottom of the problem, national criminal procedure codes have traditionally grown for national criminal proceedings. Codes normally do not contain specific legal remedies for cross-border investigative pro-

1 See for instance D Brodowski, 'Article 41' in H-H Herrnfeld, D Brodowski and C Burchard (eds), *European Public Prosecutor's Office: Article-by-Article Commentary* (Nomos 2021) mn 22.

2 Similar A Mosna, 'Europäische Ermittlungsanordnung und Europäische Staatsanwaltschaft – Die Regelung grenzüberschreitender Ermittlungen in der EU' (2019) 131 *Zeitschrift für die gesamte Strafrechtswissenschaft* 808, 843, who largely assumes a confirmation of the status quo.

ceedings.[3] Such are neither developed nor properly known; the manifold challenges and dangers for the rights of the accused can hardly be examined on the drawing board. Rather, there exists a diffusion of responsibility: the European legislator is increasingly creating regulatory regimes that potentially restrict freedom, with recourse to the Area of Freedom, Security and Justice. The implementation of a 'powerful' EPPO with additional instruments for the cross-border collection of evidence will strengthen and facilitate criminal prosecution.[4] Measures to make law enforcement more effective are certainly necessary, and there is no question that the cross-border activities of criminals pose new dangers for the victims of crime and new challenges for investigators whose powers are limited by national borders.[5] Nevertheless, in the sense of procedural equality of arms, this 'more' of prosecution requires an adequate balance of rights of the accused and possibilities of defence (Article 6 ECHR). However, the Union largely leaves the protection of the procedural subject, which is thus necessary, to the national law of the various Member States in its partly Europeanised guise, for it is not, as such, one of the EU's core objectives.

Yet the reference to the rights of the accused based on Union law is not sufficient, because even those particular rights – albeit partially harmonised – are not designed for cross-border preliminary proceedings. They were all created without considering the issues raised by the EPPO[6] and other acts of the Europeanisation of criminal proceedings. For example, the right to a defence lawyer, to which Article 41(2)(c) of the EPPO Regulation explicitly refers, is a central right of the accused, which in principle serves to create a level playing field with the prosecuting authorities. Yet, once again, the corresponding directive focuses on purely national criminal proceedings; explicit provisions for cross-border proceedings are not included. However, this would be necessary to create a true level playing field. The specifics

3 That is already due to the fact that criminal investigation is bound to national competences. However, national codes did develop rules on jurisdiction and on investigating crimes committed outside national territories, see §§ 3 ff. *Strafgesetzbuch* (German Criminal Code – StGB); §§ 153(c) ff. *Strafprozessordnung* (German Code of Criminal Procedure – StPO).

4 Similar L Bachmaier Winter, 'Cross-Border Investigations Under the EPPO Proceedings and the Quest for Balance' in L Bachmaier Winter (ed), *The European Public Prosecutor's Office. The Challenges Ahead* (Springer 2018) 117, 120.

5 L Kuhl, 'The European Public Prosecutor's Office – More Effective, Equivalent, and Independent Criminal Prosecution against Fraud?' (2017) *eucrim* 135, 135–136.

6 Brodowski (n 1) mn 63.

often require a concept of multijurisdictional defence, as cross-border (e.g. EPPO) proceedings require the support of lawyers from several states.[7] The concepts proposed so far – such as that of the Eurodefender ('Eurodefensor')[8] – not only remain unrealistic because criminal defence is freely chosen, provided and follows economic principles, but above all because a state-organised criminal defence would risk being another lawyer for the state instead of for the accused.[9] As things stand at the moment, the increasing Europeanisation – among other things through the implementation of the EPPO – has structurally led to a (necessary) strengthening of criminal prosecution, but the EU did not counter this with any specific rights for defendants.

3 EPPO proceedings as a problem amplifier

Of course, just because the cross-border nature of pre-trial proceedings entails specific problems for the rights of the accused, this does not mean that they need to specifically be addressed by the EPPO Regulation. Other EU measures also lead to a shift in the balance of power and equality of arms. An actual equality of arms in the sense of equal rights and opportunities between the prosecutor and the accused is not possible in view of the structural inequality inherent to criminal proceedings.[10] Rather, the aim must be to provide the accused with rights that best counterbalance the inequality.[11] According to the European Court of Human Rights (ECtHR), the principle 'requires each party to be given a reasonable opportunity

7 E Duesberg, 'Europäische Strafverteidigung – Ausgewogene Kräfteverhältnisse in transnationalen Strafverfahren' (2022) *Neue Juristische Wochenschrift* 596, 599; A Oehmichen, '§ 14 Verteidigung in EUStA-Verfahren' in H-H Herrnfeld and R Esser (eds), *Europäische Staatsanwaltschaft Handbuch* (Nomos 2022) mn 5–6.

8 P Asp, E Bacigalupo Zapater, N Bitzilekis, Á Farkas, D Frände, H Fuchs, R Hefendehl, A von Hirsch, M Kaiafa-Gbandi, V Militello, C Nestler, H Satzger, B Schünemann, E Symeonidou-Kastanidou and A Szwarc, 'Entwurf einer Regelung transnationaler Strafverfahren in der Europäischen Union' in B Schünemann (ed), *Ein Gesamtkonzept für die europäische Strafrechtspflege. A Programme for European Criminal Justice* (Heymanns 2006) 1, 49 ff.

9 Similar Duesberg (n 7) 596.

10 V Costa Ramos, 'The EPPO and the equality of arms between the prosecutor and the defence' (2023) *New Journal of European Criminal Law* 43, 44.

11 Costa Ramos (n 10) 44.

to present his/her case under conditions that do not place him/her at a substantial disadvantage vis-à-vis his opponent [...]'.[12]

The general reference to the comprehensive application of rights of the accused and procedural standards, as contained in Article 41 of the EPPO Regulation, without the implementation of special rights, could therefore only suffice if the inequality to the accused is not increased by proceedings involving the EPPO, but remains at the same level as in cross-border proceedings elsewhere, and if the best counterbalance can be exercised without any relation to the EPPO Regulation. However, this is not the case. Despite all understanding for the need for effective criminal prosecution, especially at European level, it must be noted that involving the EPPO as an investigator in particular contains structural changes that imply such a substantial deterioration of the rights of the accused and lead to such a 'substantial disadvantage' that they must be remedied by the EPPO Regulation from a procedural point of view[13]:

3.1 The significance of Article 31 of the EPPO Regulation

With Article 31 of the EPPO Regulation, the Union legislator has created a regime for cross-border investigative measures that exists alongside the other mutual legal assistance laws.[14] According to Article 8(1) of the EPPO Regulation, the EPPO is established as a single office, with the result that cross-border operability should not depend on mutual recognition or legal assistance regimes.[15] According to Article 31(6) of the EPPO Regulation, a European Investigation Order (EIO)[16] for the execution of measures should only be issued in exceptional cases. While the EU has committed itself to greater transparency in the context of the EIO, for example, by using forms and a clearly regulated procedure, the latter and, as a result, the

12 ECtHR, *Nideröst-Huber v. Switzerland* App no 18990/91 (18 February 1997) para 23.

13 In this spirit, R Esser, 'Transnationalität der Strafverfolgung durch die EuStA als Herausforderung für die Strafverteidigung' in T Niedernhuber (ed), *Die neue Europäische Staatsanwaltschaft. Bedeutung, Herausforderungen und erste Erfahrungen* (Nomos 2023) 89, 93, who describes Art. 41(3) of the EPPO Regulation as an emergency solution.

14 Similar Bachmaier Winter (n 4) 121, who does not see the concept as one of interstate cooperation in the sense of traditional mutual legal assistance.

15 H-H Herrnfeld, 'Article 31' in Herrnfeld, Brodowski and Burchard (eds) (n 1) mn 4.

16 Governed by Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.

defendant's ability to exercise control, suffer from the provisions of Article 31 of the EPPO Regulation. Beyond the provisions of Article 31 of the EPPO Regulation, the decentralised structure of the EPPO even promotes the informal exchange of information, for example, by simply calling a colleague in another Member State.[17] This flow of information is not transparent to the defence and is therefore difficult or even impossible to challenge.[18]

In addition, the EPPO was created on the assumption that the national law enforcement authorities are not fulfilling their obligation to effectively protect the EU's financial interests, which follows, among other things, from the principle of equivalence.[19] This may not be entirely unfounded. However, with Article 31, the EPPO Regulation exceeds the objective in that it provides the EPPO with options that are not available to national law enforcement authorities, whether for the protection of the EU's financial interests or in other cases. In fact, Article 31 of the EPPO Regulation amplifies the disparities to the detriment of the accused.

3.2 The interplay between Article 31 and 41 of the EPPO Regulation

To recap, the interplay between Articles 31 and 41 of the EPPO Regulation is far from clear. It is not clear whether the applicable law within the meaning of Article 41(3) of the EPPO Regulation refers to the law in the state of the handling or the assisting EDP.[20] If one takes the wording of Article 31 of the EPPO Regulation, this seems to be the law of the state of the handling prosecutor.[21] This may be largely true, e.g. the right to a defence lawyer or the right to request evidence can only be reasonably applied according to the law of the country in which the criminal proceedings are conducted.

17 In general S Gless, 'OHN(E)MACHT – Abschied von der Fiktion einer Waffengleichheit gegenüber europäischer Strafverfolgung?' (2013) *Strafverteidiger* 317, 320.

18 This does not mean that every step of the criminal prosecution must be traceable for criminal defence, but the possible violation of bans on the collection or use of evidence must be at all comprehensible and verifiable, and at least ensure a minimum level of transparency. This is not recognisable here.

19 Also emphasising the lack of and need for equivalent prosecutorial action Kuhl (n 5) 136 ff.

20 R Esser, '§ 11 Beschuldigtenrechte' in Herrnfeld and Esser (eds) (n 7) mn 223.

21 To some extent in this direction A Schneider, 'Die Zusammenarbeit der Europäischen Staatsanwaltschaft mit nationalen Ermittlungsbehörden' in T Niedernhuber (ed) (n 13) 39, 42, due to the installed mechanism that investigations in another Member State may be delegated to the EDP of that state. See also Herrnfeld (n 15) mn 4.

Nevertheless, there are also rights of the accused that the executing side of investigative measures has to allocate. To this day, even with 'classic' investigative measures, such as searches and seizures, no comparable convergence of national codes of criminal procedure can be determined.[22]

Take the example of the search ban on residential premises at night: In Germany, such a search is generally not allowed between 9 p.m. and 6 a.m. (§ 104 StPO).[23] If the handling EDP from a state that does not have a comparable limitation in its law instructs the EDP in Germany to conduct a residential search and the latter carries that out at 5 a.m., we have a problem. Is this a breach of rights or not? And in which court can the defendant assert a possible breach? The legality of the execution is governed by the law of the state of the assisting prosecutor, Article 31(2), 32 of the EPPO Regulation. A relevant violation of § 104 StPO therefore exists in principle. If we now combine this with the provision contained in Article 42(1) of the EPPO Regulation, it can be concluded that the order for the respective measure (in this case the search at night) must be challenged before the competent court in the Member State of the handling EDP, while the execution of the measure is subject to the judicial review of the competent court in the Member State of the assisting EDP.[24] This model of separation between law and jurisdiction for the issuing and execution of orders raises significant practical difficulties for the defence due to the associated increase in complexity.[25] To effectively defend their rights, the defence must be knowledgeable in all legal systems involved, overcome language barriers or even consist of an international team.[26] The conduct

22 This has already been criticised by M Böse, 'Die Europäische Ermittlungsanordnung – Beweistransfer nach neuen Regeln?' (2014) *Zeitschrift für Internationale Strafrechtsdogmatik* 152, 158 and still applies.

23 By way of comparison: in Belgium, it is not allowed between 9 p.m. and 5 a.m.; searches between 5 and 6 a.m. may cause unforeseen difficulties.

24 Mosna (n 2) 844; E Wirth, *Die Europäische Staatsanwaltschaft* (Nomos 2022) 333.

25 M Gierok, 'Anmerkung zu EuGH, Urteil vom 21.12.2023 – C-281/22' (2024) *Zeitschrift für Internationales Wirtschaftsrecht* 236, 238; Mosna (n 2) 844.

26 In this spirit Duesberg (n 7) 599; Oehmichen (n 7) mn 5–6. On rightful requests for a catalog of concrete minimum rights, a European mandatory defence system with parallel defence based on the division of labor in several legal systems, cf. Esser (n 13) 124; D Brodowski, '§ 22 Transnationale Strafverteidigung' in E Müller, R Schlothauer and C Knauer (eds), *Münchner Anwaltshandbuch Strafverteidigung* (3rd edn, CH Beck 2022) mn 6 ff.; already A Wehnert, 'Deutsches und Europäisches Strafrecht – Fragen und Widersprüche' in G Widmaier, H Lesch, B Müssig and R Wallau (eds), *Festschrift für Hans Dahs* (Schmidt 2005) 523, 528 ff.; H Ahlbrecht and O Lagodny, 'Einheitliche Strafverfahrensgarantien in Europa? -Eine kritische Bestands-

of criminal investigations by the EPPO therefore increases the existing need for a multijurisdictional defence. Even in the aftermath, it remains unclear how the court conducting the proceedings is to decide on the admissibility of evidence if the relevant violation is governed by different laws and thus cannot be comprehended.

3.3 Withdrawal of the defendant's rights by turning away from mutual recognition

In contrast to the EIO, Article 31 of the EPPO Regulation does not rest on the principle of mutual trust or mutual recognition, which primarily relates to judicial decisions of other Member States. Despite overlaps, it has to be seen as a system sui generis.[27] This follows from the idea of a single office with a decentralised structure, Article 8(1) of the EPPO Regulation.[28] Any order of the handling EDP is an internal directive and, despite the formal integration of delegated public prosecutors, not a judicial decision of the Member State. If mutual recognition is not granted, the reasons for waiving mutual recognition do not apply either.

Article 11 of the EIO Directive, for example, contains grounds for refusing to recognise the order. In other respects, too, the discussion in legal scholarship and case law about the limits of mutual recognition is in full swing.[29] Many of the grounds discussed here relate to the (fundamental)

aufnahme –' (2003) *Strafverteidiger-Forum* 329; F Salditt, 'Doppelte Verteidigung im einheitlichen Raum' (2003) *Strafverteidiger* 136; J Vogel, 'Licht und Schatten im Alternativ-Entwurf Europäische Strafverfolgung' (2004) 116 *Zeitschrift für die gesamte Strafrechtswissenschaft* 400, 415 f. On guidelines for EPPO criminal defence, see R Sicurella, Z Durdevic, K Ligeti and M Costa (eds), *D3.1. Handbook – A practical guide on the EPPO for defence lawyers who deal with cases investigated and prosecuted by the EPPO in their day-to-day practice* (2022).

27 In detail Y Vordermark, 'Grenzüberschreitende Beweisermittlungen der Europäischen Staatsanwaltschaft im Vergleich zur Europäischen Ermittlungsanordnung' (2024) 9 *Anglo-German Law Journal* 98.

28 Mosna (n 2) 832.

29 For instance C Burchard, *Die Konstitutionalisierung der gegenseitigen Anerkennung. Die justizielle Zusammenarbeit in Strafsachen in Europa im Lichte des Unionsverfassungsrechts* (Vittorio Klostermann 2019) 609–713; ECJ, Joined Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăru v Generalstaatsanwaltschaft Bremen*, ECLI:EU:C:2016:198; ECJ, Case C-158/21 Lluís Puig Gordi and Others, ECLI:EU:C:2023:57.

rights of the accused.[30] A move away from the principle of mutual recognition thus also means cutting off the entire discussion relevant to the accused. By contrast, Article 31 of the EPPO Regulation sets forth an enforcement rule without grounds for refusal and attempts to overcome potential hurdles through a cooperation mechanism specifically provided for in Article 31(5) of the EPPO Regulation.[31] While this is certainly meaningful and desirable from the standpoint of the investigating authorities, in this case the involved EDPs, for the defendant it means a (drastic) loss of rights. This is because the EPPO Regulation does not provide for any significant possibility of control in the state of the assisting EDP. However, in some cases, this may be countered by the need for judicial approval in the state of the assisting EDP in accordance with Article 31(3) of the EPPO Regulation.[32] Yet this is only partially helpful, if at all:

In a criminal proceeding conducted in Germany, the German handling EDP instructed the Austrian EDP to carry out several searches and seizures in Austria. Under Austrian law, judicial authorisation hereto is required; consequently, the assisting EDP from Austria had to obtain such authorisation (Article 31(3) EPPO Regulation). The Austrian court, asked to authorise, referred the question to the European Court of Justice (ECJ) as to whether the standard of proof relates to the enforcement of the measure only or also to the order itself. The ECJ relied on the former, excluded aspects of the order and its grounds, and justified this essentially by a loss of effectiveness in the event of a full review by the court in the state of the assisting EDP.[33] This not only significantly limits the scope of control, but also raises the question of how a court is to review the enforcement of a measure in advance of its implementation.[34] A considerable potential for

30 On the interplay between fundamental rights and mutual recognition see for instance M Lenk, 'Das Prinzip der gegenseitigen Anerkennung im Strafrecht' (2024) 136 *Zeitschrift für die gesamte Strafrechtswissenschaft* 348, 364 ff.; J Eisele, 'Grundrechtliche Grenzen des Grundsatzes der gegenseitigen Anerkennung – Eine Betrachtung im Spiegel der Kommentierung des Art. 82 AEUV durch Joachim Vogel' in K Tiedemann, U Sieber, H Satzger, C Burchard and D Brodowski (eds), *Die Verfassung moderner Strafrechtspflege. Erinnerung an Joachim Vogel* (Nomos 2016) 221.

31 Bachmaier Winter (n 4) 122–123.

32 Art. 31(3) EPPO Regulation is less about defence or legal protection of the accused, but rather serves the protection of rights in the assisting Member State, see clearly Herrnfeld (n 15) mn 25.

33 ECJ, Case C-281/22 *G.K. and Others* (*Parquet européen*), ECLI:EU:C:2023:1018, para 68.

34 Gierok (n 25) 238.

providing protection in favour of the suspected person is missing. Rather, the constitutionally required legal protection of the suspected person suffers from the implementation of a separate prosecution regime compared to the EIO Directive, which is based on mutual recognition. This means that the increase of efficiency through Article 31 of the EPPO Regulation poses a threat to the principle of equality of arms.[35]

4 Conclusions: Enabling the exercise of defendant rights

In fact, the status quo can be accurately summarised with *Duesberg* to the effect that the EPPO conducts its investigations with the necessary organisational, institutional and normative resources for effective European prosecution, while the European criminal defence begins organisationally and institutionally almost from scratch and/or is at a standstill.[36] Of course, this does not mean that the EPPO itself as an institution is to be questioned; the inequality of arms to the detriment of the defence in criminal proceedings is not a problem that arises only here or is even unknown. Clearly speaking, the introduction of the EPPO is even to be recognised as a significant milestone.[37] Especially offences that fall under the competence of the EPPO are often committed by professional criminals with well-equipped networks. The image of the small, powerless criminal facing state power does not apply here. The EU is therefore assuming a crucial pioneering role in cross-border law enforcement, which is also unprecedented. At the same time, the EPPO's introduction led to a further shift in an existing imbalance to the detriment of the defence. And the recognisable need for efficient prosecution does not justify its boundlessness and does not release it from its constitutional limits.

4.1 Short-term adjustment options

Instead, the strengthening of the defence through a cross-border self-organisation of lawyers, independent of the EU and the European institutions,

35 Vordermark (n 27) 129 ff.
36 Duesberg (n 7) 600.
37 A Ritter, 'Grußwort von Andrés Ritter zur Eröffnung der Tagungsveranstaltung' in Niedernhuber (ed) (n 13) 11, 12.

remains urgent and necessary and is to be preferred to any state influence.[38] Every state-organised defence is threatened with losses in the fight for defendants' rights, precisely because it is about criminal behaviour that is to be prosecuted and in which fundamental rights must be guaranteed – and individual, state-independent examination is required.

However, the EPPO Regulation – as a problem amplifier – must create the framework conditions for an effective criminal defence. It would therefore be beneficial if further rights of the accused were included within the Regulation. For example, without claiming to be exhaustive, extended possibilities for accessing files, a right to translation of documents, rights to transcript and to interpretation, and an improvement in the position of the defence attorney in proceedings, for example with regard to the right to be present, are to be considered.

4.2 A glimpse into a future of balance

If, however, and for various reasons, neither the rights of the prosecution – not even in a cross-border context – are to be restricted, nor does the the institutional establishment of state criminal defence seems feasible, a middle ground appears on the horizon and should be pursued in the long term. Hence, the structurally disadvantaged defendant must be empowered to comprehend their respective legal position (also and especially) in a cross-border context and to file a motion to challenge investigations and/or proceedings, without immediately undermining the effectiveness of the prosecution (as such) by means of full judicial review. Based on experiences in national criminal proceedings, this means nothing more and nothing less than the introduction of a court-linked – court-based and court structured – investigative institution that is to be involved in all such cases where the rights of the accused are substantially affected, and that is to independently monitor the rights of the accused and ensure their representation.[39] Elsewhere, a call has already been made for the introduction of a European investigating judge or, according to other similar models, possibly a magistrate.[40] Clearly stating, such an instalment does not mean to designate a single person at the ECJ with this task – for instance, in turns one of the

38 Duesberg (n 7) 599.

39 See the contribution by Wörner (in this volume).

40 Wörner (in this volume). Suggested for introduction already by M Böse, 'Ein europäischer Ermittlungsrichter – Perspektiven des präventiven Rechtsschutzes bei Errich-

judges at the court – because the EDPs apply various national laws and the institutional central instalment only again runs the risk of leaving the defendant behind. Instead of a single central office that would have to check the legality of the case according to all national legal systems, rather the structure of EDPs created with the introduction of the EPPO could be used herein as well. The European investigating judge (or magistrate) would then retain their role as a national (investigating) judge (or magistrate) and would only be assigned to the ECJ for EPPO proceedings. The decisive advantage would be that investigating judges (or magistrates) could be called in according to the relevance of the proceedings, order and enforcement of measures could be reviewed uniformly by one court, agreements with national defence lawyers would be considerably facilitated, and (not at least) language barriers would be less of an issue; a system of possibilities, in other words. In any case, the standardised review by an investigating judge (or magistrate), even if conducted under the laws of two – the handling and the assisting – states, would allow a determination of whether the investigative measures to be carried out in the assisting state would meet not only the standards of proof of that state but also those of the handling state conducting the proceedings. Therefore, a European investigating judge should be seen as an opportunity to institutionally unite judges from several involved countries and thus counteract the fragmentation of legal protection. This can help to build up trust, acceptance, legal certainty, support the cocreation of mutual recognition, and, with that, effectiveness. At the same time, however, this is an admittance that, although the uniformity associated with the decisive procedural involvement of the EPPO results in a considerably increased effectiveness of criminal prosecution, it is achieved without any further significance of mutual recognition of national procedural regulations primarily on the back of the legal protection of the accused. From the point of view of the accused and the defence, there is even a need for an increased, but transparent mutual recognition. Comprehensive criminal defence across borders requires at least minimum transparency in order to understand investigation and the collection of evidence to be able to prove whether defendant rights are upheld. Effective criminal defence in several Member States is otherwise rather not possible.

tung einer Europäischen Staatsanwaltschaft' (2012) *Zeitschrift für rechtswissenschaftliche Forschung* 172, 181.

In consequence, this would require more specificity in Article 41 of the EPPO Regulation, possibly including a set of minimum rights, and expanded references to the institution of the investigating judge (or magistrate), to be introduced. What is far more important, however, is – then – that Article 42 of the EPPO Regulation needs to be expanded, namely to the effect that (1) the approval of a European investigating judge (or magistrate) is required for measures that are particularly intensive in terms of fundamental rights and (2) the suspect is granted the right to an ex ante review of the lawfulness of the order for a measure. The EPPO Regulation could therefore become a breeding ground for a European criminal procedure code, which appears to be the ideal solution for the best possible protection of the rights of the accused.[41]

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41 Similarly for a harmonisation: Vordermark (n 27) 134.

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Between national procedural law and Union oversight: Article 42 of the EPPO Regulation and the emerging jurisprudence of national and EU courts

Katalin Ligeti[*]

1 Introduction

After more than 20 years of sustained advocacy for and support by the European Commission for the criminal law protection of the European Union's (EU) financial interests,[1] the European Public Prosecutor's Office (EPPO) began operations on 1 June 2021.[2] The EPPO brings a seminal change to EU criminal justice: instead of working through cooperation across national judicial authorities, the EPPO exercises genuine European powers of investigation and prosecution in the Area of Freedom, Security and Justice (AFSJ) to fight offences affecting the financial interests of the EU.

The lengthy and difficult negotiations leading to the EPPO's establishment resulted, however, in the EPPO being a hybrid instead of a truly supranational agency, as reflected in the complex legal regime that governs the EPPO's investigations and prosecutions. First, the EPPO is in charge only of investigation and prosecution; adjudication is left to national courts.[3] The European prosecution system is therefore not completed by a European criminal court.[4] Second, in the EPPO's structure the central

* I am grateful to Sebastian Trautmann for his valuable insights and constructive comments, which significantly contributed to the development of this article.

1 M Delmas-Marty and J Vervaele (eds), *The Implementation of the Corpus Juris in the Member States, Vol. 1* (Intersentia 2000).

2 Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (EPPO Regulation). The EPPO started its operations with 22 EU Member States participating in the enhanced cooperation. This increased to 24 Member States with the participation of Poland and Sweden. Denmark and Ireland have an opt-out from the AFSJ.

3 Art 86(2) of the Treaty on the Functioning of the European Union (TFEU).

4 See on this point V Mitsilegas and F Giuffrida, 'Judicial Review of EPPO Acts and Decisions' in K Ligeti, MJ Antunes and F Giuffrida (eds), *The European Public Prose-*

level[5] is completed by a decentralised structure of European Delegated Prosecutors (EDPs) operating in the Member States.[6] Whereas the decision to prosecute is taken at the central level, the decentralised level is in charge of investigation. The EDP handling a case leads the investigation on behalf of the EPPO on their own and either undertakes the appropriate investigative measures directly or instructs the national authorities to do so.[7] Third, the EPPO's activities are governed by a hybrid legislative framework comprising a set of European rules which are completed by national law and various European and national soft-law provisions.[8] The EPPO therefore applies both national law and European law during its activities and – as expressed in Article 5(1) of the EPPO Regulation – it ensures respect for the rights enshrined in the Charter of Fundamental Rights of the European Union (the Charter).

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cutor's Office at Launch. Adapting National Systems, Transforming EU Criminal Law (CEDAM 2020) 115, 128–29.

5 The central office is based in Luxembourg, and comprises the European Chief Prosecutor and two Deputies, the College (composed of one European Prosecutor from each participating Member State), 15 Permanent Chambers (PCs), and the Administrative Director.

6 K Ligeti, 'The European Public Prosecutor's Office' in V Mitsilegas, M Bergström and T Quintel (eds), *Research Handbook on EU Criminal Law* (2nd edn, Edward Elgar 2024) 462.

7 While in the initial Commission Proposal to establish the EPPO, the EPPO was invested with autonomous European powers (European Commission, 'Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office' COM (2013) 534 final (Commission Proposal)), according to Article 28(1) EPPO Regulation, the EPPO's activities heavily rely on national law. Article 28(4) of the EPPO Regulation allows the supervising European Prosecutor, in exceptional cases and with the approval of the competent PC, to conduct the investigations under the conditions mentioned in the provision. For a detailed analysis of the Commission Proposal, see K Ligeti, 'The European Public Prosecutor's Office' in V Mitsilegas, M Bergström and T Konstadinides (eds), *Research Handbook on EU Criminal Law* (1st edn, Edward Elgar 2016) 480, 486–500.

8 For a critical analysis of the EPPO's legal framework 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, 6. The EPPO Regulation itself provides for several layers of interaction between EU law and national law in EPPO operations. Article 5(3) of the EPPO Regulation states that national law will apply to the extent that a matter is not regulated by the Regulation, while a number of provisions in the EPPO Regulation refer expressly to the application of national law, in particular regarding EPPO investigations; these include provisions on the conduct of investigations (Article 28(1)), rules on investigative measures (Article 30(2) and (3)), rules on cross-border investigations (Article 31), enforcement (Article 32), and pre-trial arrest (Article 33).

Ensuring judicial oversight of the EPPO's investigative and prosecutorial decisions in this hybrid structure was a point of debate from the outset. Because it was established as a 'body of the Union',[9] one would expect that the EPPO's procedural acts and failures to act would be subject to judicial review before the Court of Justice of the European Union (CJEU) in accordance with EU law.[10] Instead, the rules on judicial review formulated in Article 42(1) of the EPPO Regulation provide for a derogatory system that largely exempts the EPPO's acts from CJEU scrutiny. Save for a limited number of scenarios, Article 42(1) of the EPPO Regulation confers on national courts the competence to exercise judicial review of those EPPO procedural acts that are intended to produce legal effects vis-à-vis third parties and failures to adopt such acts.

In practice, preliminary references in EPPO matters have so far been rare. This limited jurisprudence is not solely due to the EPPO's recent establishment. Rather, practice shows that national courts treat most EPPO acts as grounded in national procedural law and therefore see no necessity to refer questions to the CJEU. Limiting the CJEU's direct role, however, creates space for divergent national practices.

This contribution explores the evolving jurisprudence of national and EU courts. It begins in Section 2 by outlining the relevant rules on judicial review as set out in the EPPO Regulation. Section 3 then analyses the rulings issued by the CJEU related to EPPO procedural acts and the interpretation of Union law relevant for EPPO investigations and prosecutions. Although there is very little EU jurisprudence so far, one can already distill some tendencies in the CJEU's interpretation of EU law concepts relevant to EPPO procedural acts and in how it guides national courts when applying Article 42 of the EPPO Regulation.

Since it is primarily the role of national courts to review the legality of the EPPO's actions during the investigation and prosecution phases, Section 4 focuses on national decisions that are not limited to interpreting national law but also engage with provisions of Union law relevant to the EPPO's functioning. Accordingly, Section 4 studies national decisions concerning the EPPO's procedural acts adopted at the decentralised level (such as access to case files within the EPPO's case-management system and

9 Art 3(1) EPPO Regulation.

10 H-H Herrnfeld, 'Article 42' in H-H Herrnfeld, D Brodowski and C Burchard (eds), *European Public Prosecutor's Office: Article-by-Article Commentary* (Nomos 2021) mn 1–2.

allocation of competence between the EPPO and national authorities), as well as national decisions regarding procedural acts adopted at the central level (such as decisions based on Article 36 of the EPPO Regulation). The selection of cases is based on an analysis by the author with the help of the EPPO Legal Service. The aim of this chapter is to identify whether there is any gap in (effective) judicial protection in the EPPO's activities, and thus compliance with Article 47 of the Charter, and Articles 6 and 13 of the European Convention on Human Rights (ECHR). The contribution concludes with recommendations to enhance legal clarity and strengthen procedural safeguards.

2 Rules on judicial review in the EPPO Regulation

Limiting the CJEU's jurisdiction to review EPPO acts goes back to the initial Commission Proposal to establish the EPPO,[11] which declared in its Article 36 that, in the performance of its functions, the EPPO shall be considered a national authority. By excluding legal redress before EU courts, the Commission Proposal departed from the principle of EU law according to which EU courts control the legality of the actions of EU bodies and national courts exert control over the actions of national authorities.[12] Assimilating the EPPO to a national authority for the purposes of judicial review received criticism from the outset. It was difficult to see how a national court could control the legality of the EPPO's central-level decisions in a coherent fashion.

These concerns notwithstanding, in the adopted text of the EPPO Regulation the participating Member States decided to follow the Commission's initial reasoning and agreed to only minor changes to the CJEU's jurisdiction to hold the EPPO judicially accountable. Article 42(1) of the EPPO Regulation confers on national courts the competence to exercise judicial review of procedural acts by the EPPO which are intended to produce legal effects vis-à-vis third parties and failures to adopt such acts. Pursuant to

11 Commission Proposal (n 7). See on this point K Ligeti and A Weyembergh, 'The European Public Prosecutor's Office: Certain Constitutional Issues' in LH Erkelens, AWH Meij and M Pawlik (eds), *The European Public Prosecutor's Office. An Extended Arm or a Two-Headed Dragon?* (Asser 2015) 53, 68 ff.

12 See ECJ, Case C-314/85 *Foto Frost v Hauptzollamt Lübeck-Ost*, ECLI:EU:C:1987:452; and ECJ, Case C-294/83 *Les Verts v European Parliament*, ECLI:EU:C:1986:166, especially para 23.

Article 42(2) of the EPPO Regulation the CJEU is competent only to give preliminary rulings in accordance with Article 267 TFEU. The preliminary rulings shall concern: (a) the validity of procedural acts of the EPPO, insofar as such a question of validity is raised directly on the basis of Union law;[13] (b) the interpretation or validity of Union law;[14] and (c) the interpretation of Articles 22 and 25 of the EPPO Regulation 'in relation to any conflict of competence between the EPPO and the competent national authorities'.[15] Article 42(2) reflects the reasoning in *Foto-Frost* that 'national courts have no jurisdiction themselves to declare that measures taken by community institutions are invalid'[16]. Adapted to the EPPO's hybrid structure, this means that while national courts are competent to review EPPO procedural acts, they lack the power to declare such acts invalid where the question of validity arises under Union law. In those circumstances, they are required to refer the matter to the CJEU for a preliminary ruling. In other words, Union courts are competent for judicial review on the basis of Union law, whereas review on the basis of national law falls within the exclusive competence of national courts.[17]

Article 42(3) of the EPPO Regulation stipulates that 'the decisions of the EPPO to dismiss a case' can be subject to an action of annulment insofar as 'they are contested directly on the basis of Union law'. In particular, the CJEU will be competent in matters falling under the scope of Article 42(8) of the EPPO Regulation; mainly, it shall review acts related to the protection of personal data, public access to documents, and the dismissal of EDPs.[18]

To justify the derogatory rules on judicial review of the EPPO and the resulting division of competence between national courts (Article 42(1)) and the CJEU (Article 42(2)–(8)), the EPPO Regulation refers to Article 86(3) TFEU. Article 86(3) TFEU allows the EPPO Regulation to determine

13 Art 42(2)(a) EPPO Regulation.
14 Art 42(2)(b) EPPO Regulation.
15 Art 42(2)(c) EPPO Regulation.
16 ECJ, Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost*, ECLI:EU:C:1987:452.
17 M Böse, 'Judicial Control of the European Public Prosecutor's Office' in T Rafaraci and R Belfiore (eds), *EU Criminal Justice. Fundamental Rights, Transnational Proceedings and the European Public Prosecutor's Office* (Springer 2019) 191, 195.
18 Pursuant to Article 42(4)–(6) of the EPPO Regulation, the CJEU will also maintain its jurisdiction for compensation claims (Article 268 TFEU), staff-related matters (Article 270 TFEU), and arbitration clauses in contracts concluded by the EPPO (Article 272 TFEU), although this could also imply national law and rules of procedure that could grant jurisdiction to national courts.

'the rules applicable to the judicial review of procedural measures' taken by the EPPO 'in the performance of its functions'.[19] As expressed in Recitals 86, 87, and 97, the EPPO Regulation justifies the limited EU-level review of the EPPO on five main grounds. The first is the EPPO's hybrid nature, 'the tasks and structure of the EPPO, which is different from that of all other bodies and agencies of the Union [... requiring] special rules regarding judicial review'.[20] The second relates to the strong link between the operations of the EPPO and the legal orders of the Member States: whilst being an EU body, the EPPO is *de facto* integrated in the national legal systems of the participating Member States. The EPPO exercises the functions of the prosecutor in the competent courts of the Member States and it applies both EU law and national law throughout its operations, with the latter, in principle, falling outside CJEU jurisdiction.[21] Recital 87 explicitly mentions the EPPO's strong link to national legal systems. The EPPO's 'acts will be carried out by national law enforcement authorities acting under the instructions of the EPPO'; it is therefore appropriate to subject those procedural acts to judicial review by the competent national court. The third and

19 It is, however, questionable whether the possibility allowed in Article 86(3) TFEU empowers EU lawmakers not only to develop the competence of the CJEU in relation to the judicial control of the EPPO, but to actually create an exemption from the general rule. Leading experts doubt the compatibility of this derogatory regime with primary EU law. *Mitsilegas* argues that the possibility allowed by Article 86(3) TFEU as well as other similar Treaty provisions does not mean that rules of secondary EU law can substantially limit judicial review by the CJEU: see 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, 260.

20 Recital 86 EPPO Regulation.

21 This follows from Article 19 of the Treaty on European Union (TEU). See ECJ, Case C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union*, ECLI:EU:C:2002:462, para 43; and ECJ, Case C-62/14 *Peter Gauweiler and Others v Deutscher Bundestag*, ECLI:EU:C:2015:400, para 28. The Court has, however, jurisdiction in specific cases where the national law refers to the content of a provision of Union law (see, e.g., ECJ, Case C-28/95 *A. Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2*, ECLI:EU:C:1997:369, paras 25 and 27) or where the Court must provide all points of interpretation necessary for the national court to assess the compatibility with fundamental rights of national law implementing Union law (see Article 51 of the Charter as interpreted by the CJEU in ECJ, Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*, ECLI:EU:C:2013:105, para 19). See also the interpretation by the Court of 'implementing Union law' in ECJ, Case C-198/13 *Víctor Manuel Julian Hernández and Others v Reino de España (Subdelegación del Gebierno de España en Alicante) and Others*, ECLI:EU:C:2014:2055.

the fourth grounds are much more practical and relate to reasons such as national courts' easier access to case files and a desire not to overburden the CJEU.[22] The fifth and last reason is the need to maintain consistency. Since national courts are competent for providing *ex-ante* judicial authorisation for EPPO investigative measures, it is coherent also to entrust national courts with the *ex-post* judicial review of those investigative measures.[23]

The derogatory regime stipulated in Art. 42 of the EPPO Regulation has been confirmed recently by the General Court in *Stan* and *Brancusi*, where the General Court stated that Article 42 of the EPPO Regulation prevails over Article 263 TFEU – action for annulment against procedural acts of Union institutions – and that national courts are exclusively responsible for reviewing EPPO procedural acts.[24] Furthermore, in Case T-509/24, the President of the General Court reaffirmed the *sui generis* nature of the mechanism laid down in Article 42 of the EPPO Regulation, which confers on national courts the exclusive jurisdiction to rule on actions against the EPPO's decisions producing legal effects vis-à-vis third parties.[25]

Conferring judicial review on national judges risks, however, creating disparities in the scope of legal protection across Member States. This is not necessarily problematic in itself, but rather reflects the hybrid structure of the EPPO's regime, where differing standards for evaluating EPPO procedural acts stem from diverging requirements under the applicable national law. For instance, the procedural requirements governing telecommunications surveillance measures differ significantly among Member States; the same evidence may be admissible in proceedings in one jurisdiction but inadmissible in another. The European legislature has deliberately refrained from harmonising the procedural law applicable to the EPPO and thus from establishing a uniform EU-wide criminal procedure for EPPO investigations. However, insofar as questions of EU law arise – such as the scope of the EPPO's material competence, the rules applicable to cross-border investigations, etc. – the ECJ's jurisdiction based on Article 42(2) of the

22 Herrnfeld (n 10) mn 9.

23 Herrnfeld (n 10) mn 9.

24 ECJ, Case T-103/23 *Victor-Constantin Stan v European Public Prosecutor's Office*, ECLI:EU:T:2023:871; ECJ, Case T-385/23 *Constantin Mincu Pătraşcu Brâncuşi v European Public Prosecutor's Office*, ECLI:EU:T:2024:143. The compatibility of this view with the requirements of primary law is highly controversial, see M Böse and S Lobinger, 'Gerichtlicher Rechtsschutz gegen die Europäische Staatsanwaltschaft' (2025) *Zeitschrift für Internationale Strafrechtswissenschaft* 54, 55.

25 Order of the President of the General Court, in Case T-509/24 R *Research Investments and Others v European Public Prosecutor's Office*, ECLI:EU:T:2025:601.

EPPO Regulation shall prevail. This appears as a simple division of competences between national and European courts pursuant to Article 42 of the EPPO Regulation. In reality, however, the boundaries are far less clear, as the line between national and EU law often blurs. Differences in legal protection could in practice lead to a violation of Article 47 of the Charter that requires a degree of equivalent legal protection across the Member States, including comparable standards of legality for the judicial review of EPPO procedural acts. Therefore, the extent to which disparities in the scope of legal protection across Member States lead to divergent – and potentially contradictory – practices regarding the standards for assessing the legality of EPPO procedural acts is examined in Section 4, where we analyse national decisions concerning EPPO procedural acts.

3 Judicial review in the EPPO's criminal proceedings: preliminary references to the ECJ

The European Court of Justice (ECJ) has so far issued two preliminary rulings: one concerning the scope of judicial review in cross-border investigations (Articles 31–32 EPPO Regulation)[26] and another concerning the scope and form of judicial review of domestic procedural acts (Article 42 EPPO Regulation).[27] Belgium has also very recently referred a third preliminary question to the ECJ, relating to the exercise of the EPPO's competence (Articles 24, 25, 27, 35, and 120 EPPO Regulation).[28]

3.1 G.K. and Others

The first reference for a preliminary ruling concerned the extent of judicial review in the context of the EPPO's cross-border investigations. Since Article 31 of the EPPO Regulation does not explicitly regulate situations in which judicial authorisation is required both in the state of the handling and of the assisting EDPs, it was anticipated from the outset that national courts would reach out to the ECJ to resolve this ambiguity. The questions referred to the ECJ aimed to shed light on two crucial aspects of the legal framework related to cross-border EPPO investigations: first, they address

26 ECJ, Case C-281/22 *G.K. and Others (Parquet européen)*, ECLI:EU:C:2023:1018.
27 ECJ, Case C-292/23 *EPPO v I.R.O. and F.J.L.R.*, ECLI:EU:C:2025:255.
28 ECJ, Case C-407/25 *Tersten*.

the forum before which the suspect or another person negatively affected by an investigative measure of the EPPO may challenge the substantive reasons for adopting the measure; second, they concern the scope of judicial scrutiny to be performed by the national court.

According to Article 31 of the EPPO Regulation, where no judicial authorisation is required under the law of either Member State, the handling EDP decides on the adoption of the measure in accordance with national law and 'assigns' it to the assisting EDP, located in the Member State where the measure must be executed. The assisting EDP is then expected to enforce the measure, which is no longer subject to recognition procedures or grounds of refusal.[29] If judicial authorisation is required, Article 31(3) provides the following: if judicial authorisation is required only under the law of the handling EDP, the judicial authorisation is to be obtained by the handling EDP before assigning the measure (Article 31(3)(3)). In the opposite case, if authorisation is required by the law of the assisting EDP, the handling EDP may still adopt the measure according to their national law and assign it to the assisting EDP; the latter, however, must obtain the necessary judicial authorisation before executing the measure in accordance with their national law (Article 31(3)(1)).

The EPPO Regulation is, however, silent where judicial authorisation is required under the laws of both EDPs' Member States.[30] Recital 72 merely states that a single authorisation should apply. Against this background, the ECJ was asked to clarify the extent of judicial review in Case C-281/22 *G.K. and Others (Parquet européen)*.[31] The case concerned a large-scale tax-fraud investigation initiated by a German handling EDP who assigned search and seizure measures in Austria to an Austrian assisting EDP. Since Austrian

29 Under Article 31(5) of the EPPO Regulation, it is possible for the assisting EDP to raise 'reasons to consult' solely with the handling EDP. If a solution is not found within a period of seven days 'the matter will be referred to the competent Permanent Chamber' who will decide 'in accordance with applicable national law' and the EPPO Regulation.

30 College Decision 006/2022, *Adopting guidelines of the College of the EPPO on the application of Article 31 of Regulation (EU) 2017/1939* (26 January 2022) para. 8 notes that 'Article 31(3) does not expressely address situations where both the law of the Member State of the handling EDP and the law of the Member State of the assisting EDP require judicial authorization'.

31 ECJ, Case C-281/22 *G.K. and Others (Parquet européen)*, ECLI:EU:C:2023:1018. For an analysis of the *G.K. and Others* ruling, see K Ligeti, 'Remarks on the CJEU's Preliminary Ruling in C-281/22 G.K. and Others (Parquet européen)' (2024) *eucrim* 69.

law required prior judicial authorisation, the assisting EDP obtained authorisation from the competent Austrian courts.[32] The suspects challenged this authorisation, contesting, among other objections, both the necessity and proportionality of the measures. Due to the ambiguity of Article 31 of the EPPO Regulation, the Higher Regional Court of Vienna decided to stay its proceedings and ask the ECJ about the extent of the judicial review to be carried out by the court of the assisting EDP.[33]

The ECJ held that neither Article 31 nor Article 32 specify the scope of such a review. A purely textual interpretation was therefore insufficient; instead, a contextual approach was required. The Court recalled that the cooperation established by the EPPO Regulation is 'something more but not something different' than the cooperation based on the principle of mutual recognition and mutual trust. Compared with the system laid down in the Framework Decision on the European Arrest Warrant[34] and the European Investigation Order (EIO) Directive,[35] the Court observed that, in the context of judicial cooperation in criminal matters between Member States, the executing authority is generally prevented from reviewing compliance with the substantive conditions necessary for the issuing of a cross-border measure.[36] The ECJ argued that allowing the competent authority of the assisting EDP to review not only the mode of execution of a measure but also the elements related to its justification and adoption would undermine the objective of the EPPO Regulation. The ECJ concluded that, for the cross-border investigation framework, the EPPO Regulation establishes

> 'a distinction between responsibilities relating to the justification and adoption of an assigned measure, which fall within the remit of the handling European Delegated Prosecutor, and those relating to the en-

32 ECJ, Case C-281/22 *G.K. and Others (Parquet européen)*, ECLI:EU:C:2023:1018, paras 28–29.

33 ECJ, Case C-281/22 *G.K. and Others (Parquet européen)*, ECLI:EU:C:2023:1018, para 36, questions (1) and (3).

34 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

35 Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.

36 ECJ, Case C-281/22 *G.K. and Others (Parquet européen)*, ECLI:EU:C:2023:1018, paras 58–64.

> forcement of that measure, which fall within the remit of the assisting European Delegated Prosecutor'.[37]

According to this division of tasks, 'any review of the judicial authorisation required under the law of the Member State of the assisting European Delegated Prosecutor may relate only to elements connected with that enforcement'.[38] However, it added an important qualification: when the assigned investigative measure seriously interferes with the right to private life and the right to property, as guaranteed by Articles 7 and 17 of the Charter, respectively, it is up to the Member State of the handling EDP 'to provide, in national law, for adequate and sufficient safeguards, such as a prior judicial review, in order to ensure the legality and necessity of such measures'.[39]

Therefore, the Court felt that *ex-post* judicial review of the legality and the necessity of investigative measures seriously interfering with fundamental rights provided for in Article 42(1) of the EPPO Regulation would give insufficient protection. In such cases, *ex-ante* scrutiny must be ensured by the national court of the handling EDP in allowing the substantive reasons for adopting the measure to be challenged. In requiring *ex-ante* judicial control of the EPPO's investigative measure, the Court applied and further specified its existing case law developed in the context of execution of the EIO, and, particularly, the requirement set out in *Gavanozov II*, according to which the right to judicial remedy

> 'necessarily means that the persons concerned by such investigative measures must have appropriate legal remedies enabling them, first, to contest the need for, and lawfulness of, those measures and, second, to request appropriate redress if those measures have been unlawfully ordered or carried out'.[40]

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37 ECJ, Case C-281/22 *G.K. and Others (Parquet européen)*, ECLI:EU:C:2023:1018, para 71.

38 ECJ, Case C-281/22 *G.K. and Others (Parquet européen)*, ECLI:EU:C:2023:1018, para 71. See also A Mosna, 'Effective judicial protection as a central issue in EPPO cross-border investigations: The ECJ's first ruling in G. K. and Others' (2024) 61 *Common Market Law Review* 1345; R Zerbst, 'Judicial Authorisation of Cross-border Investigation Measures Conducted by the European Public Prosecutor's Office: A Comment on the Grand Chamber of the Court of Justice of the European Union's Judgment in the Case C-281/22' (2024) 14 *European Criminal Law Review* 94.

39 ECJ, Case C-281/22 *G.K. and Others (Parquet européen)*, ECLI:EU:C:2023:1018, para 75.

40 ECJ, Case C-852/19 *Ivan Gavanozov II*, ECLI:EU:C:2021:902, para 33.

However, 'it is for the Member States to provide in their national legal orders the legal remedies necessary for those purposes'.[41] The right to an effective remedy for intrusive investigative measures in cross-border investigations now has to be provided for *ex-ante* in the Member State of the handling EDP. National law must provide for the details of such an *ex-ante* review of assigned investigative measures.

It is uncontested that the EPPO Regulation aims to enhance the effectiveness of fighting crimes affecting the EU budget. In this context, the EPPO Regulation cannot be interpreted in a way that would render EPPO cross-border investigations more burdensome than cooperation between national prosecutors using the EIO. Allowing the court of the assisting EDP to carry out a full judicial review would require that court to have access to the entire case file, which in turn would need to be sent and translated by the handling EDP. This would not only be more time-consuming and costly than using an EIO but would also present considerable logistical challenges for the handling EDP. Such an approach would undermine the objectives of the EPPO Regulation. What remains striking, however, is that the text of the EPPO Regulation does not unequivocally support the Court's interpretation on the division of tasks. The Court has therefore been criticised for possibly going beyond the scope of mere judicial interpretation.[42] Should the European legislature adopt this interpretation in the course of a future revision of the Regulation, such criticism would naturally lose much of its significance.

Furthermore, it may be argued that the ECJ's interpretation weakens the position of the person affected by the measures in question. First, the division of labour between Member States may disadvantage the position of such persons in the Member State of the assisting EDP, as they have to defend themselves in a foreign legal system (i.e., the Member State of the handling EDP), often unfamiliar both in terms of procedure and, in most cases, language. More importantly, this division of powers coupled with the idea of a single judicial authorisation stipulated in Recital 72 of the EPPO Regulation would culminate in a somewhat 'awkward compromise'.[43] It

41 ECJ, Case C-852/19 *Ivan Gavanozov II*, ECLI:EU:C:2021:902, para 33.

42 H-H Herrnfeld, 'Yes Indeed, Efficiency Prevails. A Commentary on the Remarkable Judgement of the European Court of Justice in Case C-281/22 G.K. and Others (Parquet européen)' (2023) *eucrim* 370.

43 J Öberg, 'Judicial Cooperation between European Prosecutors and the Incomplete Federalisation of EU Criminal Procedure – CJEU ruling in G. K. e.a. (Parquet européen)' (2024) (189) *EU Law Live: Weekend Edition* 1, 2.

would namely mean that, if judicial authorisation is required only in the Member State of the assisting EDP, prior judicial review in respect of the substantive reasons for the measure would not be available to the suspects or other persons negatively affected by the EPPO's investigative measure, since this would only be possible before the court in the Member State of the handling EDP.[44] This leads to a legal gap in judicial protection contrary to Article 42(1) of the EPPO Regulation and Article 47 of the Charter that protect the accused person's right to an effective remedy. In particular, Article 42(1) of the EPPO Regulation states that EPPO procedural acts intended to produce legal effects vis-à-vis third parties shall be subject to judicial review.[45]

The final part of the ECJ's reasoning in *G.K. and Others* may to some extent attenuate this gap. In cases involving searches and seizures or the hearing of a witness via videoconference, the Court requires Member States to provide for *ex-ante* judicial review in respect of the substantive reasons of the assigned measure. Therefore, one might argue that the gap would not arise – in theory, at least – in cases involving searches and seizures or the hearing of a witness via videoconference, since compliance with the Court's ruling obliges Member States to ensure such a review. However, this raises further questions. It remains unclear which measures fall within the scope of this case law. In other words, what level of intrusiveness triggers the requirements of prior judicial control? And what if Member States fail to comply with the ECJ's requirements? Could the assisting EDP refuse to execute the measure in such cases? In *Gavanozov II*, the ECJ held that the availability of effective legal remedies in the issuing Member State is a pre-condition for the principle of mutual recognition to operate,[46] such that the

44 However, this gap could be mitigated if the national law of the Member State of the handling EDP provides the suspects or other persons negatively affected by the EPPO's investigative measure with other legal remedies (e.g. *ex-post* judicial review) that allow for scrutiny of the substantive grounds of the measure.

45 K Ligeti, 'Judicial Review of Acts of the European Public Prosecutor's Office: The Limits of Effective Judicial Protection of European Prosecution' in K Lenaerts, E Regan, U Neergaard and KE Sørensen (eds), *Shaping a Genuine Area of Freedom, Security and Justice* (Bloomsbury 2024) 61.

46 A Weyembergh, 'About the Gavanozov II and HP judgments of the CJEU on the European Investigation Order Directive: strengthening the judicial protection in the issuing Member State' in Eurojust, *20 years of Eurojust: EU judicial cooperation in the making. A collection of anniversary essays* (Eurojust 2022) at https://www.eurojust.europa.eu/sites/default/files/assets/eurojust-20-years-anniversary-essays.pdf 95, 98; AH Weiss, 'Effective Protection of Rights as a Precondition to Mutual Recognition: Some

absence of such remedies precludes the competent authority of that state from issuing an EIO.[47] Transposed to the EPPO context, this reasoning could fill the identified gap: the availability of *ex-ante* judicial review in the Member State of the handling EDP could be considered a precondition for the use of the mechanism under Article 31 of the EPPO Regulation. Absent such review, the handling EDP would be precluded from relying on this procedure. Yet whether this case law can be extended to EPPO cross-border investigations remains debatable. The *Gavanozov II* line of reasoning rests on the premise that mutual recognition must be excluded where the right to an effective remedy is infringed.[48] By contrast, as Advocate General *Ćapeta* has observed, Article 31 of the EPPO Regulation constitutes an enhanced form of mutual recognition of judicial decisions. The Regulation itself does not provide for refusal grounds to be examined by the assisting EDP, but leaves this to internal supervision by the competent Permanent Chamber (PC). Consequently, an assignment based on Article 31 cannot be refused even where there are strong grounds to believe that its execution would conflict with the Member State's obligations under Article 6 TEU and the Charter (see, by contrast, Article 11(1)(f) EIO Directive). Finally, the gap nonetheless remains with respect to other measures that are not considered sufficiently intrusive to fall within the ECJ's case law in *G.K. and Others*.

It remains to be seen how this framework will operate in practice. National courts have begun to address the issue, largely following the ECJ's reasoning in *G.K. and Others*. For instance, the Court of Rotterdam[49] was called upon to rule on an appeal against the freezing of assets in the context of enforcing a measure under Article 31 of the EPPO Regulation. The Court dismissed the appeal on the grounds that it had jurisdiction to review only the manner in which the measure was enforced, not its justification. Similarly, in proceedings before the Court of Amsterdam,[50] the court had to rule on appeals against freezing orders under Regulation (EU) 2018/1805,[51]

Thoughts on the CJEU's Gavanozov II Decision' (2022) 13 *New Journal of European Criminal Law* 180.

47 ECJ, Case C-852/19 *Ivan Gavanozov II*, ECLI:EU:C:2021:902, para 62.

48 ECJ, Case C-852/19 *Ivan Gavanozov II*, ECLI:EU:C:2021:902, para 56.

49 Rechtbank Rotterdam of 23 January 2024, Parketno 23–000586, ECLI:NL:RBROT:2024:533.

50 Rechtbank Amsterdam of 14 September 2023, Parketno 23/014471, ECLI:NL:RBAMS:2023:5807.

51 Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders.

which froze the bank accounts of a company that had not been involved in the offences. The court examined the requirements for recognising the freezing order, but without addressing the question of whether the order should have been issued. In the same vein, recently the Higher Court in Munich held that the requirements for issuing a freezing order – specifically its legality and whether it is permitted under the applicable law – may be reviewed only by the courts of the Member State of the handling EDP.[52] The decision went even further. The court observed that the ECJ did not define the concept of 'enforcement' in its ruling. However, according to the Munich court, issues such as the amount to be frozen, whether the freezing measure should depend on a suspicion of unlawfully obtained financial advantage, or the proportionality of the amount, relate to the justification of the freezing order rather than to its enforcement. Consequently, these matters fall outside the competence of the court of the Member State of the assisting EDP.

Moreover, the Higher Court of Munich went on to address the ECJ's requirement of 'prior judicial review of the justification and adoption of the measure in cases of serious interference with the rights of the person concerned'. In the case at hand, the handling EDP in the Netherlands had obtained judicial authorisation to conduct a financial investigation as a whole (which under the Dutch Code of Criminal Procedure also include the freezing and confiscation of proceeds) aimed at determining the proceeds of crime unlawfully obtained by the suspect, with a view to confiscating them – rather than for the specific freezing order to be executed in Germany. The Munich court considered that the ECJ did not require an explicit judicial review of each individual measure; rather, such a general judicial authorisation was deemed sufficient. Finally, it is noteworthy that the court of the Member State of the assisting EDP examined whether prior judicial review of the substantive grounds of the freezing order had been conducted. Returning to the questions raised above and to the uncertainty regarding the scope of this requirement, the Munich court's reasoning seems to suggest that it regarded prior judicial review as a mandatory condition for the use of the mechanism of Article 31. However, since the Dutch EDP had, in fact, obtained judicial authorisation, the case did not provide an opportunity to see how a court in the Member State of the assisting EDP would have proceeded had such prior review been absent, nor whether it would have declined to execute the measure in that scenario.

52 OLG München of 29 April 2025, 2 Ws 224/25.

The Munich court also considered the freezing order to be a measure that seriously interferes with the fundamental rights of the person concerned, and therefore one that falls within the scope of the ECJ's case law.

There are, however, decisions in which the national court of the assisting EDP does not limit its review to the confines set by *G.K. and Others*. For instance, in the context of an EPPO investigation, the Dutch assisting EDP, acting upon a request from the handling EDP, seized several assets belonging to a third party. In this context, the court of first instance, Rechtsbank Rotterdam,[53] held that it was entitled to examine whether the third party possessed legal rights over the assets in question. Similarly, in its decision of 9 October 2024,[54] the Court of Appeal of Lisbon overturned a decision of the competent court of first instance, which had rejected the assisting EDP's request to issue a court order for the execution of search and seizure measures. The Court of Appeal of Lisbon argued that the application did not meet the requirements of national law and, in particular, had not sufficiently described the circumstances of the offence; the court emphasised the cross-border nature of the order and the fact that it was based on a judicial decision from the Member State of the handling EDP. By basing its decision on the fact that the statement of facts was insufficient, the Court of Appeal of Lisbon did not follow ECJ jurisprudence and went beyond examining only the manner of enforcement.

3.2 EPPO v I.R.O. and F.J.L.R.

Article 42(1) of the EPPO Regulation leaves it to national law to define the nature and the modalities of judicial review (time limits, relevant procedures). Accordingly, national rules determine, for example, whether courts may declare only that an EPPO act violated domestic standards, or whether they may also remedy the violation, such as by granting access to the case file. National law also decides whether review is limited to legality or extends to the expediency of investigative measures taken by the EDP.

The EPPO Regulation thus gives a very broad margin to national courts in ensuring adequate judicial control over the activities of the decentralised level of the EPPO. Based on Recital 88(1) of the EPPO Regulation, Member States are responsible for ensuring effective remedies against the EPPO's

53 Rechtsbank Rotterdam of 20 November 2024, raadkamerno 24/017352.
54 Tribunal da Relação de Lisboa of 09 October 2024, Referência 22175859.

procedural acts. The exact scope of this obligation is, however, not further defined and leaves open whether it extends to requiring Member States to ensure judicial review of the activities of the EPPO if such review is not given under the relevant provisions of national law. It follows from established ECJ case law that judicial review must always be provided for if persons' fundamental rights are impacted.[55] If, however, the EPPO's decision does not directly impact the suspect's or other persons' fundamental rights and national law does not provide for the possibility of seeking review against such decisions, national differences will persist.[56] For instance, an EPPO decision to appoint an expert or to reimburse witness costs are decisions that are not intended to produce legal effects vis-à-vis third persons and if seeking judicial remedy against such acts is not possible under national law, EU law currently does not create an obligation to allow remedy to be sought. The only aspect where harmonisation of divergent national rules on judicial review seems possible under the current provision of Article 42(1) relates to the definition of the EPPO's 'procedural acts' subject to judicial review. Article 42(1) of the EPPO Regulation does not specify what is meant by 'procedural acts'.[57]

Given this lack of clarity related to Article 42(1), it was anticipated that national courts would seek guidance from the ECJ on the obligation concerning the judicial review of EPPO acts deriving from the EPPO Regulation. Indeed, the ruling in Case C-292/23 *EPPO v I.R.O. and F.J.L.R.* addressed questions regarding the scope and form of judicial review of domestic procedural acts, and particularly whether Article 42(1) requires

55 ECJ, Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, ECLI:EU:C:2008:461, paras 282 ff.

56 *Herrnfeld* argues that the EPPO's decision to initiate an investigation (Article 26 EPPO Regulation) or to exercise its right of evocation (Article 27 EPPO Regulation) would not qualify as procedural acts against which EU law would require Member States to provide for possibilities to seek judicial review: Herrnfeld (n 10) mn 35.

57 The competence for the judicial review of the administrative decisions of the EPPO lies with the ECJ (Article 42(8) EPPO Regulation). Based on established CJEU case law one might expect that this term should receive uniform interpretation as an autonomous concept of EU law. See ECJ, Case C-108/16 PPU *Openbaar Ministerie v Paweł Dworzecki*, ECLI:EU:C:2016:346, para 28; ECJ, Case C-494/14 *European Union v Axa Belgium SA*, ECLI:EU:C:2015:692, para 21; ECJ, Case C-66/08 *Szymon Kozłowski*, ECLI:EU:C:2008:437, para 42. On the role of the ECJ in developing autonomous concepts see V Mitsilegas, 'Autonomous concepts, diversity management and mutual trust in Europe's area of criminal justice' (2020) 57 *Common Market Law Review* 45.

Member States to ensure judicial review of an EDP decision to summon witnesses where national law does not provide such a remedy.[58] The case arose from an EPPO investigation conducted by Spanish EDPs into subsidy fraud and forgery. The handling EDP summoned two witnesses, and the suspects' lawyers challenged the decision before *Juzgado Central de Instrucción no 6 de Madrid*, arguing that this measure was unnecessary and infringed procedural rights. Spanish law (Organic Law 9/2021) precludes judicial review of witness summonses issued by the EPPO, though such review is possible when witness summonses are issued by an investigating judge. The Spanish court referred the matter to the ECJ, asking whether the lack of judicial review is compatible with Article 42(1) of the EPPO Regulation.

The ECJ addressed two issues: first, whether an EPPO summons falls within the notion of 'procedural acts intended to have legal effects vis-à-vis third parties'; second, whether judicial review must take the form of a direct appeal. The Court held that 'procedural acts intended to produce legal effects vis-à-vis third parties' is an autonomous concept of EU law, equivalent to 'challengeable acts' under Article 263 TFEU.[59] Based on its settled case law, the ECJ held that procedural acts within the scope of Article 42(1) should include any

> 'acts of a procedural nature intended to produce binding legal effects capable of affecting the interests of third parties by bringing about a distinct change in their legal position, including those adopted in the course of a criminal investigation procedure'.[60]

In determining whether an act produces binding legal effects, the following criteria must be considered: the substance and content of the act, the context in which it was adopted, the powers of the issuing body, the third-party status of the person challenging the act, and – more importantly – *the impact of the act on the procedural rights of persons under investigation.*[61] The Court refrained, however, from deciding whether a witness summons meets these criteria, leaving the assessment to national courts.[62]

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58 ECJ, Case C-292/23 *I.R.O. and F.J.L.R.*, ECLI:EU:C:2025:255.

59 Article 263 TFEU regulates the action for annulment against any provision or act adopted by the EU institutions, bodies, offices, and agencies.

60 ECJ, Case C-292/23 *I.R.O. and F.J.L.R.*, ECLI:EU:C:2025:255, para 63.

61 ECJ, Case C-292/23 *I.R.O. and F.J.L.R.*, ECLI:EU:C:2025:255, paras 67 and 69.

62 Article 41(3) of the EPPO Regulation states that: 'Without prejudice to the rights referred to in this Chapter, suspects and accused persons as well as other persons

The ECJ therefore did not provide a definitive answer; instead it offered significant guidance for national courts to evaluate whether an act falls under the scope of Article 42(1), emphasising the need to consider *the impact of the act on the procedural rights of the person challenging it* (in the present case, the person under investigation). This consideration reminds us of the case law of the ECJ on the right to an effective legal remedy in the context of cross-border investigations, wherein the ECJ considers whether the act in question is liable to infringe rights and freedoms guaranteed by EU law as a basis for establishing whether the person concerned is entitled to a legal remedy. For example, in cases *État luxembourgeois*[63] and *Berlioz Investment Fund*[64] (both cited by the Court in this ruling), the ECJ held that requests for information exchange in tax cooperation could interfere with fundamental rights,[65] thereby necessitating the availability of effective remedies. Similarly, in *Gavanozov II*,[66] the Court found that an EIO for searches, seizures, or testimony via videoconference could affect fundamental rights,[67] requiring Member States to ensure remedies against the issuing of such an order. Finally, in *G.K. and Others*,[68] the Court clarified that in the context of cross-border EPPO investigations, intrusive investigative measures (such as house searches, conservatory measures relating to personal property, asset-freezing) must be subject to *ex-ante* judicial review in the Member State of the handling EDP.

Nevertheless, in the present case, the Court refrained from undertaking a concrete evaluation of whether a witness summons interferes with suspects' rights. The Court justified its restrained approach on the ground that this evaluation depends heavily on national procedural rules and the

involved in the proceedings of the EPPO shall have all the procedural rights available to them under the applicable national law'.

63 ECJ, Joined Cases C-245/19 and C-246/19 *État luxembourgeois v B and Others*, ECLI:EU:C:2020:795.

64 ECJ, Case C-682/15 *Berlioz Investment Fund SA v Directeur de l'administration des contributions directes*, ECLI:EU:C:2017:373.

65 Such as the right to respect for private life guaranteed by Article 7 of the Charter and the right to the protection of personal data guaranteed by Article 8(1) of the Charter.

66 ECJ, Case C-852/19 *Ivan Gavanozov II*, ECLI:EU:C:2021:902, para 32.

67 Regarding searches and seizures, the pertinent right at stake is the right to respect for private and family life, home, and communications, as guaranteed by Article 7 of the Charter. Concerning the hearing of a witness via videoconferencing, this might interfere with the general EU principle on the protection against arbitrary or disproportionate interference by public authorities in the realm of private activities, because the order may compel witnesses to appear and testify under threat of penalty.

68 ECJ, Case C-281/22 *G.K. and Others (Parquet européen)*, ECLI:EU:C:2023:1018.

specific investigative context given that the procedural rights of persons under investigation are stipulated not only by EU law, and particularly Article 41(1) of the EPPO Regulation, but also by domestic law. One could, however, counterargue that the same rationale could equally apply to investigative measures taken within the framework of the EIO or the *sui generis* mechanism for cross-border investigations under Article 31 of the EPPO Regulation.

While it is true that the previous mechanisms have approximated the rules of cooperation[69] between the issuing and the executing Member State (in the case of the EIO), and between the Member State of the handling EDP and that of the assisting EDP (in the context of the EPPO), neither the EIO Directive nor Article 31 of the EPPO Regulation has fully harmonised the procedural requirements, modalities, or applicable safeguards for cross-border investigations. Therefore, as in the present case, the procedural safeguards governing investigative measures remain subject to both EU and national legal frameworks. This did not, however, prevent the ECJ from explicitly recognising that the measures at hand (searches and seizures and hearing of witnesses via videoconference) interfere with fundamental rights guaranteed under EU law, thereby requiring Member States either to provide legal remedies against the issuing of such an EIO (*Gavanozov II*) or to provide for *ex-ante* judicial review in cases involving intrusive investigative measures in EPPO cross-border investigations (*G.K. and Others*).

The stronger procedural autonomy in *I.R.O. and F.J.L.R.* in comparison to the above-cited rulings might be linked to the different contexts of these cases. Whereas the earlier cases involved judicial review mechanisms within the framework of administrative cooperation in taxation and judicial cooperation in criminal matters respectively, *I.R.O. and F.J.L.R.* addresses the judicial review of a purely domestic measure – a witness summons – issued within the scope of an investigation conducted by the EPPO, governed primarily by national procedural law.[70] Indeed, the ECJ highlighted in its ruling that the EU legislature intended to limit the extent to which judicial review of EPPO procedural acts was harmonised to what is strictly necessary to ensure a uniform level of effective judicial protection which

69 P Asp, *The Procedural Criminal Law Cooperation of the EU* (Stiftelsen Skrifter utgivna av Juridiska fakulteten vid Stockholms universitet 2016) 22.

70 According to Article 30(5) of the EPPO Regulation, '[t]he procedures and the modalities for taking the measures shall be governed by the applicable national law'.

complies with EU primary law.[71] Therefore, the conclusion in *I.R.O. and F.J.L.R.* could be seen as the Court's effort to strike a balance between the uniform interpretation of autonomous concepts and the preservation of Member States' procedural autonomy. The second notable difference concerns the nature of the measure itself, i.e., the decision to summon witnesses, challenged by those under investigation. Unlike searches, seizures, or videoconference witness hearings, which unequivocally interfere with fundamental rights under EU law and are generally recognised as coercive measures necessitating *ex-ante* judicial authorisation in many Member States, a witness summons does not clearly infringe upon the procedural rights of the suspect. Therefore, evaluating the exact implications of such a summons on the suspects' procedural rights and on the fairness of the process[72] necessitates a comprehensive understanding of national procedural frameworks, thereby posing greater interpretative challenges for the ECJ. It is, therefore, reasonable to question whether the outcome of the ruling might have differed had it concerned a different procedural measure.

Although the Court did not decide whether a witness summons falls within Article 42(1), it clarified the consequences if national courts were to find that it does. In that case, that decision *must* be subject to judicial review under national law; however, the *form* of such judicial review is left to national systems, subject to two limits: remedies must ensure effective protection under Article 19(1) of the TEU and must not be less favourable than those available in comparable domestic cases (principle of equivalence). The Court clarified that Article 19(1) TEU does not necessarily require a direct legal remedy; rather, it is sufficient in some cases if national law allows the person concerned to obtain incidental judicial review of the act.[73] Nevertheless, if domestic law provides a direct appeal for analogous measures, the principle of equivalence requires that the same apply to EPPO acts.[74]

Therefore, the ECJ followed its settled case law on the interpretation of the right to an 'effective legal remedy' as elaborated *inter alia* in *État*

71 ECJ, Case C-292/23 *I.R.O. and F.J.L.R.*, ECLI:EU:C:2025:255, para 74.
72 The issuance of a witness summons may affect the principle of equality of arms and, consequently, the fairness of the proceedings as a whole.
73 ECJ, Case C-292/23 *I.R.O. and F.J.L.R.*, ECLI:EU:C:2025:255, paras 79–80.
74 ECJ, Case C-292/23 *I.R.O. and F.J.L.R.*, ECLI:EU:C:2025:255, paras 84–87, 92.

luxembourgeois[75] and *Berlioz Investment Fund*.[76] According to the ECJ's case law, Article 47 of the Charter does not require a direct legal remedy, as long as effective legal protection is available indirectly. Nevertheless, it is important to recall that in *État luxembourgeois*, when assessing whether the absence of direct judicial review infringed upon Article 47 of the Charter, the ECJ placed significant emphasis on whether the contested decision imposed a legal obligation or risk of penalties on the individuals challenging it. Specifically, the Court distinguished between two scenarios concerning the right to an effective remedy: first, the person holding information who is *compelled* to provide it under threat of penalty, and therefore must have a direct legal remedy against the information order itself; and second, the taxpayer concerned by the investigation giving rise to the decision ordering that information be provided, whose right to an effective remedy may instead be indirectly exercised through subsequent decisions. This thus gives rise to the question of whether the ECJ's conclusion regarding the *direct form* of judicial review might differ in a scenario where the decision of the Spanish EDP is contested by witnesses rather than suspects, given that witnesses are legally obliged to appear and provide evidence.

From a broader perspective, it remains uncertain whether this ruling will foster a more uniform framework for judicial review of the EPPO's acts. While the Court has offered useful interpretative criteria for defining 'procedural acts', it has also left considerable discretion to national courts. Member States are not obliged to establish direct remedies against EPPO acts – even where domestic courts consider an act to fall within the scope of Article 42(1) – unless national law provides a comparable remedy for equivalent domestic measures, in line with the principle of equivalence. This aspect of the Court's reasoning may prompt adjustments in Member States where discrepancies exist between the level of protection afforded in domestic proceedings and in EPPO cases. The overall impact is nevertheless likely to remain limited. The principle of equivalence is relevant only in situations where Member States apply a lower standard of judicial review to EPPO acts than to domestic acts. Even in such cases, its effect would merely be to raise the level of protection for EPPO acts to the level provided

75 ECJ, Joined Cases C-245/19 and C-246/19 *État luxembourgeois v B and Others*, ECLI:EU:C:2020:795.

76 ECJ, Case C-682/15 *Berlioz Investment Fund SA v Directeur de l'administration des contributions directes*, ECLI:EU:C:2017:373.

for domestic cases – assuming such discrepancies exist – rather than to establish a truly uniform level of protection across the Member States.

Nonetheless, even under the Court's cautious approach, recognising the EPPO's 'procedural acts' as an autonomous concept of EU law may contribute to a baseline convergence concerning which acts are subject to judicial review. The question remains, however, whether this is sufficient to ensure effective protection of the fundamental rights of persons involved in EPPO proceedings. This concern is particularly pressing given the specific features of the EPPO's investigations, notably their cross-border dimension, which may lead to a fragmented and uneven treatment of individual rights across different jurisdictions. In the following, we shall now turn to the jurisprudence of national courts to examine whether such fragmentation and inconsistency truly exist or whether it is merely a scholarly concern.

4 Scrutinising the EPPO's procedural acts before national courts

When analysing the national jurisprudence on the legality of the EPPO's procedural acts, it is essential to distinguish between procedural acts based solely on national procedural law and those affected by EU law obligations – although the boundaries between national and EU law are not always clearly defined. The first case refers to procedural acts carried out at the decentralised level, grounded exclusively in national procedural law. As explained above, under Article 42(1) of the EPPO Regulation, procedural acts carried out by EDPs can be challenged by affected persons in the same way as those of national public prosecutors, following the relevant national laws. Article 42(2) further clarifies that Union courts are involved in reviewing EPPO procedural acts through preliminary rulings only when the validity of such acts directly depends on Union law. Consequently, national courts cannot refer questions to the ECJ regarding the validity of EPPO acts based solely on national procedural law.[77] In such instances, national courts should effectively be able to assess these acts as they do

77 Unless these acts are somehow affected by EU law – such as obligations set by the defence rights directives, the Charter, or the EPPO Regulation itself. However, as the case *EPPO v I.R.O. and F.J.L.R.* illustrates, the distinction between procedural acts governed by national law and those governed by EU law is not always clear. Even ostensibly domestic procedural acts, such as the issuing of a witness summons, should comply with obligations stemming from EU law.

with purely domestic cases. This does not appear to raise any significant difficulties.

Conversely, the second set of cases comprises procedural acts – whether at the decentralised or central level – that are affected by requirements of EU law. Such acts may be domestic in nature but nonetheless shaped by EU law (for example, decisions refusing access to the case file), or they may have an inherently transnational scope (such as decisions on cross-border investigative measures or on forum choice). The risk of divergent and contradictory practice may occur in particular in case of decisions adopted at central level that produce legal effects in several Member States, such as the decision of the PCs pursuant to Article 10(3) of the EPPO Regulation to conclude the proceedings, to decide on cross-border investigative measures, or to bring charges in different Member States.

While referral to the ECJ under Article 42(2) can help to prevent divergent national approaches, the evolving jurisprudence of national courts reveals that, despite the growing number of EPPO cases, such referrals are still rare. As shown in previous Section 3, national courts have referred questions to the ECJ especially where the text of the EPPO Regulation is ambiguous or silent; in most cases, however, national courts treat most EPPO acts as grounded in national procedural law that they can review without ECJ guidance. According to the EPPO Legal Service, national courts have addressed EU law questions in relation to the competence of the EPPO (Articles 22 and 23), access to the case file (Article 45(2)), the scope of judicial review for investigative measures in the context of cross-border investigations (Article 31), and prosecution decisions (Article 36). In these cases, courts were required to interpret both national and Union law. However, even when Union law was clearly relevant, courts so far have rarely referred the matter to the ECJ.

In the following we examine national court decisions concerning two categories of procedural acts undertaken by the EPPO. First, we consider national decisions concerning the EPPO's procedural acts adopted at the decentralised level (such as access to case files within the EPPO's case management system, allocation of competence between the EPPO and national authorities). Second, we analyse national decisions regarding procedural acts adopted at the central level (such as decisions based on Article 36 of the EPPO Regulation). While the impact of some of these decisions is confined to a single Member State, others have cross-border implications. Our objective is to identify practices and tendencies manifest in national jurisprudence that could reveal substantive gaps in judicial protections.

4.1 National decisions on procedural acts at the decentralised level

The Frankfurt court of first instance[78] was required to rule on a complaint lodged by a company seeking access to the procedural file in the context of EPPO cross-border investigations. The assisting EDP refused to grant access to the case file, relying on Article 45(2) of the EPPO Regulation, which stipulates that case files are maintained in accordance with the national law of the handling EDP. Access to the case file shall, therefore, be granted exclusively in accordance with the applicable national law. At the same time, the assisting EDP also rejected access to the files available in the assisting Member State, arguing that disclosure could jeopardise ongoing investigations and that there was no overriding interest justifying access. The court in Frankfurt upheld this reasoning and confirmed the assisting EDP's view. It held that access to the file – including in proceedings conducted under Article 31 of the EPPO Regulation – may only be authorised in accordance with the law of the handling EDP and must be decided by the latter. To date, the EPPO Legal Service is not aware of any contradictory jurisprudence regarding access to case files held by an assisting EDP. Accordingly, the interpretation adopted by the Frankfurt court appears to pose no difficulties in practice.

The courts in Palermo[79] and Trapani[80] had to decide independently how the term 'inextricably linked offence' under Articles 22(3) and 25(3)(b) of the EPPO Regulation should be interpreted for the purpose of establishing and exercising the EPPO's jurisdiction. Both cases ultimately concerned the question of whether, in the case of subsidy fraud, the EPPO can also prosecute the damage caused by the violation of criminal laws for the protection of the national budget, even if these were independent partial acts but covered by a common offence plan. The Palermo court held that the EPPO had jurisdiction, considering the partial acts to be inextricably linked. It went further, stating that even if the EPPO lacked jurisdiction, this would not entail procedural consequences (such as invalidity or nullity), since the allocation of competence relates only to the internal distribution of authority between law enforcement authorities and does not affect the legality of measures ordered by a competent court. By contrast, the Trapani court adopted a narrower interpretation, reasoning that inextricably linked

78 Amtsgericht Frankfurt of 08 February 2024, 931 Gs 1371/23.
79 Tribunale di Palermo of 26 June 2023, N. 73/2023 R. G. G. I. P.
80 Tribunale di Trapani of 29 February 2024, N. 30/2024 R. G. G. I. P.

offences exist only where there is an identity of material facts, which was not the case here.

Regarding the division of competence between Member States and EPPO, the Court of Appeal of Liège[81] was asked to determine whether prosecutions initiated by the national prosecution service were invalid on the grounds that the case had not been presented in accordance with Article 24(2) of the EPPO Regulation, although the EPPO could have exercised its competence. The Court concluded that failure to provide the EPPO with the opportunity to evoke the case does not render the prosecution invalid, provided there is no violation of the rights of the defence or of the principles of a fair trial. Nevertheless, such a violation of Article 24(2) unlawfully restricts the EPPO's jurisdiction, thus raising questions as to the persuasiveness of the Belgian court's reasoning. To date, there are no other national decisions on breaches of the right of evocation that might shed light on how other Member States approach this issue.

In a decision of 27 June 2024,[82] the Court of Appeal of Paris clarified that the EPPO's material jurisdiction does not depend on whether the relevant offence – here, the criminal offence of *tromperie* (deception) provided for in the French Code of Criminal Law – was expressly included in France's notification under Article 117 of the EPPO Regulation, but solely on whether the offence falls within the material scope of the PIF Directive.[83] The court further held that the EPPO still has jurisdiction even though EU funds had not yet been disbursed, since the decisive factor was whether the contract at issue could have existed without the commitment of European funds enabling long-term financing. A comparable case before the Spanish *Audiencia Nacional* reached the same conclusion.[84] In its view, the EPPO's competence is to be assumed where the recipient disregards the purposes of a subsidy supported by EU funds, irrespective of whether the EU funds were actually disbursed or the national expenditure subsequently reimbursed by the Commission.

The above cursory look at national jurisprudence shows that national courts have a tendency to interpret concepts of EU law relevant for EPPO procedural acts without necessarily making a reference to the ECJ. Based

81 Cour d'Appel de Liège of 20 March 2025, 2023/CO/869.
82 Cour d'Appel de Paris of 27 June 2024, No. 2023/06345.
83 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.
84 Audicenca Nacional S. 3 of 25 March 2025, No. 191/2025.

on the sample of national decisions examined here, divergences in national interpretations of EU law remain relatively rare. Nonetheless, it remains questionable whether national courts have adequately addressed all the EU law issues identified. Certain questions – such as the interpretation of the term 'inextricably linked offence' and the legal consequences of a violation of Article 24(2) of the EPPO Regulation, which results in restrictions on the EPPO's jurisdiction – raise matters of general significance for the functioning of the EPPO. In this light, one may argue that guidance from the ECJ would be highly desirable.

4.2 National decisions on procedural acts at the central level

The Italian Court of Cassation[85] clarified in a judgement of 3 April 2025 that the EPPO Regulation does not give a suspect the right to be heard before the PC. In the case at hand, defence lawyers argued, *inter alia*, that the defendant's rights had been infringed because they had not been heard before the PC. The Court of Cassation rejected this argument, holding that the internal consultation mechanism between the handling EDP and the PC provided for under the EPPO Regulation does not constitute an additional means of defence; rather, even in EPPO proceedings, the suspect is only entitled to the rights provided for under the applicable national criminal law. Whether the characterisation of the PC as a purely internal body that has no influence on the rights of the suspect is sufficiently convincing remains open to question. The Court of Cassation went further, stating that the PC, after examining the reports and the case file, merely expresses its opinion on the EDP's decision to request an indictment from the national judge. In this respect, the Court held that the term *decision*, as employed in the EPPO Regulation to describe the act of the PC, is misleading, since such an act constitutes no more than an internal step within the EPPO's administrative organisation. The case thus raises questions not only about the right to be heard under national procedural law, but also about the right to be heard before the PC at the central level, the institutional structure of the EPPO, and the nature of procedural acts subject to EU law requirements (such as the legal nature of the 'decision' adopted by the PC under Article 36 of the EPPO Regulation). Given that the matter touches upon

85 Corte Suprema di Cassazione of 03 April 2025, S. N.: 14835.

fundamental aspects of the EPPO's institutional framework with potentially far-reaching implications – and considering that the defendant expressly requested it – one might have expected the Italian Court of Cassation to refer a preliminary question to the ECJ; it chose not to do so.[86]

In a judgement of 5 December 2023,[87] the Court of Milan addressed, among other things, the question of the effect of decisions by the PCs. This case concerned the decision of the PC in an EU-wide VAT carousel scenario to allocate the prosecution to an Italian EDP pursuant to Article 26(4) of the EPPO Regulation. Of course, this decision also had consequences concerning where to present the indictment (Article 36(3) EPPO Regulation) and which legal-review framework to apply (Article 42(1) EPPO Regulation). The defence argued that prosecution in Italy was precluded by national rules on extraterritorial jurisdiction, according to which the prosecution of crimes committed abroad by Italian nationals requires a request from the Ministry of Justice.[88] The court took the view that in the relationship between the national regulations on extraterritorial jurisdiction and those on EPPO competence, the EPPO Regulation prevails. The Court of Milan further clarified that the criteria for the territorial jurisdiction of the EPPO are autonomously defined by the EPPO Regulation and do not necessarily coincide with the strict criterion of the *locus commissi delicti* under national law. In particular, in cases of potentially competing jurisdiction among different Member States, Article 26(4) assigns territorial jurisdiction to the EPPO in the Member State where the focus of the criminal activity is located and/or where the main financial damage occurred, thereby ensuring the unified exercise of criminal proceedings before a 'prevailing jurisdiction'. Accordingly, the Court of Milan stated that the assignment of a case to an EDP of a Member State by the PC results in its competence and is therefore the basis for its jurisdiction.

86 The defence lawyers requested the Court of Cassation to refer the following question (among others) to the ECJ for a preliminary ruling: Whether the combined provisions of Articles 10, 35, 36 and 42 of the EPPO Regulation, read in the light of the fundamental rights guaranteed by European Union law and, in particular, in the light of the general principles of the right of defence and the right to be heard, Articles 41 and 47 of the Charter, and Article 6 ECHR, must be interpreted, in the present case, in the sense that, before taking a decision on the request for indictment and/or prosecution to be brought at national level by the competent EDP, the PC must grant the suspect the right to be heard and/or to submit observations.

87 Tribunale di Milano of 05 December 2023, Chamber of Judges for preliminary investigation, I.000199/2023.

88 Article 9 of the Italian Criminal Code.

This judgement is particularly interesting as VAT fraud cases are by nature transnational and involve several legal orders. According to the EPPO Regulation, the EPPO only has jurisdiction for VAT fraud when the fraud scheme crosses borders – making such cases inherently transnational. The ECJ has ruled that a tax exemption under Article 138 of the VAT Directive[89] must be denied if the taxable person knew or should have known that they were participating in VAT evasion within a supply chain.[90] As a result, tax losses occur at each stage of the fraudulent chain, giving rise to criminal jurisdiction in multiple Member States.

Article 26(4) of the EPPO Regulation states that when several connected offences fall within the EPPO's competence, the case should be handled by an EDP from the Member State where the focus of the criminal activity lies. However, determining the 'focus' can be challenging when the damage is spread across many Member States and criminal networks operate in each, collectively enabling the VAT carousel. In practice, the EPPO uses different approaches to manage such complex cases. One approach is to concentrate the investigation in the hands of one handling EDP and transfer parts of the case subsequently. In such cases the handling EDP leads the investigation, and – either during or after the investigation – the PC may transfer parts of the case involving other Member States to their respective EDPs under Articles 26(4) and 36(3) of the EPPO Regulation. All evidence collected by the handling EDP is shared with the other EDPs following the transfer. Instead of concentrating VAT fraud investigations in the hands of one handling EDP, it is also possible for the EPPO to conduct parallel (mirror) investigations. This is the case if multiple EDPs in different Member States conduct coordinated investigations, each focusing on offences committed within their jurisdiction. Evidence is regularly exchanged in accordance with Article 31 of the EPPO Regulation.

In both scenarios, the transnational nature of the proceedings means suspects may face multiple sets of procedural rules within a single case. These rules can differ significantly in terms of legal safeguards and defence rights.

89 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

90 ECJ, Joined Cases C-439/04 and C-440/04 *Axel Kittel v Belgian State and Belgian State v Recolta Recycling SPRL*, ECLI:EU:C:2006:446; ECJ, Case C-285/09 *R*, ECLI:EU:C:2010:742; ECJ, Joined Cases C-131/13, C-163/13 and C-164/13 *Staatssecretaris van Financiën v Schoenimport 'Italmoda' Mariano Previti vof and Turbu.com BV and Turbu.com Mobile Phone's BV v Staatssecretaris van Financiën*, ECLI:EU:C:2014:2455.

Moreover, the choice of forum – and therefore the applicable sanctions, sentencing practices, enforcement, and rehabilitation options – can greatly influence the outcome of the case for the accused.[91]

The EPPO's forum choice may be reviewed by national courts under Article 42(1) of the EPPO Regulation before charges are brought, as per Article 36(1). However, doubts may arise regarding the ability of national courts to perform a proper oversight of the EPPO's decision on forum choice.[92] First, this raises the question of how national courts should interpret key concepts such as the 'focus of the criminal activity' or the 'general interest of justice'. Should these be understood through the lens of domestic law, or do they constitute autonomous concepts of EU law? If the latter, national courts would be required to refer preliminary questions to the ECJ to seek interpretative guidance. Nevertheless, even in such cases, the ECJ may provide only an interpretation of Article 26(4); it is ultimately for the national courts to apply this interpretation to the facts in question. Second and more importantly, a national court may simply establish whether the case can be prosecuted and tried in front of the courts of its state, but it would not be in a position to reassign a case to another Member State. Such a decision involves supranational considerations that transcend the competence of any single national authority. It implicates the interests and legal systems of multiple Member States.[93] This limitation raises the risk of a 'jurisdiction ping-pong', where responsibility for prosecution is passed back and forth between Member States.

One may argue, therefore, that there is a risk of national courts reviewing EPPO procedural acts through the lens of their own domestic legal frameworks. This, however, carries the risk of overlooking the unique characteristics of EPPO proceedings, namely that they are often transnational and involve several legal orders. The Milan judgment[94] illustrates this tendency. The court appeared to limit its review to issues of Italian criminal procedure (specifically the rules on extraterritorial jurisdiction) without adequately considering the broader transnational aspect of the case – namely, the choice of forum as Italy rather than other potentially competent

91 Mitsilegas (n 19) 256.
92 Mitsilegas (n 19) 262.
93 M Panzavolta, 'Choosing the National Forum in Proceedings Conducted by the EPPO: Who Is to Decide?' in L Bachmaier Winter (ed), *The European Public Prosecutor's Office. The Challenges Ahead* (Springer 2018) 59, 80.
94 Tribunale di Milano of 05 February 2023, I.000199/2023.

Member States.[95] In this specific case it is difficult to determine, however, whether the court's limited approach was due to a domestically oriented perspective or to the fact that the defendant's challenge was confined to jurisdictional rules under Italian law and did not directly contest Italy's designation as forum. Indeed, the defence did not argue that the suspects should have been prosecuted elsewhere; rather, it sought the nullity of prosecution on the basis that the facts had occurred abroad and that, under Italian law, extraterritorial jurisdiction may be exercised only upon a prior request by the Ministry of Justice – a requirement not fulfilled in this case. Still, even without expressly addressing the forum choice, the court made important observations concerning judicial review of such decisions. It held that national judges cannot undertake an *ex-post* review of how the criteria laid down in the EPPO Regulation were applied to allocate jurisdiction among several Member States. The court further clarified that these criteria, set out in Articles 22 ff of the EPPO Regulation, govern the internal allocation of jurisdiction between public prosecutor's offices (i.e., between different EDPs' offices) and are to be resolved, where conflicts arise, by the PC. Such decisions of the PC, according to the Milan court, cannot be reviewed by national courts – just as the decision of the Prosecutor General of the Court of Cassation resolving conflicts between the EPPO and national prosecutors, or resolving conflicts of competence at national level, is not subject to national judicial review.

The court of Milan thus treated the PC's forum choice as a decision merely allocating competence among different prosecutor's offices – but are these decisions indeed comparable? Unlike a decision resolving a conflict of competence between, for example, the prosecutor's office in Rome and that in Milan, the decision of the PC, as discussed above, not only allocates competence to an EDP's office but also determines the applicable law – including procedural safeguards, applicable sanctions, sentencing practices, enforcement, and rehabilitation options – and thus can profoundly affect the outcome of the case for the accused. The consequences for the defendant are therefore far more severe. While Article 42(1) of the EPPO Regulation leaves judicial review to national courts in accordance with national law, such a law must nonetheless provide effective remedies against EPPO procedural acts that produce legal effects vis-à-vis third parties, in line with Article 19(1) TEU. One might argue, therefore, that Italian law creates a gap

95 As this was an EU-wide VAT carousel case with transnational dimensions.

in judicial protection, contrary to Article 42(1) of the EPPO Regulation as well as Article 47 of the Charter and Article 19(1) TEU, insofar as it excludes judicial review of forum choice, despite the significant legal effects on third parties.[96] This interpretation is reinforced by Recital 87(2) of the EPPO Regulation, which expressly states that

> '[p]rocedural acts that relate to the choice of the Member State whose courts will be competent to hear the prosecution, which is to be determined on the basis of the criteria laid down in this Regulation, are intended to produce legal effects vis-à-vis third parties and should therefore be subject to judicial review by national courts, at the latest at the trial stage'.

In the end, this decision[97] was overturned by the Court of Appeal of Milan.[98] The appellate court held that the EPPO Regulation does confer on PC the power to determine the Member State in which a case should be prosecuted when multiple Member States have jurisdiction, but this choice is not binding on national courts, which may review it *ex officio*. Therefore, in line with our analysis above, the Italian courts may review whether they have jurisdiction over the specific case. On the merits, the court found that the offences had been committed on Italian territory rather than abroad according to the applicable national rules on jurisdiction. It therefore concluded that the Italian courts did indeed have jurisdiction, and that the Ministry's request – relevant only to situations of extraterritorial jurisdiction – was unnecessary. The decision of the Court of Appeal is more compelling because, unlike the first-instance ruling, it distinguishes the EPPO's 'competence' from the courts' 'jurisdiction' and emphasises that the EPPO cannot determine the jurisdiction of national courts without the possibility of judicial review. However, similarly to the first-instance court, the judicial review exercised by the Court of Appeal is limited to verifying whether Italian courts have jurisdiction. Nothing is said about the choice of forum and the application of the criteria under Article 26(4) of the EPPO

96 Amedeo Barletta, 'Questioni di competenza e giurisdizione nel sistema della Procura europea, a partire da una recente sentenza del GUP di Milano' (2024) 3 *Giurisprudenza Penale Web*, available at https://www.giurisprudenzapenale.com/2024/03/14/questioni-di-competenza-e-giurisdizione-nel-sistema-della-procura-europea-a-partire-da-una-recente-sentenza-del-gup-di-milano/.

97 Tribunale di Milano of 05 December 2023, Chamber of Judges for preliminary investigation, I.000199/2023.

98 The decision of the Court of Appeal of Milan is not publicly available at present.

Regulation, namely whether one Member State is better placed than another to prosecute the case. It remains unclear whether this omission is due to the contextual circumstances of the challenge or due to the domestically oriented perspective of the court.

Finally, it is noteworthy that the Court of Milan characterised the PC's act – made in response to a proposal by the EDP – as a *decision* allocating jurisdiction to a specific Member State, rather than as a mere *opinion*, unlike the Italian Court of Cassation, which held that the PC merely issues an opinion on the EDP's decision. Thus, two national courts within the same Member State appear to diverge in their interpretation of Article 36 of the EPPO Regulation, particularly with regard to the legal nature of a 'decision' by the PC adopted under that provision.

Beyond the review of forum choice, another important issue arises in cases where proceedings are reallocated to a different EDP: the review of investigative material gathered in other Member States. Can the national courts of the Member State of the 'new' EDP in charge effectively assess the investigative material collected by the first EDP in charge in accordance with the law of their Member State? To date, no national decision has addressed this question.

5 Conclusions: substantive gaps in judicial protection by national courts?

The hybrid structure of judicial review concerning the legality of EPPO investigations and prosecutions requires both the CJEU and national courts to clarify their respective roles and competencies. Only through such clarification can they jointly ensure effective judicial protection for individuals affected by EPPO proceedings. This hybrid system of judicial protection rests on two key assumptions: first, it assumes that national courts are fully aware of the unique nature of EPPO investigations and, when reviewing the legality of the EPPO's procedural acts, take into account the often cross-border dimension of these cases. Second, it presumes that national courts, when interpreting both national and EU law in the context of EPPO procedural acts, will make use of the preliminary reference procedure to seek guidance from the ECJ on the interpretation of EU law concepts. However, as demonstrated in Sections 3 and 4, these assumptions are not yet fully realised in practice.

To support a clearer understanding of the respective roles of European and national courts, the CJEU has repeatedly reaffirmed the special regime

of judicial protection established by the EPPO Regulation. This regime limits the CJEU's jurisdiction to reviewing the legality of EPPO investigations and prosecutions. In *G.K. and Others*, the ECJ went to considerable lengths to fill the legislative gap left by Article 31 of the EPPO Regulation. Following criticism of this approach, the judgment in *I.R.O. and F.J.L.R.* can be seen as the Court's first attempt to strike a balance between the uniform interpretation of autonomous EU law concepts and the preservation of Member States' procedural autonomy.

National courts, by contrast, tend to interpret their procedural autonomy broadly. To date, they have made limited use of the preliminary reference procedure. Often, they treat EPPO procedural acts as primarily grounded in national law or consider the legal questions – despite involving EU law concepts – as sufficiently clear under the *acte clair* doctrine. As a result, they feel confident deciding these matters without referring them to the ECJ. It should also be taken into consideration that the constraints of the daily work of national courts and the duration of proceedings do not favour readiness to present a preliminary question to the ECJ pursuant to Article 42(2) of the EPPO Regulation. The examples in Section 4 reveal a few clearly contradictory national decisions on identical legal questions. While this limited jurisprudence does not yet provide conclusive evidence of fragmented or uneven protection of individual rights across jurisdictions, it equally fails to confirm that the hybrid structure of judicial protection under Article 42 of the EPPO Regulation functions effectively. In fact, several examples show that national courts are deciding on critical aspects of the EPPO's institutional framework – such as the right to be heard before the PC – that have far-reaching implications. These matters require uniform treatment across all participating Member States to ensure consistent protection of individual rights.

The absence of preliminary references presents, in itself, significant concerns. The EU's 'complete system of judicial review' relies on the preliminary ruling procedure, whereby national courts refer questions on the interpretation of EU law to the ECJ. This mechanism is designed to ensure the uniform interpretation and application of EU law across all Member States. Such uniformity is particularly crucial for the EPPO, which operates as a single office but functions within a highly intricate framework shaped by national legal systems. Yet national courts often refrain from making preliminary references even in cases that clearly implicate EU law, assuming that the issues are sufficiently clear. However, this assumption is open to

challenge. Is the concept of 'inextricably linked offences' unambiguous? The literature, as well as ongoing academic and political debates, strongly suggests otherwise. Likewise, can national courts unilaterally determine whether suspects have the right to be heard before the PC, given that this question concerns procedures at the central rather than the decentralised level? One could argue that ECJ clarification on such matters would be of considerable value. The most recent preliminary reference from the Court of Appeal in Brussels provides an excellent illustration of a case that merits a ruling by the ECJ.[99] It concerns the interpretation of Article 24(2) of the EPPO Regulation, and in particular the obligation imposed on national authorities that have initiated an investigation into a criminal offence falling within the EPPO's competence to inform the EPPO. Central to the reference is the question of how long such an investigation must be considered 'ongoing', thereby requiring the competent authority to notify the EPPO in accordance with that provision, so that the latter may decide whether to exercise its right of evocation. In essence, the Court is asked to clarify the meaning of the phrase 'at any time after the initiation of an investigation'. This is a crucial issue that cannot be decided by a national court; it requires interpretation by the ECJ, as failure to comply with the obligation set out in Article 24(2) may unlawfully restrict the EPPO's competence. It is noteworthy that, in a similar case, the Court of Appeal of Liège decided the matter without referring a preliminary question to the ECJ.[100] This contrast demonstrates how national courts – even within the same Member State – may differ significantly in their assessment of when interpretative guidance from the ECJ is required.

Furthermore, the lack of preliminary references to the ECJ is particularly problematic where the national court reviews EPPO decisions with a transnational dimension (for instance, forum choice), as national courts might tend to approach the case through the lens of domestic law only and ignore aspects of foreign law.

In sum, there is currently insufficient evidence either that national courts are incapable of reviewing the EPPO's procedural acts – thus necessitating revision of Article 42 – or that they interpret EU law adequately. More time and jurisprudence will likely be needed before the real problems fully materialise. In the meantime, however, a case can be made for strengthening the preliminary reference procedure, including by considering whether

99 ECJ, Case C-407/25, *Tersten*.

100 Cour d'Appel de Liège of 20 March 2025, 2023/CO/869.

the EPPO itself should be granted the capacity to submit preliminary references. This would enable more consistent guidance from the ECJ. Yet this raises a further question: is ECJ guidance through preliminary rulings sufficient, or is more robust harmonisation within the EPPO Regulation (including the concept of EPPO 'procedural acts') required? At present, this question cannot be answered. More time is needed to observe how courts and legislators respond to recent ECJ judgments, and whether such guidance may contribute to the development of a more uniform framework for EPPO criminal proceedings.

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EPPO's institutional independence and sustainability

(In-)Dependency of the EPPO on national resources

Lorenzo Salazar

The establishment of the European Public Prosecutor's Office (EPPO)[1] as a supranational prosecutorial authority represents not only the Union's commitment to protecting its budget against frauds but also an experiment of European enhanced integration, blending national legal traditions with an innovative prosecutorial body. Independence is at the core of the design of the new Office.

The EPPO's independence is not a merely declaratory concept; rather, since its conception, it has appeared vital for ensuring the impartial exercise of its prosecutorial functions, safeguarding the Office from undue external influence and reinforcing its capacity to act exclusively in the interest of the Union as a whole.

An examination of the principles underpinning its institutional design – specifically independence, accountability, and the status of its staff and delegated prosecutors – offers an opportunity for some considerations which may also be useful in the perspective of a possible future reform.

1 The principle of independence

1.1 Substantive and functional aspects

The EPPO Regulation unequivocally stipulates that '[t]he EPPO shall be independent'.[2] This provision crystallises the essential nature of the EPPO as an institution insulated from external direction or influence.

The concept of *independence*, as codified in the EPPO Regulation, must be understood both in its *external* dimension – freedom from interference by external actors such as Member States, national authorities, or Union

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

2 See Art 6(1) EPPO Regulation.

institutions not part of the EPPO – and in its *internal* dimension, which acknowledges the hierarchical organisation of the EPPO itself. The rationale for this *independence*, stemming already from the very first design of the EPPO in the Corpus Juris in 1997,[3] is that independence is necessary and strictly functional for the performance of its powers of investigation and prosecution, also having in mind that the investigation and prosecution activities of the EPPO 'should be guided by the legality principle'.[4]

This concept seems to mirror the basic (but at the same time *revolutionary*) idea underlying Article 5 of the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,[5] which has been revealed to be a key provision in the overall system of the Convention. Its Article 5 reads as follows: 'Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved'. Though recognising the possibility of maintaining national regimes inclined to prosecutorial discretion (*principe d'opportunité des poursuites*) or to mandatory prosecution (*principe de légalité des poursuites*), it recognises as well that, in order to protect the independence of prosecution, such discretion is to be exercised on the basis of professional motives and is not to be subject to any form of improper influence nor to concerns of a political nature.[6]

This dual dimension of independence – external and internal – finds further elaboration in the principles of *active and passive independence*. While the first obliges the EPPO to act in the interest of the Union as a whole and neither seek nor take instructions from any person external to the EPPO, *passive independence* imposes reciprocal obligations on Member States and EU institutions to refrain from seeking to influence the exercise of the EPPO's investigative and prosecutorial powers. Such duality

3 M Delmas-Marty, *Corpus Juris portant dispositions pénales pour la protection des intérêts financiers de l'Union européenne* (Economica 1997).

4 See Recital 66 EPPO Regulation.

5 Convention on Combating Bribery of Foreign Public Officials in International Business
Transactions [1997] OECD/LEGAL/0293.

6 See OECD, 'Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions' (21 November 1997), at https://legalinstruments.oecd.org/public/doc/205/185f5f38-ba6b-4e35-93a8-50fa739c7005.pdf, mn *27*.

reinforces the functional autonomy of the EPPO, ensuring that its mandate is not compromised by national or political considerations.

1.2 Institutional guarantees of independence

The functional independence of the EPPO is further reinforced by a constellation of institutional safeguards embedded within the EPPO Regulation. The selection and appointment procedures for the European Chief Prosecutor (ECP), the European Prosecutors (EPs), and the European Delegated Prosecutors (EDPs) are meticulously designed – notwithstanding the number of compromises needed to reach unanimity among delegations – to protect the impartiality and autonomy of the body.

For instance, the appointment of the ECP, conducted pursuant to Article 14 of the EPPO Regulation, involves a competitive selection process overseen by an independent panel, thus minimising the potential for undue political influence. The Italian Presidency of 2014 achieved an important result by managing to reach an agreement on a procedure which, by allowing applications by all candidates who fulfill the conditions provided for by the Regulation without the need for any designation nor endorsement by the governments of Member States, defended the full independence of the Head of the Office[7].

Also, the procedure for the appointment of EPs (through a system inspired both by the panel provided for by Article 255 of the Treaty on the Function of the European Union (TFEU) and the trio of candidates needed for the appointment of the judges at the European Court of Human Rights) and the one for the appointment of the EDPs (with the EPPO College having the final word on the appointment of the candidates designated by the Member States) seem to provide an effective contribution to the overall independence of the Office.

The concept of independence is also reflected in other provisions of the Regulation providing for the self-government of the organisation of the work of the EPPO enabling it to adopt its internal rules of procedure,[8]

7 Salazar L, 'Habemus EPPO! La lunga marcia della Procura europea' (2017) *Archivio penale* n. 3, https://www.ecba.org/extdocserv/conferences/rome2020/EPPO_Salazar.pdf

8 See Art 21 EPPO Regulation.

the financial rules,[9] the application of the Protocol on the Privileges and Immunities of the European Union 'to the EPPO and its staff'[10].

It also seems to stem from the general principles regulating the EPPO that no future extension of its powers will be possible without full confidence in its effective and complete independence.

2 Accountability as a corollary of independence

The EPPO Regulation establishes a complementary principle to independence, stipulating that '[t]he EPPO shall be accountable to the European Parliament, to the Council and to the Commission for its general activities'[11]. The balance between independence and accountability is expressly acknowledged in Recital 18 of the EPPO Regulation, which frames accountability as a *complement* to independence.[12]

The practical expression of this accountability is articulated through the EPPO's obligation to prepare and transmit an *annual report* on its general activities to the European Parliament and to national parliaments, as well as to the Council and the Commission.[13] Against this background, the EPPO seems to be accountable for its general activities to the EU institutions while, with regard to the national parliaments of the Member States, the ECP shall appear before them, at their request only, to give account of the general activities of the body. This underscores the supranational character of the EPPO, which is accountable only to the EU institutions as a whole, thus reflecting the fundamental principle of unity in the exercise of Union competences.

9 See Art 95 EPPO Regulation.
10 See Art 96(5) EPPO Regulation.
11 See Art 7(1) EPPO Regulation.
12 See Recital18 EPPO Regulation: 'Strict accountability is a complement to the independence and the powers granted to the EPPO under this Regulation. The European Chief Prosecutor is fully accountable for the performance of his/her duties as the head of the EPPO and as such he/she bears an overall institutional accountability for its general activities to the European Parliament, the Council and the Commission. As a result, any of these institutions can apply to the Court of Justice of the European Union (the 'Court of Justice'), with a view to his/her removal under certain circumstances, including in cases of serious misconduct. The same procedure should apply for the dismissal of European Prosecutors.'.
13 See Art 6(2) EPPO Regulation.

Moreover, the mechanism for the removal of the ECP or the EPs[14] reinforces the high threshold for dismissal, which requires a finding of *serious misconduct* by the Court of Justice of the European Union. In no case it seems possible that the ECP could be removed because of a possible discontent or lack of appreciation by the Parliament or another Institution with the substance of the annual report presented to them or with the general activities conducted by the EPPO. This safeguard further ensures that the accountability relationship does not degenerate into a tool for exerting improper political or national influence over the EPPO's prosecutorial discretion.

Finally, it is also interesting to note that the ECP, during her appearance at this conference,[15] explained that it is the European Chief Prosecutor who is held accountable by the Institutions, rather than the College of the EPPO.

3 Budgetary autonomy as a pillar of independence

Furthermore, the overall group of rules on the budget may also be considered relevant to the independence of the EPPO.

The financial autonomy of the EPPO is recognised in Article 95 of the EPPO Regulation, in conjunction with Recital 111, which affirms that '[t]o guarantee the full autonomy and independence of the EPPO, it should be granted an autonomous budget, with revenue coming essentially from a contribution from the budget of the Union'. The budgetary framework of the EPPO thus plays a critical role in insulating the institution from external pressures that may arise through financial leverage or constraints as further demonstrated by the final consideration in Recital 111. It stipulates that, though subject to the relevant Union standards applicable to all EU agencies and bodies, due regard should be put, 'however, to the fact that the competence of the EPPO to carry out criminal investigations and prosecutions at Union level is unique'.

Under Article 92 of the EPPO Regulation, the EPPO is empowered to prepare an estimate of its revenue and expenditure, which is then submitted to the European Commission as part of the Union's overall budgetary process. However, the final decision regarding the budgetary allocations

14 Provided for by Art 14(3) EPPO Regulation.

15 'Strengthening the Future of the European Public Prosecutor's Office', Villa Vigoni, 31 March – 2 April 2025.

for the EPPO rests with the Commission, subject to the scrutiny of the budgetary authority. While this procedure follows the model applicable to Union agencies under Article 70 of Regulation (EU, Euratom) 2024/2509[16] and formerly Article 208 of Regulation (EU, Euratom) No 966/2012[17], it raises pertinent questions as to whether the EPPO's unique mandate and competence – distinct from that of regulatory agencies – require an enhanced level of financial autonomy.

It should be further considered that the principle of budgetary independence is not a merely technical matter of resource allocation; rather, it is inextricably linked to the functional and operational independence of the EPPO. Adequate financial resources are indispensable to ensure the EPPO's capacity to undertake complex, cross-border investigations and prosecutions, and to maintain the integrity of its activities free from external interference.

In this respect, it has been argued that the budgetary procedure for the EPPO ought to be revisited to better reflect its *sui generis* status as a body of the Union entrusted with the exercise of public authority in the field of criminal justice.[18] Such an enhanced framework would ensure that the EPPO has the necessary resources to discharge its mandate effectively, while simultaneously subjecting it to rigorous financial accountability in line with the general principles of sound financial management under Union law.

4 The role and status of EDPs

The EDPs are a cornerstone of the EPPO's decentralised operational model, acting as the linchpin between the EPPO and national legal systems. EDPs must 'be active members of the public prosecution service or judi-

16 Regulation (EU, Euratom) 2024/2509 of the European Parliament and of the Council of 23 September 2024 on the financial rules applicable to the general budget of the Union.

17 Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002.

18 See European Parliament, Decision of 7 May 2025 with observations forming an integral part of the decision on discharge in respect of the implementation of the budget of the European Public Prosecutor's Office for the financial year 2023 (P10_TA(2025)0087).

ciary of the respective Member States which nominated them',[19] thereby ensuring their integration into domestic judicial hierarchies.

Nevertheless, the legal status of EDPs has been the subject of considerable debate. In fact the Regulation[20] provides that EDPs are engaged as *Special Advisors* within the meaning of Articles 5, 123 and 124 of the Conditions of Employment of Other Servants of the Union.[21] This distinctive status, while tailored to the specificities of their role, has been understandably criticised for failing to afford EDPs the same degree of institutional security and professional guarantees as temporary agents, which is the status held by the ECP and the EPs.

This divergence in status seems to have produced practical implications for the attractiveness of the role of EDPs and their capacity to operate with full independence. Indeed, as also noted by the European Parliament,[22] there is a growing recognition that the creation of a specific statute for EDPs, reflecting the judicial nature of their functions, would not only enhance the appeal of these positions but also reinforce the legitimacy and independence of the EPPO as a whole.

Furthermore, the EDPs' dependence on their national prosecution services for most of the logistics poses challenges in ensuring uniformity and coherence in the application of Union law. The national authorities remain responsible for providing the EDPs 'with the resources and equipment necessary to exercise their functions', including the provision of secretarial and logistical support.[23] Yet, the level of resources and the status of the support staff vary considerably across Member States, creating potential disparities in the capacity of EDPs to carry out their tasks effectively.

This overall situation may explain why, at least in some participating Member States, the posts of EDPs seem to have not been considered very appealing by the members of the local Judiciary.

19 See Art 17(2) EPPO Regulation.

20 See Art 96(6) EPPO Regulation.

21 Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, as amended.

22 See Resolution (EU) 2024/2253 of the European Parliament of 11 April 2024 with observations forming an integral part of the decision on discharge in respect of the implementation of the budget of the European Public Prosecutor's Office for the financial year 2022.

23 See Art 96(6) EPPO Regulation.

5 Staff of the EPPO and local Support Personnel: challenges to consistency and independence

The definition of 'staff of the EPPO' under the Regulation[24] encompasses the personnel at the central level, explicitly excluding the ECP, the EPs, the EDPs, and the Administrative Director. Yet, the broader application of staff provisions in Chapter IX of the Regulation[25] has led to ambiguity regarding the precise scope of these categories.

This regulatory complexity becomes particularly evident when considering the assistance provided to the EDPs. The Regulation stipulates that 'the European Delegated Prosecutors shall be assisted by the staff of the EPPO in their duties',[26] while Recital 113 underscores that 'the costs of the European Delegated Prosecutors' office and secretarial support should be covered by the Member States'. Accordingly, a functional dichotomy seems to emerge: while the EPPO staff is *formally* tasked with assisting EDPs, secretarial and logistical support is eventually provided by national authorities.

This divergence may produce in practice significant implications for the independence of the EPPO's operations. In several Member States, such as Italy, Spain and France, the practice of seconding law enforcement officers to support EDPs is well-established, fostering an operational continuity with national investigative structures. However, in other participating Member States, the provision of such support is far less systematic, creating possible discrepancies in the investigative capacities of the EPPO across the Union.

Moreover, the fact that local support personnel are employed by national authorities – rather than by the EPPO itself – raises questions regarding the application of the guarantees of active and passive independence enshrined in Articles 6 and 96(7) of the EPPO Regulation. In practice, local staff may be more susceptible to hierarchical pressures or political influences at the national level, particularly in jurisdictions where the public prosecution service is not itself institutionally independent. This creates a potential weak link in the chain of procedural safeguards, undermining the effectiveness of the EPPO's supranational mandate.

24 See Art 2(4) EPPO Regulation.
25 See in particular Art 96 EPPO Regulation.
26 See Art 8(5) EPPO Regulation.

This situation highlights the need for a possible move towards a sort of broader principle of *assimilation*, whereby national authorities are required to provide *their* EDPs with resources and personnel *equivalent* to those available to national prosecutors. While this approach may promote functional equivalence, it also risks entrenching disparities where national prosecutorial services themselves vary widely in resources and independence.

Concrete experiences reported from practice indicate that these local support roles are often not considered very attractive by the most qualified personnel. The absence of Union-level incentives or formal guarantees of independence for local staff further exacerbates this problem. In the interest of securing the effective and independent exercise of EPPO functions, it may be recommended that the EPPO consider developing mechanisms – either through financial incentives or through an extension of the Protocol on the Privileges and Immunities of the European Union – to ensure that local staff can perform their duties free from external influence.

6 Concluding Remarks and possible Policy Recommendations

The analysis of the EPPO's independence and accountability regime within the broader context of European law reveals a number of structural challenges that merit closer scrutiny. Comparative analysis with other Union agencies and bodies – such as Eurojust, Europol, Frontex and OLAF – demonstrates that while these entities also perform investigative or operational tasks, none exercise powers of criminal prosecution analogous to or comparable with those of the EPPO. This *sui generis* nature necessitates a tailored institutional architecture that goes beyond the traditional agency model, recognising the unique *constitutional* role of the EPPO under Article 86 TFEU.

As it was indicated above, a possible element of concern arises from the potential tension between the national integration of EDPs and the supranational mandate of the EPPO. Unlike Europol or Frontex, which operate as support and coordination agencies, the EPPO wields direct authority to initiate prosecutions and conduct criminal proceedings before national courts. This creates a structural dynamic in which the EPPO must rely on national staff and resources to exercise its powers, even as it remains formally independent of those same national systems.

The case law of the Court of Justice of the European Union, particularly in cases addressing the independence of national judicial authorities,[27] provides valuable insights into the broader principles of institutional independence under EU law. However, the EPPO's hybrid nature – both supranational and operationally dependent on national structures – poses unprecedented challenges that go beyond the classic judicial independence paradigm.

The independence of the EPPO, as enshrined in Article 6 of the EPPO Regulation, is not a mere rhetorical aspiration and cannot be asserted by decree ('*L'indépendance ne se décrète pas…*') but is instrumental and inherent to the overall action of the European prosecutor and to its incisive powers of investigation and prosecution. As the EPPO's activities expand and its role in safeguarding the Union's financial interests becomes increasingly prominent, its institutional independence should be matched by robust practical guarantees.

To this end, some sort of policy recommendations may emerge from the preceding considerations:

1. Reforming the Status of EDPs: in line with the recommendations of the European Parliament, the status of EDPs should be re-examined to align more closely with that of temporary agents under the Staff Regulations of the Union. This would provide them with enhanced job security, clearer professional guarantees and greater attractiveness for highly qualified candidates.
2. Enhancing Budgetary Autonomy: the current budgetary model, which follows the template applicable to Union agencies, may not sufficiently reflect the *sui generis* status of the EPPO. A more autonomous budgetary process – modelled on the principles of direct institutional accountability and financial independence – would reinforce the EPPO's operational capacity and democratic legitimacy.
3. Harmonising Local Support Structures: The disparate practices among participating Member States regarding the provision of local staff and resources to EDPs must be addressed. Establishing minimum standards for the support of EDPs would promote uniformity in the exercise of EPPO competences and reduce the risk of external interference.
4. Extending Guarantees of Independence to Local Staff: Given the crucial role played by local staff in supporting the work of the EDPs, it is

27 See the general principles in ECJ, Case C-64/16 *Associação Sindical dos Juízes Portugueses,* ECLI:EU:C:2018:117.

essential to extend the principles of active and passive independence to this personnel, either through amendments to the Regulation or through the adoption of implementing measures at Union level.

In conclusion, the EPPO stands as a unique institutional innovation in the evolving constitutional order of the European Union. Its dual character – supranational and operationally reliant on national structures – poses complex legal and practical questions that go to the heart of the Union's commitment to the rule of law and the effective protection of its financial interests.

Through the rigorous application of the principles of independence and accountability, and the careful calibration of its institutional design, the EPPO may serve not only as a watchdog of the Union budget but also as a model for possible future steps towards supranational integration in the field of criminal justice.

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Institutional independence and sustainability: selection, status and number of EDPs and support staff

Garonne Bezjak

According to Article 119 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), the Commission shall prepare an evaluation and shall submit an evaluation report on the implementation and impact of the EPPO Regulation, as well as on the effectiveness and efficiency of the European Public Prosecutor's Office (EPPO) and its working practices no later than five years after the start date of the operational work of the EPPO. As the EPPO started its work on 1 June 2021, the Commission's report is due on 1 June 2026. Leading up to this date, discussions are already underway as to which parts of the EPPO Regulation might or might not be subject to a revision. The overall aim of this exercise is to think about ways of strengthening the EPPO in the future. One important part of this consideration concerns institutional independence. Against this background, the present contribution reflects on the selection, status and number of European Delegated Prosecutors (EDPs) and support staff under Article 96 of the EPPO Regulation from the perspective of a Member State. It should be emphasised in this regard that these reflections can currently represent no more than initial personal[1] reflections. It cannot be ruled out that these assessments may change over the course of the discussions on the revision of the EPPO Regulation – discussions which are just beginning and to which Villa Vigoni has opened its doors.

1 The role of the EDPs within the EPPO

Article 8 of the EPPO Regulation sets out the structure and the framework of the EPPO: The EPPO is an indivisible Union body operating as one

1 The contribution only reflects the personal view of the author and not the official opinion of the German Federal Ministry of Justice and Consumer Protection.

single office with a decentralised structure. It is organised at a central level (College, Permanent Chambers, European Chief Prosecutor, Administrative Director etc) and at a decentralised level. According to Article 8(4) and Recital 21 of the EPPO Regulation, the decentralised level of the EPPO consists of EDPs located in the Member States. According to Article 13(1) of the EPPO Regulation, the EDPs shall act on behalf of the EPPO in their respective Member State and shall have the same powers as national prosecutors in respect of investigations, prosecutions and bringing cases to judgment. Article 17(2) of the EPPO Regulation clarifies further that the EDPs shall be active members of the public prosecution service or judiciary of the respective Member State which nominated them.

The role of the EDPs as intended by the EPPO Regulation mirrors the hybrid structure of the EPPO. On the one hand, the EPPO is a supranational body connected to the European Union (EU) and is essentially governed by the EPPO Regulation. On the other hand, the EPPO is linked to the national law of the Member States and national law applies if a matter is not regulated by the EPPO Regulation. Thus, the EDPs act on behalf of the EPPO in their respective Member States while at the same time being able to use their powers as national prosecutors. This Janus-faced nature of the EDPs is also known as the 'double hat' of the EDPs, which will be further explained at a later stage. In terms of staff conditions, Article 96(6) of the EPPO Regulation sets out that EDPs shall be engaged as Special Advisors in accordance with Articles 5, 123 and 124 of the Conditions for Employment of other Servants (CEOS)[2] and the rules adopted by agreement between the institutions of the Union. The status as Special Advisors allows the EDPs to continue being active members of the public prosecution service or judiciary in their Member State.[3]

2 Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, as amended.

3 H-H Herrnfeld, 'Article 96' in H-H Herrnfeld, D Brodowski and C Burchard (eds), *European Public Prosecutor's Office: Article-by-Article Commentary* (Nomos, 2021) mn 13; H-H Herrnfeld and M Reiser, 'Die Europäische Staatsanwaltschaft' in W Bohnen and L Haase (eds), *Kontrolle, Konflikt und Kooperation. Festschrift 200 Jahre Staatsanwaltschaften Koblenz und Trier (1820–2020)* (CH Beck 2020) 249, 253 f.

2 Institutional independence of the EDPs

One does not need much imagination to realise that the hybrid structure of the EPPO and its manifestation in the EDPs' work as the 'double hat' model[4] is challenging[5] and might be especially problematic for the independence of the EDPs. The Member States and the EPPO are continually called upon to find compromises – something that inevitably pushes independence to its limits. The question is whether these limits are justified in the light of the given concept of the EPPO or whether there is still room for improvement. In light of this question, different aspects of interactions between the EPPO and the Member States have to be examined in more detail.

2.1 The structural organisation of the EDPs

The process of setting up EDPs in the Member States begins with Article 13(2) of the EPPO Regulation. The European Chief Prosecutor (ECP) shall, after consulting and reaching an agreement with the relevant authorities of the Member States, approve the number of EDPs, as well as the functional and territorial division of competences between the EDPs within each Member State. In such consultations, due account should be taken of the organisation of the national prosecution system (Recital 44 EPPO Regulation). For Germany, it was decided to establish five offices in five different German States (*Bundesländer* – Bavaria, Berlin, Hamburg, Hesse and North Rhine-Westphalia). One further EDP is to be found at the Federal Prosecutor General level.

The settlement of the number of the EDPs by the ECP must also take place on the basis of an agreement with the Member State concerned. It goes without saying that the number of EDPs may not be determined arbitrarily but must be decided on a verifiable basis. Initially, the determination of the number of EDPs was based on the working hours that national prosecutors needed to invest in relevant cases before these started falling under the EPPO's competence. On this basis, it was initially determined that twelve EDPs were necessary for Germany.

4 See section 2.3.1.

5 For the aspect of tension see also F Meyer, '§ 3 Aufgaben der EUStA – Rolle im System europäischer Strafverfolgung' in H-H Herrnfeld and R Esser (eds), *Europäische Staatsanwaltschaft. Handbuch* (Nomos 2022) mn 88.

As the EPPO is constantly developing, the number of EDPs needed varies. According to Recital 45 of the EPPO Regulation, the total number of EDPs in a Member State may therefore be modified with the approval of the ECP, subject to the limits of the annual budget line of the EPPO. The latter is of importance as the remuneration of the EDPs – and other staff – is borne by the EPPO pursuant to Article 91(4) of the EPPO Regulation. If the caseload rises over time and the EPPO manages to get the budget for additional EDPs, the EPPO must – again – reach an agreement with Member States in line with Article 13(2) of the EPPO Regulation on the additional number of EDPs. An agreement can only be reached if the EPPO can substantiate that additional working hours (and hence more EDPs) are needed to handle the caseload assigned to the EPPO in the Member State at hand. As any action, policy or procedure under the EPPO Regulation shall be guided by the principle of sincere cooperation (Article 5(6) EPPO Regulation), it will be difficult for Member States to reject the agreement if the EPPO backs up its request with objective reasons. However, in order to reach an agreement, the Member States' interests must also be considered. The integration of (additional) EDPs into the national authorities can be challenging for Member States as they have to provide the EDPs with both human and infrastructural resources. Office space and supporting staff have to be found. In practice, there were no substantial problems in Germany when an agreement on ten additional EDPs was reached. In total, 21 EDPs are currently working in Germany.

As a first intermediate result, Article 13(2) of the EPPO Regulation enables the appropriate respect of the EDPs' independence within the hybrid structure of the EPPO. The organisation and the number of EDPs in a Member State is subject to an agreement with the respective Member State (Article 13(2) EPPO Regulation – especially in connection with Article 5(6) EPPO Regulation), which allows for a sufficient consideration of the EPPO's interest in comprehensive investigations within their competencies while at the same time leaving sufficient room for the Member States' interests as regards integrating the EDPs into the national system.

2.2 Selection procedure

Another important step is the selection of the EDPs. According to Article 17(1) of the EPPO Regulation, the College shall appoint the EDPs nominated by the Member States upon a proposal by the ECP. Again, the provision

mirrors the hybrid structure of the EPPO, being connected both to the Member States (nomination process) and to the EU (proposal and nomination of the EDP). Focusing on a Member State's perspective, the national nomination process is of interest here.

The nomination process is a challenging task for the Member States. The candidates have to be active members of the public prosecution service or judiciary of the respective Member State. Their independence shall be beyond doubt and they shall possess the necessary qualifications and relevant practical experience of their national system (Article 17(2) EPPO Regulation). In other words, the Member States must – at least temporarily – let go of their best national prosecutors and judges who furthermore are experienced in a field where good prosecutors and judges are generally hard to find. For countries like Germany – currently with 21 EDPs – this is hard to cope with; especially as Member States have to maintain each EDP's rights to social security, pension and insurance coverage while losing them as purely national prosecutors at least for a couple of years to the EPPO. It can of course be argued that the EDPs take on investigations which then no longer have to be conducted by the national prosecution offices. In this sense, the personnel transferred to the EPPO is no longer needed in the national prosecution offices. However, due to the possibilities offered by the EPPO Regulation, the EPPO's concentration on specific cases committed to the disadvantage of the EU's financial interests and the synergies created thereby, the crux of the matter is that the EPPO most likely is in a position to uncover more cases than would have been possible at the national level. While this is on the one hand encouraging and the desired goal of the EPPO, it has to be admitted that the growing caseload leads to a greater need for EDPs, which then have to be provided by the Member States.

In this regard, the main burden lies on the German *Bundesländer* which lose national prosecutors in their function of being purely national prosecutors to the extent that they provide EDPs. Without wanting to judge this, one could say that the Member States are thus paying a price for the success of the EPPO. It is not entirely inconceivable that this situation might in future reduce the willingness to agree to higher numbers of EDPs; especially as Member States will have to provide not only the EDPs but also sufficient equipment and support staff. From a Member State's perspective, a certain reluctance to an increase in EDPs is therefore understandable and it would obviously be good if this issue would also be considered by the EPPO when requesting more EDPs, support staff and equipment.

It must be said that so far, no conflicts have occurred between Germany and the EPPO in this regard. Germany is, of course, bound by the EPPO Regulation and is always open to follow justified requests of the EPPO. At the same time, there is a sense of trust that in return the aforementioned difficulties of the Member States are taken seriously.

Independently of this aspect, it is true that the nomination procedure exercised by the Member States is as such not set out in the EPPO Regulation. It has been criticised that the EPPO Regulation does therefore not guarantee that the nomination process is carried out in an efficient and transparent manner and without political interference.[6] However, this criticism is put into perspective given that the Member States have to respect applicable Union and national law when carrying out the nomination procedure. In addition, the nomination procedure is guided by the principle of sincere cooperation (Article 5(6) EPPO Regulation) meaning that, for example, the refusal to nominate EDPs, even though there are suitable candidates in place, is unlawful. Furthermore, the college may reject a person who has been nominated if this person does not fulfil the criteria (Article 17(1) EPPO Regulation). Overall, certain control mechanisms are therefore in place to appropriately balance the effects of the hybrid structure and the necessity to take both interests (of the EPPO and of the Member States) into consideration. While it is in the interest of the EPPO to gain competent EDPs, it is in the interest of Member States to conduct the nomination processes in accordance with their national system. As a result, there does not seem to be any need to amend the selection procedure outlined in the EPPO Regulation.

2.3 The status of the EDPs

The status of the EDPs is very closely linked to the independence of the EDPs. The status provides information on the position and relationship between the office a person holds and the institution they work for. The status is determined on the one hand by the EPPO Regulation and the EU law deriving therefrom and on the other hand by national legislation which also derives from the EPPO Regulation in accordance with Article 13(1) of the EPPO Regulation.

6 D Ceccarelli, 'Status of the EPPO: an EU Judicial Actor' (2024) *eucrim* 58, 61.

2.3.1 The EU framework

According to Article 13(1) of the EPPO Regulation, the EDPs act on behalf of the EPPO in their respective Member State and have the same powers as national prosecutors in respect of investigations, prosecutions and bringing cases to judgment (see also Recital 33 EPPO Regulation). At the same time, EDPs shall – from the time of their appointment as EDP until dismissal – be active members of the public prosecution service or judiciary of the respective Member States which nominated them and their independence shall be beyond doubt (Article 17(2) EPPO Regulation). Against this background, the status of the EDPs has been described as wearing a 'double hat', meaning that EDPs work on behalf of the EPPO (one hat) while having the same powers as national prosecutors (other hat). The expression 'double hat' might be useful as a catchphrase to describe the situation. It is nevertheless important to understand that EDPs always and exclusively work for the EPPO, be it on the basis of the EPPO Regulation or be it on the basis of their respective national law – the latter, however, derived from the EPPO Regulation.[7] In fact, the EDPs wear just one European hat but have several instruments authorising them to act under this hat (EPPO Regulation and EU law or national law derived from the EPPO Regulation). The same applies if, in accordance with Article 13(3) of the EPPO Regulation, the prosecutor is partly working as an EDP and partly working as a national prosecutor. As soon as this person takes up their position as an (part-time) EDP, they are exclusively working for the EPPO under the European hat.

In the framework of Chapter IX (Financial and staff Provisions), the EPPO Regulation reflects this situation in Article 96. According to Article 96(1) of the EPPO Regulation, the Union's Staff Regulations of Officials (EUSR) and CEOS shall apply to the ECP, the European Prosecutors (EPs) and the EDPs.[8] Pursuant to Article 96(6) sentence 1 of the EPPO Regulation, the EDPs shall be engaged as Special Advisors in accordance with Articles 5, 123 and 124 of the CEOS. The chosen status allows the EDPs to serve the EPPO while maintaining their position as a national prosecutor who is fully integrated in the national prosecution service.[9]

7 C Burchard, 'Article 8' in Herrnfeld, Brodowski and Burchard (eds) (n 3) mn 21 ff.
8 Herrnfeld (n 3) mn 3.
9 H-H Herrnfeld, '§ 4 Aufgaben, Grundprinzipien, Struktur, interne Verfahrensregelungen' in Herrnfeld and Esser (eds) (n 5) mn 20; Herrnfeld and Reiser (n 3) 253 f.

For Germany, this principle is reflected in § 142b *Gerichtsverfassungsgesetz* (Courts Constitution Act – GVG) which states that – within EPPO cases – the official duties of the public prosecution office shall be discharged by public prosecutors who at the same time have been appointed as EDPs for the Federal Republic of Germany. As a result, the *Strafprozessordnung* (German Code of Criminal Procedure – StPO), the GVG and other legal provisions apply subsidiarily with regard to investigations of the EDPs in Germany.[10]

According to Article 5 of the CEOS, Special Advisor means a person who, by reason of their special qualifications and notwithstanding gainful employment in some other capacity, is engaged to assist one of the institutions of the Union either regularly or for a specified period and who is paid from the total appropriations for the purpose under the section of the budget relating to the institution which they serve. It follows from this and from Article 91(4) of the EPPO Regulation that the remuneration of the EDPs is paid by the EPPO. Article 123(1) sentence1 of the CEOS specifies that the remuneration of Special Advisors shall be determined by direct agreement between the advisor concerned and the authority – i.e. the EPPO in the case at hand. The content of the contract will be determined by the EPPO Regulation and by the Decision on the rules on the conditions of employment of the EDPs adopted by the College on the proposal of the European Chief Prosecutor (Article 114 (c) EPPO Regulation). The latest College Decision is College Decision 015/2025 of 12 February 2025[11] (CD 15/2025). As regards the amount of renumeration, Article 96(6) sentence 3 of the EPPO Regulation contains one precondition. It shall be ensured that the total renumeration of an EDP is not lower than what it would be if that prosecutor would only have remained a national prosecutor. The details are laid down in Article 16 ff CD 15/2025. According to Article 16(1)(a) of CD 15/2025, the EDPs are entitled to a basic monthly remuneration which corresponds to the basic monthly salary of an Official function group AD, grade 9, step 1, which according to Article 66 of the EUSR is 7,185.01 €. This basic monthly remuneration shall increase by 6 % for each next level of the scale. Every three years, EDPs shall advance to the next level. They shall be engaged on a scale comprising eight levels (Article 14(1) and (2)

10 Herrnfeld and Reiser (n 3) 255.

11 Decision 015/2025 of the College of the European Public Prosecutor's Office of 12 February 2025 on the Conditions of Employment of the European Delegated Prosecutors, and Replacing and Repealing Decisions 001/2020, 013/2020, 017/2021, 013/2021, 098/2021, 007/2023 and 058/2024 of the College of the EPPO.

CD 15/2025). A top-up amount can be granted in accordance with Article 18 CD 15/2025 in case the total net remuneration of an EDP is lower than what it would be if that prosecutor would have remained a national prosecutor.

Regarding social security, pension and insurance coverage, Article 96(6) sentence 4 of the EPPO Regulation states that it shall be ensured that adequate arrangements are in place so that the rights of EDPs under the national scheme are maintained. The reason for this provision is that Special Advisors are not entitled to the Union's social security system. Title V, Chapter 2 and 3 of the EUSR does not apply to Special Advisors. The wording of Article 96(6) sentence 4 of the EPPO Regulation leaves it open whether the aforementioned financial obligation affects only the Member States or if the EPPO has to reimburse the Member States in this regard.[12] In practice, a reimbursement does not take place.

According to Article 123(1) sentences 2 and 3 of the CEOS, the contract of a Special Advisor shall be for a term not exceeding two years. It shall be renewable. This contradicts Article 17(1) sentence 3 of the EPPO Regulation which stipulates that the EDPs shall be appointed for a renewable term of five years. Article 7(4) CD 15/2025 addresses this issue. The contracts of the EDPs shall be successively extended as necessary to allow the EDPs to complete their five-year term provided for in Article 17(1) of the EPPO Regulation. This is an elegant solution, as it respects the specifications of Article 123 of the CEOS with its limitation to two years. It also has the advantage that the EDPs can rely on the regular five-year term, meaning that the successive extension must be granted as long as there is no reason for dismissal under the EPPO Regulation. For example, it would not be possible to refuse an extension up to five years on grounds of budgetary constraints.

Article 124 of the CEOS refers to several provisions of the EUSR (General Provision: Articles 1c, 1d; Rights and Obligations of Officials: Articles 11, 11a, 12, 12a, 16(1), 17, 17a, 19, 22, 22a, 22b, 23, 25(2); Appeals: Articles 90 and 91 EUSR) which shall apply by analogy.

12 Herrnfeld (n 3) mn 20.

2.3.2 The national German framework

In Germany, the assignment of national prosecutors to the EPPO takes place on the basis of the *Verwaltungsvereinbarung über die Entsendung von Staatsanwältinnen und Staatsanwälten aus Anlass ihrer Tätigkeit als Delegierte Europäische Staatsanwälte für die Europäische Staatsanwaltschaft* (Administrative Agreement on the Assignment of Prosecutors for their Activities as Delegated European Prosecutors for the European Public Prosecutor's Office -VwVereinbEntsendEUStA). According to § 2(4) VwVereinbEntsendEUStA, the national prosecutor can be assigned (*zugewiesen*) to the EPPO to perform the function of an EDP in Germany. The legal basis for this assignment is to be found in § 20 *Beamtenstatusgesetz* (Civil Service Status Act – BeamtStG) which applies to the officials of the German *Bundesländer* and in § 29 *Bundesbeamtengesetz* (Federal Civil Service Act – BBG) which applies to federal officials. Germany has 21 EDPs – 20 EDPs are officials of the German *Bundesländer* and one EDP is a federal official. The choice of § 20 BeamtStG and § 29 BBG as a legal basis makes sense as this is the only national legal construction which allows for an assignment (*Zuweisung*) of national German prosecutors to international institutions such as the EU and the EPPO. A secondment (*Abordnung*) is not applicable in this context.[13]

According to § 20(3) BeamtStG and § 29(3) BBG, the legal status of the official remains unaffected. This means that the prosecutor remains a national prosecutor in line with Article 17(2) of the EPPO Regulation. They remain in a relationship of public service and loyalty (*Treueverhältnis*).[14] Their rights and obligations from their national civil service status do not change.[15] In consequence, the national authority must continue to take care of the national prosecutor. § 45 BeamtStG applies meaning that the national authority remains responsible for social security, pension and insurance

13 Deutscher Bundestag, 'Gesetzentwurf der Bundesregierung. Entwurf eines Gesetzes zur Regelung des Statusrechts der Beamtinnen und Beamten in den Ländern (Beamtenstatusgesetz – BeamtStG)' (21.01.2007) *BT-Drucksache 16/4027* 26 f; Deutscher Bundestag, 'Gesetzentwurf der Bundesregierung. Entwurf eines Gesetzes zur Neuordnung und Modernisierung des Bundesdienstrechts (Dienstrechtsneuordnungsgesetz – DNeuG)' (12.11.2007) *BT-Drucksache 16/7076* 108.

14 M Thomsen, '§ 20 BeamtStG ' in R Brinktrine and K Schollendorf (eds), *Beamtenrecht Bund. Kommentar* (CH Beck 2021) mn 18.

15 KJ Grigoleit, '§ 29 BBG' in U Battis (ed), *Bundesbeamtengesetz. Kommentar* (CH Beck 2022) mn 4.

coverage. The national authority also remains responsible for renumeration.[16] However, the EPPO Regulation takes a different approach in this regard as renumeration has to be paid by the EPPO according to Articles 91(4) and 96(6) of the EPPO Regulation in conjunction with Article 5 of the CEOS. This is in line with Article 5(3) of the EPPO Regulation stating that the EPPO Regulation prevails if a matter is governed by both national legislation and the EPPO Regulation.

Furthermore, the general working conditions are subject to the responsibility of the national authorities, as pointed out by Article 96(6) of the EPPO Regulation. Correspondingly, Article 23(2) CD 15/2025 states that the working hours shall be determined based on the regime applicable to national prosecutors in the Member State of the respective EDP. A similar provision is to be found in Article 24(1) CD 15/2025 where the EDP's rights relating to annual leave are in principle those governed by the respective national rules and regulations, unless otherwise provided in the CD 15/2025.

2.3.3 Status and independence

After having taken stock of the current status of the EDPs according to the EPPO Regulation and the German national provisions, the question arises as to what influence the interweaving of EDPs into both the European system and the national system has on their independence. A potential problem was clearly anticipated when the EPPO Regulation was negotiated. For this reason, the question of the independence of EDPs is addressed several times in the EPPO Regulation. According to Article 96(6) sentence 2 of the EPPO Regulation, the competent national authorities shall facilitate the exercise of the functions of EDPs under the EPPO Regulation and refrain from any action or policy that may adversely affect their career or status in the national prosecution system. Article 96(7) of the EPPO Regulation adds that EDPs shall not, in the exercise of their investigation and prosecution powers, receive any orders, guidelines or instructions. Article 6(1) of the EPPO Regulation repeats in its last sentence that the Member States shall respect the independence of the EPPO and shall not seek to influence it in the exercise of its tasks. And even Article 96(6) Sentence 1 of the EPPO

16 S Trautmann, '§ 6 Zusammenarbeit der nationalen Behörden' in Herrnfeld and Esser (eds) (n 5) mn 32; Thomsen (n 14) mn 22.

Regulation in conjunction with Article 124 of the CEOS in conjunction with Articles 11 and 11(a) of the EUSR emphasises the obligation that Special Agents be independent.[17] According to Article 11 of the EUSR, an official shall carry out their duties and conduct themself solely with the interests of the Union in mind. They shall neither seek nor take instructions from any government, authority, organisation or person outside their institution. Article 11(a) of the EUSR adds that officials shall not, in the performance of their duties, deal with a matter in which, directly or indirectly, they have any personal interest such as to impair their independence. Against this background, one cannot help but believe that a specific concern emerged during the negotiations, which found its expression in the outlined provisions. It can indeed be challenging to remain entirely independent while staying attached to the national authority. The position of an EDP requires, therefore, a firm personality. In the words of Article 17(2) sentence 2 of the EPPO Regulation, the independence of an EDP shall be beyond doubt. This is a good approach as real independence always has its root in the attitude of the person concerned. Nevertheless, there are several points at which the independence of an EDP might be influenced.

2.3.3.1 Obligation of loyalty (Treuepflicht)

As a starting point, the EDPs are in fact connected to the EPPO and to their respective Member State. Even though they only wear one European hat, the EPPO Regulation envisages that EDPs remain active members of the public prosecution service of their respective Member State (Article 17(2) EPPO Regulation). This hybrid structure inevitably produces links to the national authority which can be described as the inner loyalty of the EDP. This aspect should not be underestimated. EDPs are socialised in their national authority, and this shapes their identification in terms of (legal) attitude and morality in combination with a sense of belonging. Also, law-wise German EDPs continue to have an obligation of trust towards their national home authority in accordance with the applicable provisions for the assignment of national prosecutors to the EPPO. Pursuant to § 20(3) BeamtStG and § 29(3) BBG, an assigned national prosecutor remains in a relationship of public service and loyalty as mentioned earlier. This

17 More negatively Ceccarelli (n 6) 61: "In particular, SRs [Staff Regulations – note from the author] cannot guarantee that the prosecutors of the EPPO enjoy institutional safeguards protecting their position from external interferences or undue influence".

circumstance might at first glance seem contradictory to the notion of independence stemming from the EPPO Regulation since this independence mentioned in the EPPO Regulation is related to the task of the EPPO and not to the national authority.

Upon closer inspection, however, there is no such contradiction between the EPPO Regulation and national law. Article 96(6) sentence 1 of the EPPO Regulation in conjunction with Article 124 of the CEOS in conjunction with Article 11 of the EUSR clearly states that officials shall carry out their duties and conduct themselves solely with the interests of the Union – and not with the interests of the national authority – in mind. Despite the fact that § 20(3) BeamtStG and § 29(3) BBG oblige an assigned national official to remain loyal to their national authority, this loyalty due to the assignment does not differ from the loyalty Member States are obliged to show to the EPPO. According to Article 4(3) of the Treaty on European Union (TEU), the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. This principle is also reflected in Article 5(6) of the EPPO Regulation, according to which any action, policy or procedure under the EPPO Regulation shall be guided by the principle of sincere cooperation. The national obligation of loyalty therefore includes the obligation for an EDP to act independently and loyally in the interests of the EPPO and hence in the sense of the EPPO Regulation. Assignment pursuant to § 20(3) BeamtStG and § 29(3) BBG is accordingly characterised as an official task under the national civil service.[18] The legal institution of assignment even makes it possible to use disciplinary law to ensure the proper fulfillment of duties in the assignment relationship.[19] As a result, the EDP's independence and loyalty towards the EPPO is identical to the independence and loyalty towards the national authority as long as the national prosecutor is acting as an EDP on behalf of the EPPO. From a legal point of view, conflicts do not arise.

And even if this view is not shared and a conflict is assumed, the notion of independence and the notion of obligation to trust and loyalty as far as the latter is connected to independence would prevail over the obligation of loyalty towards a national authority as set out by § 20(3) BeamtStG and § 29(3) BBG. According to Article 5(3) of the EPPO Regulation, national law shall only apply to the extent that a matter is not regulated by the EPPO Regulation, and where a matter is governed by both national and

18 Thomsen (n 14) mn 20.
19 BT-Drs. 16/4027 (n 13) 26.

the EPPO Regulation, the latter shall prevail. The question of independence is regulated by the EPPO Regulation. To the extent that independence is inextricably linked to loyalty and fidelity, the EPPO Regulation therefore provides a preferentially applicable regulation in this respect.

2.3.3.2 Duration of service as an EDP

According to Article 17(1) sentence 3 of the EPPO Regulation, EDPs are appointed for a renewable term of five years. The EPPO Regulation does not limit the number of such renewals.[20] The details of the renewal are subject to Articles 8, 9 and 10 CD 15/2025. According to these provisions, the EDP has to consent to the extension of their term. In addition, the performance of the EDP has to be taken into consideration and the renewal must be in line with the agreement between the ECP and the competent national authority of the Member State according to Article 13(2) of the EPPO Regulation. For instance, a reduction of the number of EDPs of the respective Member State could lead to the denial of a further term.

From the perspective of the Member States, the question arises as to whether the prolongation of the term also depends on the consent of the Member State. The EPPO Regulation simply says that the term of an EDP is renewable without expressly stating whether the consent of the Member State is necessary or not. The question is debatable. For the sake of an EDP's independence, it could on the one hand be argued that the decision on the term's renewal falls under the exclusive competence of the EPPO.[21] Otherwise, an EDP would have to fear being recalled by their national authority after their term of five years expired and this fear could make an EDP dependent upon their national authority. On the other hand, it could be argued that if the nomination of an EDP falls within the responsibility of a Member State under Article 17(1) of the EPPO Regulation, it is reasonable to expect that the renewal of an EDP be accompanied by a confirming act of the Member State. In addition, from the national German perspective, assignments under § 20 BeamtStG and § 29 BBG are a temporary arrangement and must not be permanent. Against this background, assignments must, according to German national law, be limited in time, but *can* be

20 Ceccarelli (n 6) 61.
21 Ceccarelli (n 6) 61.

extended.[22] The national decision on an extension depends on the national authority having an official interest or on Germany having a public interest.[23] Germany's public interest can easily be affirmed as Germany is obliged to assign a sufficient number of EDPs to the EPPO. It might nevertheless be in the interest of a specific national prosecution office that an EDP return to their duty as a purely national prosecutor or judge, for instance due to a lack of national personnel in a specific prosecution office or court. In such cases, however, a new national prosecutor would have to be nominated; in the end, this is probably a rather theoretical scenario.

The VwVereinbEntsendEUStA does not address the renewal of the term of EDPs. The question of consent might nevertheless come up soon as the first term of the EDPs expires in 2026. This discussion might then need to be continued in the unlikely event that problems occur in practice.

2.3.3.3 Career or status in the national prosecution system

According to Article 96(6) sentence 2 of the EPPO Regulation, the competent national authorities refrain from any action or policy that may adversely affect the career or status of EDPs in the national prosecution system. In consequence, Member States have to make sure that EDPs do not face any disadvantages when they return to their national authority.[24] It remains to be seen what this actually means. In any case, the position they return to cannot be lower than the one the EDP held immediately before they were assigned to the EPPO. It also means that the time the national prosecutor has served as an EDP must be taken into consideration for their national career. This period of time might for instance be considered as an additional qualification which can – depending on the case at hand – qualify for the appointment of the national prosecutor to a higher rank after their return from the EPPO.

Another question is whether Article 96(6) sentence 2 of the EPPO Regulation also grants a right for the EDP to remain integrated within the national promotion system while working as an EDP career-wise. Injustices could arise if a national colleague who stayed within the respective national authority is promoted to the next national rank while this is not the case for the EDP as they (temporarily and/or partly) left the national authority. It

22 Thomsen (n 14) mn 5.
23 Thomsen (n 14) mn 8 ff.
24 Herrnfeld (n 3) mn 17.

should not be forgotten that a national promotion is linked to a higher national renumeration as a basis for the amount of pension. As the pension is to be paid by the EDP's Member State, the question of national promotion can be relevant in this regard. To the extent that an appraisal is required for the national promotion, this will have to be obtained in the form of an assessment contribution from the EP who is supervising the investigations and prosecutions for which the EDP is responsible in accordance with Article 12(1) of the EPPO Regulation. This contribution feeds into the national appraisal and here again, an effect on the independence of the EDP cannot entirely be excluded.

2.3.3.4 EDPs as temporary agents as a possible solution

Daring to think outside the box – which was clearly the task of the working session at Villa Vigoni – one consideration could be to change the status of the EDP from "Special Advisor" to "Temporary Agent" as suggested by the EPPO during the discussions. This would mean that EDPs were provided with the same status as granted to the ECP and the EPs according to Article 96(1) of the EPPO Regulation in conjunction with Article 2(a) of the CEOS. The legal basis of the Temporary Agent is to be found in Title II Article 8 ff of the CEOS and in Articles 11 to 26a of the EUSR in conjunction with Article 11(1) of the CEOS. EDPs would among other things benefit from Chapter 5 (Remuneration and expenses) and Chapter 6 (Social security benefits), including insurance coverage and pension. As a result, the Member States would no longer be obliged to take care of these costs and Article 96(6) sentence 4 of the EPPO Regulation would be obsolete. This construction would more clearly separate the EDPs from their national authority. It would defuse the issue of appraisal and promotion within the national authority during the service as an EDP.

Furthermore, the EPPO proposed that the time of the EDP's return to the national authority does not depend on the Member State. *If* an EDP wants to return, they shall have the right to return to their national agency at the end of their service. By the time of return, the period of the EDP's absence would – according to the EPPO – have to be taken into consideration by the national authority in a manner that does not pose any career disadvantages. The EDP has the right to return to the same or a higher position than the one they occupied at the time of their appointment to the EPPO. Member States must further ensure that the period of service

at the EPPO is recognised, for the purpose of career advancements and promotions, as equivalent to seniority as a member of the national prosecution or judiciary. In addition, the EPPO suggests opening up the possibility for EDPs to be promoted on EU level according to Articles 44 and 45 of the EUSR.

Picking up on the proposal of the EPPO as described above, EDPs are doubtless more independent as they are to a larger extent detached from the national authority. For Germany, the legal basis for granting EDPs the status of Temporary Agent could – at first glance – be found in the Federal Ordinance on Special Leave (*Verordnung über den Sonderurlaub für Bundesbeamtinnen und Bundesbeamte sowie für Richterinnen und Richter des Bundes* – SUrlV) or in the respective legal framework of the *Bundesländer*. The guidelines on the granting of special leave for civil servants and judges in Hamburg (*Richtlinien über die Bewilligung von Sonderurlaub für Beamtinnen und Beamte sowie Richterinnen und Richter* – HmbSUrlR) serves as an example here. According to No. 1 HmbSUrlR, approval of special leave requires the absence of any official interest to the contrary. Special leave is in the official interest if it promotes the fulfilment of the duties of the national authority concerned (No 2(2) HmbSUrlR). Pursuant to No 11(1)(a) HmbSUrlR, special leave without pay may be granted in order to take up a position in the public service of an intergovernmental or supranational institution. The approval of special leave may be revoked if the civil servant's absence would jeopardise the proper performance of official national duties (No 16(2) HmbSUrlR).

The aim of completely detaching the EDPs from the national authority by granting them the right to return to the national authority whenever they want does not seem very balanced. From the Member State's perspective, there is either the possibility of entirely detaching the national prosecutor from the national authority with the consequence that a return is no longer possible – or at least not possible under the conditions set out by the EPPO (Option 1) or that there is the possibility of granting the right to return – for instance in accordance with the HmbSUrlR – with the consequence that they are not entirely detached (Option 2).

Option 1 might make it difficult to fulfill the requirement of Article 17(2) of the EPPO Regulation because an EDP would no longer be an active member of the national public prosecution service if they are entirely detached from their national authority. In this case, it might be difficult to grant them the same powers as national prosecutors as set out in Article 13(1) of the EPPO Regulation. It could be argued that the EDP is neverthe-

less competent to investigate in their respective Member State because their legal basis is the EPPO Regulation and the applicability of national law as derived from the EPPO Regulation. However, at least politically if not also with regard to German constitutional law, problems may occur if an EDP – no longer being an active member of the national public prosecution service – undertakes or requests investigation measures in Germany.

Also, in Option 2, the question arises as to whether an EDP with the status of a Temporary Agent can still be an active member of the national prosecution service. This does not seem to be given when the national prosecutor is on special leave. At least, Option 2 includes the possibility of the EDP returning to be a national prosecutor. However, the national understanding is that a return is not dependent on the decision of the EDP alone, because No 16(2) HmbSurlR allows for revocation – as probably do the other German national laws on special leave on the federal and *Land* level. In addition, it can hardly be expected that the national authorities can easily reintegrate the national prosecutors again. Their former post might have been replaced with a new colleague. Also, higher ranked positions to which an EDP might feel entitled might not be available. Such positions can hardly be kept open for a possible return of an EDP.

As a preliminary result, any proposal to amend the EPPO Regulation with the aim of providing EDPs with more independence should be balanced and take both interests (of the EPPO and of the Member States) into consideration as appropriate.

2.3.4 Conclusion

Due to the hybrid structure of the EPPO, EDPs are in several respects pulled in two different directions: An EDP acts on behalf of the EPPO while having the same powers as national prosecutors in their respective Member States. An EDP – while being part of the EPPO – even stays an active member of the public prosecution service of the respective Member State. Their legal basis is the EPPO Regulation and the national law derived from the EPPO Regulation. As a consequence, EDPs and their status remain interwoven with their national authority and do not completely separate from it. This combination is due to the concept of the EPPO which is in itself rooted both in the EU *and* in the Member States. It was – and still is – not wanted to establish the EPPO as a completely autonomous EU body: The EPPO does not work on the basis of autonomous EU procedural law. It does not indict before EU courts and sentences are not executed in

EU prisons. The seeds for gradually dissolving this concept in the future have been laid by the mere existence of the EPPO, but so far, no further progress has yet been made. As long as this is the case, the other side of this coin is the embedding of EDPs in their national prosecution office and the downside of this is inevitably a possible risk to independence. The EPPO Regulation tries to balance this risk in an appropriate way by providing safeguards such as in Article 96(6) sentences 2 and 6 EPPO Regulation. In summary, the current well-balanced concept follows the basic decision chosen by the Treaty of Lisbon for the EPPO. On this basis, a compelling need for a change of the status of the EDP – to alleviate the symptoms of the hybrid structure – can currently not be identified. *If*, however, changes regarding the status of the EDPs are nevertheless discussed during the revision of the EPPO Regulation, the interests of the Member States have to be taken into consideration appropriately.

2.4 The support staff

According to Article 96(6) sentences 2, 3 and 6 of the EPPO Regulation, the competent national authorities facilitate the exercise of the functions of EDPs. In particular, the competent national authorities provide the EDPs with the resources and equipment necessary to exercise their functions under the EPPO Regulation and ensure that they are fully integrated into their national prosecution services. The general working conditions and work environment of the EDPs shall fall under the responsibility of the competent national judicial authorities. Recital 113 EPPO Regulation clarifies that the costs of an EDP's office and secretarial support should be covered by the Member State. The interesting question is what does 'necessary' resources and equipment mean. The answer to this question might be different depending on who is asked – the EPPO or the Member State. One interpretation is that the Member States are simply obliged to provide EDPs with the resources and equipment they need to fulfill their task.[25] This is true in a sense. However, the idea behind the concept of Article 96(6) EPPO Regulation is that the Member States must bear only those costs which they would have to carry anyway if the EPPO did not exist and if they had to continue investigating those crimes for which the

25 Trautmann (n 16) mn 34.

EPPO is now responsible. It follows from this idea that the Member States do have to provide resources to the EDPs in exactly the same manner as they do for their own national prosecutors. As a result, the Member States have to provide the EDPs with suitable office space and equipment as well as administrative support personnel – comparable to the national prosecution services.[26] The EDP's working environment must be adjusted to the working environment of the national prosecution service to create and utilise as many synergy effects as possible. The Member States organise the EDPs like an additional national prosecution office without – of course – affecting the independence of the EDPs in a negative way.[27]

The five EDP's offices of Germany (Munich, Berlin, Frankfurt, Hamburg, Cologne) were organised in this manner. These centers are not supposed to differ from the comparable prosecution offices in the five cities. This means for instance that if two national prosecutors are supposed to share one office room in the German *Bundesland* X where an EDP office is established, then this is also enough for the EDPs working at this office. The Member States – or more precisely the German *Bundesländer* – are not obliged to provide anything extra, be it in terms of office space, computer equipment, pencils or supporting staff for the EDPs. This might lead to the situation that the equipment of the EDPs within Germany might differ from one another as the general national equipment might differ from one German *Bundesland* to another. For instance, German *Bundesland* X might provide better and more computers to the national prosecutors than German *Bundesland* Y. This is, however, also the situation regarding the equipment of the EDPs in different Member States.[28]

On the aforementioned basis, the German *Bundesländer* have to provide the EDPs with equipment but also with registry clerks (*Geschäftsstellenbeamten*) to the same extent as they do for their respective national prosecutors. § 153 GVG applies,[29] which states that a court registry staffed with the necessary number of registry clerks shall be established at each prosecution office. Furthermore, the national authorities must ensure that

26 Herrnfeld (n 3) mn 16; Trautmann (n 16) mn 35.
27 Trautmann (n 16) mn 36.
28 Herrnfeld (n 3) mn 16.
29 Deutscher Bundestag, 'Gesetzentwurf der Bundesregierung. Entwurf eines Gesetzes zur Durchführung der Verordnung (EU) 2017/1939 des Rates vom 12. Oktober 2017 zur Durchführung einer Verstärkten Zusammenarbeit zur Errichtung der Europäischen Staatsanwaltschaft und zur Änderung weiterer Vorschriften' (16.03.2020) *BT-Drucksache 19/17963* 42.

EDPs can benefit from judicial administration officers (*Rechtspfleger*) and experts (*Sachverständige*) in the same way as this is possible for national prosecutors. According to Article 28(1) of the EPPO Regulation, the EDP handling a case may undertake investigation measures and other measures on their own or instruct the competent authorities in their Member State. Those authorities shall, in accordance with national law, ensure that all instructions are followed and undertake the measures assigned to them. On this basis, judicial administration officers and experts should be available for EDPs.

It goes without saying that neither the national prosecutors nor the EDPs are always satisfied with their amount of equipment and supporting staff. Regardless of whether these complaints are justified or not, it should be pointed out that more staff inevitably leads to higher costs and that even if authorities are willing to and capable of spending this money, it is not always easy to find properly qualified supporting staff. But as long as EDPs are treated as equal compared to their national colleagues, the independence of the EDPs is not really at risk. Even actual shortfalls of support staff for EDPs impact the work of the EDPs less in terms of affecting their independence and more in terms of affecting their efficiency. In this regard, the Member States have of course to make sure that EDPs can at least work as efficiently as their national colleagues. Deficiencies would have to be addressed and figured out between the EPPO and the Member States as foreseen by the EPPO Regulation.

To guarantee a sufficient amount of support staff, the EPPO proposed at Villa Vigoni that staff of the EPPO should not only include the supporting personnel at the *central* level as currently stated in Article 2(4) of the EPPO Regulation but should also include personnel at the *decentralised* level with the aim of better supporting the EDPs in the day-to-day activities of performing the tasks of the EPPO. The support staff for the EDPs shall on proposal of the EPPO be recruited according to the rules and regulations applicable to officials and other servants of the European Union. That would be the EUSR and the CEOS. According to Article 1 of the CEOS, such servants are temporary staff, contract staff, local staff, Special Advisors and so on. The supporting staff of the EDPs would in this case work for the EPPO and would be paid by the EPPO. At first glance, this might be feasible for experts such as auditors which could be hired by the EPPO and work for the EDPs on a decentralised level at the cost of the EPPO. However, the question remains as to who is paying for the equipment and office space in this regard. This concept is slightly harder to imagine when

it comes to registry clerks and judicial administration officers as far as they are German officials who also have to be active members of the German national prosecution office. A less complicated approach might be that the EPPO simply reimburses the Member States for the costs of the supporting staff for the EDPs.

Indeed, the Ministers of Justice of the German *Bundesländer* decided at the Conference of Justice Ministers in Hannover on 5 and 6 June 2024 to call on the Federal Government to work towards a further development of the EPPO Regulation in a sense that would stipulate a greater contribution by the EPPO to the costs of the office and secretariat of the EDPs and that would enable the EPPO to employ its own experts and judicial administration officers at a decentralised level.[30] This decision seems to go in the direction of the EPPO proposal. Of course, the concrete implementation would need to be discussed in more depth, particularly with regard to the recruitment of judicial administrative officers and registry clerks by the EPPO as mentioned above.

From the perspective of the federal level of Germany, this concept produces an additional problem: To the extent that the German *Bundesländer* are exempted from paying the costs for the supporting staff, the Federal Government of Germany would be burdened with higher costs. Remunerations and other personnel costs borne by the EPPO are charged to the EU budget, approximately 24 % of which comes from the federal level of Germany. The financial burden would not only refer to the costs for the support staff provided for German EDPs but also for the EDPs of other participating Member States. This would be an enormous financial burden for the German federal budget, not to mention the fact that Germany is currently facing a general budgetary reservation.

The EPPO naturally emphasises the fact that – thanks to the EPPO – a lot of the damage caused by offenders was able to be repaid due to the freezing and confiscation of assets derived from the crimes in question. And indeed, according to the annual report of the EPPO in 2024, freezing orders

30 Number 5 of the decision under 'TOP II.23 – Europäische Staatsanwaltschaft – Finanzierung und Kostenbeteiligung der EU sicherstellen, Frühjahrskonferenz der Justizminister und Justizministerinnen' (Hannover, 5 and 6 June 2024), at https://www.mj.niedersachsen.de/JuMiKo/fruehjahrskonferenz/fruhjahrskonferenz-228116.html.

of € 2.42 billion were granted by competent authorities in EPPO cases.[31] However, this does not automatically mean that the EPPO is gaining money which can be reinvested in the EPPO. The purpose of EPPO investigations is primarily to bring offenders to justice. Freezing and confiscation orders do not primarily serve as financial support for the investigating unit, especially as the assets derived are subject to Article 38 of the EPPO Regulation. Under this provision, assets or proceeds shall be disposed of in accordance with applicable national law. However, this disposition shall not negatively affect the rights of the Union or other victims to be compensated for damage that they have incurred.

For the time being, it is only possible to point out the actual or potential problems associated with an increase in support staff. No solution is yet available and the issue is up for discussion. In fact, neither Member States nor the EU will be easily convinced to pay for additional personnel. Interesting debates can be expected.

3 Summary

This contribution has attempted to point out where the difficulties surrounding the institutional independence of EDPs are to be seen in terms of selection, status and the number of EDPs as well as in terms of support staff; both from the perspective of a participating Member State. It showed that the provisions on the EDPs – above all Articles 13(1), 17(2) and 96(6) of the EPPO Regulation – are dedicated to the hybrid structure of the EPPO. Embedding the EDPs into the national authorities comes with the price that a complete detachment of the EDPs from their national authority is neither possible nor intended. In consequence, a certain impact on the independence of EDPs cannot be entirely ruled out. However, the EPPO Regulation sets reasonable boundaries which ensure that the independence of the EDPs is respected in a balanced manner. Ideas to further strengthen the role of the EDPs will have to be discussed on the basis of the evaluation report expected in June 2026 and on the basis of concrete proposals from the Commission following the evaluation report. At the same time, it cannot be denied that discussions are already ongoing. From a Member State

31 European Public Prosecutor's Office, 'Annual Report 2024' (Luxembourg, 2025), at https://www.eppo.europa.eu/sites/default/files/2025-03/EPPO%20Annual%20Report%202024_0.pdf, 12.

perspective, it remains important that the next steps will be taken jointly and in the interest of the EPPO as well as in the interest of Member States. As successful as the EPPO is in its work, it must not be forgotten that there are also valid interests on the side of the Member States. For the time being, the EPPO is and remains a hybrid structure *sui generis*. As long as this is the case, we will have to continue to find viable solutions together in a trusting dialogue.

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The EPPO's institutional responsibility: the annual report as a strategic cornerstone in the EU's anti-fraud architecture

Marius Bulancea

The European Public Prosecutor's Office (EPPO) is the cornerstone of the EU's anti-fraud architecture. Operating as an independent body with a mandate to investigate and prosecute crimes affecting the EU budget, its unique position necessitates a robust framework of institutional responsibility, ensuring transparency and accountability. The Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (EPPO Regulation), particularly Article 7 and the broader provisions regarding accountability, establishes this framework, demanding a delicate balance between operational independence and democratic oversight.

This paper will delve into the institutional responsibilities of the EPPO, examining its relationship with the European Parliament, the Council, the Commission, and national parliaments, as mandated by the Regulation. Crucially, it will propose that the Annual Report is not merely used as the basis for a retrospective performance assessment, but as a strategic tool for shaping the EU's entire anti-fraud architecture.

1 Introduction

The EPPO's mandate, to combat crimes against the EU's financial interests, demands independence specific to a judicial body. This independence is crucial for ensuring impartiality and effectiveness in investigations and prosecutions. However, judicial independence also necessitates robust mechanisms of accountability. The EPPO Regulation addresses this by establishing a multi-layered accountability structure.

The first thing to note is that the EPPO is not an EU agency, and that its activity, consisting of criminal investigations and prosecutions, cannot be subject to review by political or administrative bodies. However, this does not eliminate the need for institutional oversight without infringing on its prosecutorial independence. The key aspects of this oversight include

democratic accountability, which enhances public trust, budgetary, policy and legislative coherence, and interinstitutional coordination.

However, institutional accountability extends beyond mere assessment of performance. The EPPO's findings, shared mainly via its Annual Report, should be leveraged as a strategic instrument for shaping EU anti-fraud policy. This report, published in all official EU languages, provides a comprehensive overview of the EPPO's activities, but also, perhaps more importantly, a unique, data-driven insight into the evolving landscape of crimes affecting the EU budget.

This data, including trends in fraud patterns, emerging criminal methodologies, and vulnerabilities in EU funding mechanisms, can inform legislative initiatives, budgetary decisions, and the development of targeted anti-fraud strategies.

2 Balancing efficiency and legality: the dilemma of prosecutorial performance metrics

The idea that the quality of justice could be measured by performance indicators is not self-evident. Evaluating the performance of a prosecutor's office presents a complex and often contentious challenge, and the difficulty only increases when it comes to evaluating the performance of the EPPO, the first transnational prosecution office in history. Unlike private or even many public sector entities, where output can be measured in clear, quantifiable units, prosecutorial work is embedded within a broader legal and institutional context that resists simplistic metrics. The difficulty lies in defining what 'success' looks like in a judicial institution whose primary mandate is to uphold the rule of law, rather than to maximise efficiency or productivity in a commercial sense.

While key performance indicators (KPIs) are commonly used across sectors, their application to prosecutorial functions raises important conceptual and normative concerns. Is an efficient prosecutor's office one that brings more indictments? One that secures more convictions? One that works within a constrained budget? Or perhaps one that proactively investigates and seizes criminal proceeds? Each of these indicators captures a facet of performance, yet none provides a comprehensive or definitive measure of prosecutorial effectiveness. A high number of indictments may suggest prosecutorial activism but could also reflect overcharging or weak evidentiary thresholds. Conversely, a low acquittal rate might suggest strong

case selection, but it might equally indicate risk aversion and under-prosecution of complex or high-level cases.

When applied to the EPPO, these difficulties are amplified. As a newly established, transnational prosecutorial body with jurisdiction across 24 EU Member States, the EPPO operates in a diverse legal and procedural landscape. Uniform metrics may not fully account for these contextual differences, and performance indicators must be sensitive to the EPPO's mandate: to investigate and prosecute crimes affecting the EU's financial interests, and to do so with fairness, legality, and procedural integrity. For instance, measuring the volume of assets seized or the number of investigations initiated may provide insight into the EPPO's activity levels, but they do not necessarily correlate with long-term impact on financial crime deterrence or legal accountability.

Ultimately, the question of who is best placed to assess prosecutorial efficiency is as important as how it should be measured. Internal evaluations by the EPPO risk self-referential assessments while external oversight—whether by judicial bodies or European institutions—may lack operational nuance. An ideal framework would balance quantitative data with qualitative evaluations, including case complexity, cross-border cooperation, and respect for fundamental rights, ensuring that performance assessment remains aligned with the EPPO's legal and ethical obligations.

3 Accountability to the European Parliament: democratic oversight and strategic input

The European Parliament, as the directly elected representative of EU citizens, holds a central role in ensuring the EPPO's institutional accountability. Article 7(2) of the EPPO Regulation mandates the European Chief Prosecutor (ECP) to appear annually before the Parliament to provide an account of the EPPO's general activities. This public hearing serves as a vital tool for democratic oversight, allowing Members of the European Parliament (MEPs) to scrutinise the EPPO's activity, raise concerns, and demand explanations.

In this context, the Parliament can and should use the EPPO's Annual Report to identify systemic weaknesses and propose amendments to existing regulations, fostering a proactive and preventative approach to combating financial crime.

The annual hearing should thus be seen as an opportunity for a strategic dialogue, where beyond reporting on past activities, the ECP should engage with MEPs on emerging threats and potential policy responses. This interaction should be framed as a collaborative effort to strengthen the EU's anti-fraud architecture, leveraging the EPPO's operational experience and the Parliament's legislative powers.

This said, the Parliament's role in monitoring and reviewing the EPPO extends beyond the Annual Report hearings to a more continuous and structured approach, with the possibility to focus on aspects of the EPPO's performance such as:

- Operational effectiveness: The extent to which the EPPO successfully prosecutes fraud and corruption cases affecting the EU budget.
- Cooperation: How the EPPO cooperates with national prosecutorial authorities and other EU bodies like the European Anti-Fraud Office (Office Européen De Lutte Anti-Fraude, OLAF) or agencies like Europol and Eurojust.
- Resource allocation and budgetary efficiency: Whether the EPPO's financial and human resources are sufficient and properly managed.
- Legal challenges: Identifying regulatory or procedural barriers that may hinder the EPPO's effectiveness.

To fulfil its oversight function, the European Parliament has several tools at its disposal:

1. Different types of hearings
2. Budgetary control and financial scrutiny
   - o The Parliament, particularly through its Budgetary Control Committee (CONT), reviews how the EPPO spends EU funds and can withhold EPPO's discharge.
   - o The Parliament, as budgetary authority, also plays a crucial role in defining the material conditions for the EPPO's activity.
3. Reports and investigations
   - o Any parliamentary committee can initiate reports or investigations on relevant topics with relevance to the EPPO's activity.
4. Legislative interventions
   - o The Parliament can propose amendments to close legal loopholes identified by the EPPO but, more generally, on any policy aspect with potential impact on the EPPO.
5. Conditionality mechanisms

- The Parliament can propose linking the disbursement of EU funds to Member States to an efficient and independent operation of the EPPO.

4 Accountability to the Council: intergovernmental cooperation and strategic alignment

The Council, representing the Member States, holds an equally important role in ensuring the EPPO's institutional accountability and disposes of substantially the same set of tools as the Parliament to do so, including policy recommendations and strategic guidance, particularly through the Justice and Home Affairs Council.

Also in this context, the EPPO's Annual Report should serve as a tool for aligning national anti-fraud strategies, while the annual hearing should be the occasion for a strategic dialogue on national anti-fraud strategies.

By providing a comprehensive overview in each Member State and creating a perspective to compare the data, the report can inform national risk assessments and facilitate the sharing of best practices, assist in identifying vulnerabilities in their national systems and developing targeted measures.

5 Accountability to the Commission: strategic integration

The Commission, as the executive body of the EU with the power of legislative initiative and assisting the EU budgetary authority, also plays a role in ensuring the EPPO's accountability, particularly in terms of policy alignment, and institutional coordination. Article 7(1) of the EPPO Regulation mandates the EPPO to transmit its Annual Report to the Commission, facilitating relevant information dissemination for further development and adjustment of relevant EU policies.

Making use of its right of initiative, the Commission's oversight role of the EPPO includes:

- Policy integration: Incorporating EPPO findings into EU legislative and policy initiatives related to anti-fraud measures.
- Interinstitutional cooperation: Facilitating coordination between the EPPO and other numerous stakeholders to ensure a unified approach to the antifraud activities.
- Legal and regulatory review: Proposing legislative amendments where necessary.

Moreover, given the Commission's assisting function in the budgetary process, the EPPO submits financial reports to the Commission, which incorporates EPPO's requests into its EU's budget proposals.

Given its executive role, the importance of the EPPO's Annual Report for the Commission is arguably even higher, as it should be integrated into its broader anti-fraud strategy. The Commission should use the data and insights provided in the report to inform its policy recommendations, legislative proposals, and budgetary decisions.

The Commission can also use the Annual Report to identify potential vulnerabilities in EU funding mechanisms and propose targeted measures to mitigate fraud risks. This proactive approach will strengthen the EU's financial resilience and protect its resources from criminal exploitation.

6 Accountability to national parliaments: bridging the gap and strategic collaboration

The EPPO's mandate has a direct impact on national legal systems and national parliaments can be essential stakeholders in the EPPO's accountability framework. Article 7(2) of the EPPO Regulation acknowledges this by mandating the ECP to appear before national parliaments at their request, however a more structured approach can be envisaged.

National legislatures have a crucial role in incorporating the EPPO's findings into domestic anti-fraud policies, ensuring compliance by overseeing national authorities' cooperation with the EPPO, for example by monitoring how national prosecutors handle EPPO referrals or address issues of conflicts of competence.

Strengthening national parliamentary engagement with the EPPO can ensure that EPPO findings translate into actionable domestic reforms, enhancing fraud prevention and prosecution of relevant fraud.

7 The Annual Report: a key contribution

The EPPO's Annual Reports have a deliberate design that goes beyond simple performance reporting and are structured to provide a comprehensive and insightful overview of the EU's fraud landscape, facilitating strategic decision-making at both EU and national levels.

Here is how the report's structure supports this strategic role and provides stakeholders with the tools necessary to evaluate the effectiveness of current anti-fraud strategies:

Executive summary and key findings which provide a concise overview of the EPPO's key achievements and the most significant trends in financial crime, allowing stakeholders to quickly grasp the essential information and identify critical areas for attention.

Operational activities and case analysis, including typologies of fraud, investigative strategies, and outcomes which can be highly relevant for developing targeted preventive measures and enhancing investigative techniques. Comprehensive statistical data provides a quantitative overview of the EPPO's activities and the evolving fraud landscape, allowing data driven policy creation.

Cooperation and coordination with national authorities, EU actors (Eurojust, Europol, OLAF), and international partners, emphasising the need for a unified and coordinated approach and indicating potential gaps in cooperation.

8 *Illustrative example: VAT fraud related to cross-border e-commerce, and how the report can be used to create policy*

Cross-border e-commerce has significantly expanded, offering consumers access to a global marketplace. However, this growth has also facilitated complex Value Added Tax (VAT) fraud schemes, notably Missing Trader Intra-Community (MTIC) fraud, which exploits the EU's VAT system. The EPPO has identified such fraud as a major threat to the EU's financial interests.

Consider a scenario where a criminal organisation establishes fictitious companies across multiple EU Member States. These entities engage in trading high-value goods, such as electronics, across borders. In a MTIC fraud scheme, one company imports goods VAT-free and sells them domestically, charging VAT to the buyer. Instead of remitting the collected VAT to the tax authorities, the company disappears, resulting in significant revenue losses for Member States. Subsequent companies in the chain may continue trading the goods, eventually exporting them back to the original country, often reclaiming VAT that was never paid, thus amplifying the fraud.

The EPPO's 2024 Annual Report highlights the severity of VAT fraud:

- By the end of 2024, the EPPO had 2,666 active investigations, with an estimated damage of €24.8 billion. Notably, VAT fraud accounted for over 53 % of this amount, approximately €13.15 billion.
- Case Example: In November 2024, the EPPO uncovered a complex VAT fraud scheme, known as Investigation Admiral 2.0, involving the trade of popular electronic goods and resulting in an estimated VAT loss of €297 million. This was linked to the initial Admiral investigation conducted in 2022, which was believed to be the largest VAT fraud ever investigated in the EU, with a damage estimated at €2.9 billion.

9 Policy implications and actions

The EPPO's findings can serve as a critical resource for EU institutions to formulate and implement policies aimed at combating VAT fraud, such as:

1. Enhanced cooperation
   - o Advocate for stronger collaboration between Member States' tax authorities and the EPPO to facilitate the exchange of information and joint investigations into cross-border VAT fraud.
   - o Develop regulatory proposals to enhance cooperation mechanisms, such as implementing mandatory e-invoicing or expanding the scope of the Central Electronic System of Payments (CESOP), which collects data on cross-border payments to detect fraudulent activities.
2. Harmonised VAT rules
   - o Initiate discussions on standardising VAT rates and rules across Member States to minimise opportunities for fraudsters to exploit differences.
     - o Grant VAT Information Exchange System (VIES) status based on trustworthiness and existence of financial guarantees, limit VAT exemptions and access to special VAT regimes to companies with proven and ongoing economic activity.
3. Digital platform accountability
   - o Propose legislation imposing stricter obligations on online platforms to monitor and report sellers' VAT compliance, ensuring that digital marketplaces are not inadvertently facilitating fraud.

- o Expand 'deemed supplier' rules to include payment service providers and shift the obligation to collect and remit VAT to marketplaces and payment service providers in all relevant cases.

oIntroduce licensing and (better) oversight for platforms and payment providers to ensure proper monitoring and enforcement and create automatic mechanisms to share transaction data with tax authorities.

4. Capacity building
   - o Increase the ability of EU actors such as Eurofisc, the Anti-Money Laundering Authority (AMLA), and the Customs Authority to consistently detect VAT fraud, creating dedicated units and using data driven approaches.
   - o Propose budgetary adjustments to ensure that the EPPO has the necessary financial and human resources to tackle complex cross-border VAT fraud schemes.
   - o Advocate for the development of specialised training programs for tax authorities and law enforcement agencies to detect and combat VAT fraud effectively.

By leveraging these findings, EU institutions can enact targeted policies and regulations to strengthen the VAT system, enhance cooperation among Member States, and allocate resources effectively to combat fraud. This collaborative approach is essential to safeguard the EU's financial interests and ensure a fair and transparent market environment.

10 Conclusion

The EPPO's institutional accountability extends beyond mere performance evaluation. Its responsibility encompasses a strategic role in shaping the EU's anti-fraud architecture. By using the Annual Report proactively as a data-driven instrument, the EU can leverage the EPPO's operational experience to strengthen its defences against financial crime. This approach would not only enhance the EPPO's effectiveness, but also contribute to a more resilient and secure financial environment for the European Union.

Judicial review in view of the EPPO's independence

Dominik Brodowski

One of the foundational principles of the European Public Prosecutor's Office (EPPO) is its independence. At the same time, the EPPO is not above the law but bound by EU and national law, and the lawfulness of the EPPO's actions and omissions is subject to judicial review. This creates a productive tension (1) which is at the centre of this brief contribution. It sheds light on the extent to which the EPPO is independent *from* judicial review (2), but also how the EPPO's independence may be strengthened *through* judicial review (3). It concludes with suggestions to strengthen both the EPPO's independence and its binding to the law as interpreted by (European) courts (4).

1 The EPPO's independence and its structural boundaries

Article 6(1) 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) sets out, in bold terms, that '[t]he EPPO shall be independent', and that no-one within the EPPO 'shall […] 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'. The wording of this provision therefore puts a strong emphasis on the EPPO's 'negative external independence'[1] and guards against external interference with the EPPO performing its task of 'investigating, prosecuting and bringing to judgment the perpetrators of,

1 C Burchard, 'Article 33' in H-H Herrnfeld, D Brodowski and C Burchard (eds), *European Public Prosecutor's Office: Article-by-Article Commentary* (Nomos 2021) mn 1; F Giuffrida, 'The European Public Prosecutor's Office: King without kingdom?' (CEPS Research Report 2017/03, February 2017), at https://www.ceps.eu/ceps-publications/european-public-prosecutors-office-king-without-kingdom/ 16; A Martínez Santos, 'The Status of Independence of the European Public Prosecutor's Office and Its Guarantees' in L Bachmaier Winter (ed), *The European Public Prosecutor's Office. The Challenges Ahead* (Springer 2018) 1, 6.

and accomplices to' PIF offences (Article 4 EPPO Regulation). In view of this external independence which, for instance, the German Prosecution service lacks, it is consistent that European Delegated Prosecutors (EDPs) are empowered by Article 33(2) of the EPPO Regulation to issue European Arrest Warrants themselves.[2]

This independence is constrained, however, by a number of further foundational principles, so that the EPPO is no free-floating prosecution authority:

Already in the same Article 6 of the EPPO Regulation, its independence is put into systematic context to its accountability in paragraph 2: 'The EPPO shall be accountable to the European Parliament, to the Council and to the Commission for its general activities'. Given that this accountability is limited to the 'general activities' and that these bodies cannot lawfully interfere with specific investigations and prosecutions, this creates a limited political accountability in the sense that these institutions have only limited, specific powers to consider if they are dissatisfied with the EPPO; in other words, their abilities to keep the EPPO on a leash are limited. Among them are budgetary powers (cf Article 92 EPPO Regulation) and the power, as co-legislative institutions of the EU, to modify the EPPO Regulation; in principle, they could even consider shutting down the EPPO. The European Parliament and the Council furthermore may take the current practices of the EPPO into account when appointing a European Chief Prosecutor (ECP) in the future (Article 14(1) EPPO Regulation), the Council also when selecting and appointing new European Prosecutors (EPs) (Article 16(3) EPPO Regulation). As a last resort, these institutions may also launch proceedings at the European Court of Justice if they consider the ECP or an EP 'is no longer able to perform his/her duties, or that he/she is guilty of serious misconduct' (Article 14(5) EPPO Regulation, Article 16(5) EPPO Regulation). Moreover, accountability – accompanied by reporting obligations and the duty to respond to potentially critical inquiries (Article 7 EPPO Regulation) – ideally fosters an internal culture of high performance expectations within the EPPO.

Another boundary to its independence follows from the EPPO's dependence on the allocation of its budget in accordance with Article 92 of the

2 See ECJ, Joined Cases C-508/18 and C-82/19 PPU *OG and PI*, ECLI:EU:C:2019:456 on the requirement of an independent prosecution authority to issue a European Arrest Warrant. On the tensions this creates between German EDPs and German national prosecutors, see Burchard (n 1) mn 16.

EPPO Regulation, on national resources (for instance support staff),[3] and on its interaction with national criminal justice systems where the EPPO, for instance, does not have the last word in conflicts on the extent of the EPPO's competence (Article 25(6) EPPO Regulation).

The most important boundary to the EPPO's independence, however, follows from the fundamental rule that the EPPO and all of its activities are bound by the rule of law. Its activities are bound by primary law, in particular the Charter of Fundamental Rights (CFR, cf Article 5(1) EPPO Regulation), secondary law (in particular the EPPO Regulation) and, on the basis of Article 5(3) of the EPPO Regulation, also national law. As law oftentimes is ambiguous, the concept of law requires that its authoritative interpretation as well as an evaluation of its correct application are, in principle, matters for courts – and not prosecution authorities – to decide. This raises the question of the EPPO's independence in relation to judicial review, specifically towards the question to what extent the EPPO is independent from judicial review (see Section 2 below). At the same time, however, judicial review may also be helpful to strengthen the EPPO's independence in view of the aforementioned boundaries, especially vis-à-vis the Member States (see Section 3 below).

2 The EPPO's independence from judicial review

The surprisingly low number of EPPO-related cases that have reached the Court of Justice (ECJ) so far should not be mistaken for a lack of judicial oversight of the EPPO's investigations and prosecutions. Instead, Article 42 of the EPPO Regulation makes it very clear that these activities of the EPPO, at least as long as they 'produce legal effects vis-à-vis third parties',[4] are subject to judicial review by default. Setting aside decisions to dismiss

3 On this matter, see the contributions by L Salazar and G Bezjak in this volume; see furthermore Tipik and Spark Legal and Policy Consulting, 'Extension of the 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/280163/Final%20Report%20on%20Extension%20Findings%20DG%20JUST%20Study%20on%20the%20EPPO_en.pdf 18–22.

4 On the interpretation of this phrase, see H-H Herrnfeld, 'Article 42' in Herrnfeld, Brodowski and Burchard (eds) (n 1) mn 17–20.

a case, which are subject to direct review by the Court of Justice (Article 42(3) EPPO Regulation), national courts are primarily tasked with this review. However, the ECJ is to be involved by means of a preliminary ruling proceeding in accordance with Article 267 of the Treaty on the Functioning of the European Union (TFEU) and Article 42(2) of the EPPO Regulation.[5]

2.1 No judicial review according to national law?

A limitation to judicial review stems, however, from the condition embedded into Article 42(1) of the EPPO Regulation that it depends on 'the requirements and procedures laid down by national law' – making the existence of a legal remedy in national law a *conditio sine qua non* for judicial review of the EPPO's activities. That limitation is itself constrained by Article 47 CFR, which is fully applicable in EPPO proceedings, and which prescribes that the 'right to an effective remedy' must be maintained. The combination of Article 47 CFR and Article 42(1) of the EPPO Regulation therefore obliges Member States to provide for procedures in national law for judicial review of procedural acts of the EPPO that produce legal effects vis-à-vis third parties.[6] Notably, this has the potential to create tensions with national criminal justice systems, as they may impose limitations that affect the practical availability of judicial review:

In Germany, for instance, there is practically no judicial review of decisions to launch a criminal investigation, or against its continuation.[7] Many justify this by pointing to alternative means of checks and balances,[8] including the right of the ministries of justice to intervene in unlawful investigations – yet this exact '"external" power to issue instructions'[9] pro-

5 On the discussions surrounding this hybrid model, see Herrnfeld (n 4) mn 7–9.

6 Herrnfeld (n 4) mn 31–33.

7 But see M Jahn, 'Die Ermittlungsverfahrensanfechungs-„Klage". Der Rechtsschutz des Beschuldigten gegen die Einleitung und Fortführung eines Ermittlungsverfahrens nach geltendem Strafprozessrecht' in W Beulke and E Müller (eds), *Festschrift zu Ehren des Strafrechtsausschusses der Bundesrechtsanwaltskammer* (Luchterhand 2006), 335; U Eisenberg and S Conen, '§ 152 II StPO: Legalitätsprinzip im gerichtsfreien Raum?' (1998) *Neue Juristische Wochenschrift* 2241 on how the existing legal framework may be interpreted to provide for such judicial review.

8 Cf S Peters, '§ 152' in H Schneider (ed), *Münchener Kommentar zur Strafprozessordnung. Band 2* (2nd edn, CH Beck 2024) mn 54.

9 ECJ, Joined Cases C-508/18 and C-82/19 PPU *OG and PI*, ECLI:EU:C:2019:456, para 73–77.

hibits German prosecution authorities, according to the jurisprudence of the European Court of Justice, from issuing European Arrest Warrants themselves, as it leads to a significant lack of independence. And as there is no comparable 'external power' in relation to the EPPO due to its independence, the system of checks and balances vis-à-vis a prosecution authority needs to be readjusted with the EPPO's independence in mind. In particular, it raises doubts whether the exclusion of decisions by the EPPO to initiate investigations (Article 26 EPPO Regulation) or to exercise its right of evocation (Article 27 EPPO Regulation) from any judicial review is justified,[10] considering that the mere presence of criminal investigations is like a sword of Damocles hanging over the accused. To summarise, the independence of the EPPO – compared to the national German prosecution service – requires compensation in the form of increased judicial oversight of its activities, but national law may not yet be sufficiently prepared to provide it.

A similar problem, relating to the Spanish criminal justice system, has recently reached the European Court of Justice: In its judgment of 8 April 2025, it clarified the interpretation of Article 42(1) of the EPPO Regulation by stating 'that a decision by which, in the course of an investigation, the European Delegated Prosecutor handling the case concerned summons witnesses to appear is subject to review by the competent national court, pursuant to Article 42(1), where that decision is intended to produce binding legal effects capable of affecting the interests of the persons challenging that decision, such as the persons who are the subject of that investigation, by bringing about a distinct change in their legal situation.'[11] In 'light of the principle of the procedural autonomy of the Member States',[12] the Court of Justice refrained from requiring a direct, immediate judicial review, but stated that an incidental review by the trial court may suffice for the matter at stake (witness summoning), provided that it may 'verify that the evidence on which the act concerned is based has not been obtained or used in breach of the rights and freedoms guaranteed to the person concerned by EU law'.[13] While this adds to the confusion whether and to what extent

10 H-H Herrnfeld, 'Article 26' in Herrnfeld, Brodowski and Burchard (eds) (n 1) mn 37; Herrnfeld (n 4) mn 35 seeks to justify the exclusion of judicial review with the preliminary nature of such decisions.

11 ECJ, Case C-292/23 *I.R.O. and F.J.L.R.*, ECLI:EU:C:2025:255, para 91.

12 ECJ, Case C-292/23 *I.R.O. and F.J.L.R.*, ECLI:EU:C:2025:255, para 81.

13 ECJ, Case C-292/23 *I.R.O. and F.J.L.R.*, ECLI:EU:C:2025:255, para 80.

EU law requires the exclusion or disregard of evidence obtained illegally,[14] it clearly countered the idea that the EPPO, in view of its independence, may be subject to less judicial review than Spanish investigative judges whenever a Spanish EDP handles the case.

2.2 No judicial review of Permanent Chamber decisions?

Another issue currently before the court, not finally decided yet, relates to the judicial review of decisions taken by the EPPO's Permanent Chambers (PCs). The PC had decided, on the basis of Article 10(3)(a) of the EPPO Regulation, to bring a case to judgment; the applicant now seeks judicial review, by the Court of Justice of the European Union, of this decision by a body of the European Union. In line with the EPPO's argumentation, the General Court held this to be inadmissible in view of the *sui generis* mechanism of judicial review set out by Article 42 of the EPPO Regulation,[15] with the national trial court now tasked with assessing the case and, if appropriate, initiating a preliminary ruling procedure to clarify questions arising under EU law.

On the one hand, PC decisions may be considered to be a preliminary, purely internal part of the decision-making process within the EPPO,[16] which do not create any external effects on their own and are therefore not subject to judicial review. On the other hand, it is the PC which takes the final decision on this matter, with the EDP merely implementing this decision thereafter. Functionally, the PC provides for a strong internal review of

14 See, on the one hand, ECJ, Case C-670/22 *M.N.*, ECLI:EU:C:2024:372, para 128 ('it is, in principle, for national law alone to determine the rules relating to the admissibility and assessment in criminal proceedings of information and evidence obtained in a manner contrary to EU law'), and, on the other hand, ECJ, Case C-603/22 *M.S. and Others*, ECLI:EU:C:2024:685, para 176 ('to draw all the inferences from [a breach of EU law], in particular as regards the probative value of the evidence obtained in those circumstances').

15 ECJ, Case C-328/24 P *Mincu Pătrașcu Brâncuși v European Public Prosecutor's Office* (pending); see previously General Court, Case T-385/23 *Mincu Pătrașcu Brâncuși v European Public Prosecutor's Office*, ECLI:EU:T:2024:143.

16 In this direction, see the contributions by A Venegoni and by L Wörner in this volume.

the legality of the EPPO's activities.[17] This provides for some compensation for the additional intrusiveness of transnational EPPO proceedings.[18] What is decisive here is, though, that the *addition* of an internal quality assurance mechanism in the form of the PC deciding instead of the EDP should not entail unwarranted implications, here in the form of opening the door to (additional) external review by the Court of Justice.

3 The EPPO's independence through judicial review

Let us now shift perspectives and explore how judicial review might serve to strengthen the EPPO's independence. In particular, its independence relies on abilities to initiate legal proceedings whenever its activities are unlawfully constrained.

Primarily, the EPPO Regulation – and obligations on the Member States resulting from it – depend on enforcement by the Commission as the 'guardian of the treaties', in particular by launching proceedings in accordance with Articles 258, 260 TFEU if either the laws in the Member States or the practice is contrary to the requirements set out in EU law. However, the Commission enjoys a wide margin of appreciation when deciding on whether and when to launch such proceedings,[19] and it has shown considerable reluctance to sue Member States relating to matters of criminal justice – which may stem from the persistent view that this area is closely linked to the Member States' sovereignty.[20] Therefore, to safeguard the EPPO's independence, it is crucial to assess the extent to which the EPPO may launch legal proceedings before the Court of Justice itself.

In this regard, no provision of the Treaties nor of the EPPO Regulation gives the EPPO, by itself, standing to sue Member States regarding their

17 D Brodowski, 'Strafverfolgung im Namen Europas. Die Europäische Staatsanwaltschaft als Meilenstein supranationaler Kriminalpolitik' (2022) *Goltdammer's Archiv für Strafrecht* 421, 426.

18 For a more sceptical perspective see the contribution by L Wörner in this volume.

19 Just see N Wunderlich, 'Artikel 258 AEUV' in H von der Groeben, J Schwarze and A Hatje (eds), *Europäisches Unionsrecht* (7th edn, Nomos 2015) mn 17 with several references.

20 Against this claim brought forward, for instance, by the German Federal Constitutional Court (BVerfG), judgment of 30 june 2009 – 2 BvE 2/08 and others *Lisbon Treaty* ECLI:DE:BVerfG:2009:es20090630.2bve000208 = BVerfGE 123, 267 para 253; see D Brodowski, 'Sonderstellung des Strafrechts aus der europäischen Mehrebenenperspektive' in M Bäcker and C Burchard (eds), *Strafverfassungsrecht* (Mohr Siebeck 2022) 139.

obligations under the EPPO Regulation. The EPPO is at a structural disadvantage compared to two other independent institutions and bodies of the EU, the European Central Bank (ECB) and the European Investment Bank (EIB): To protect their independence, Article 271 TFEU transfers the power to initiate infringement proceedings from the Commission to them, such as in relation to 'the fulfilment by Member States of obligations under the Statute of the European Investment Bank'. A comparable provision in relation to the EPPO would strengthen its independence vis-à-vis the Member States, but also vis-à-vis the Commission – as only actions but not omissions can be challenged in an action for annulment based on Article 263 TFEU, and Article 265 TFEU only relates to omissions to act vis-à-vis the claimant.

Furthermore, in relation to Article 263 TFEU, it is unclear to what extent the EPPO may launch actions for annulment vis-à-vis the Commission and other institutions, bodies and agencies (IBOAs) of the EU. It is clearly – and reasonably – not a privileged party under Article 263(2) TFEU, but also not listed explicitly in Article 263(3) TFEU, which grants the Court of Justice jurisdiction in relation to 'actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives'. According to Article 263(4) TFEU, any such action therefore depends on whether the contested act is either addressed to the EPPO or is 'of direct and individual concern to' it. For instance, the Court of Auditors' refusal to lift the confidentiality of an official to have them heard as a witness in an EPPO-led investigation was clearly addressed to the EPPO, allowing the EPPO to contest it before the General Court.[21] Generally, however, the requirement to identify that its legal position is *directly* and *individually concerned* puts it at a structural disadvantage compared to the partly privileged parties that may base their actions on the 'purpose of protecting their prerogatives'. Notably, some academics discuss whether the status of partly privileged parties should be extended to all EU IBOAs endowed with their own competencies to protect a proper institutional balance, as the Court of Justice did for the European Parliament[22] before it gained its privileged status in the Treaties. However, as the wording of Article 263 TFEU is very nuanced since the

21 General Court, Case T-99/25 *European Public Prosecutor's Office v Court of Auditors* (pending).

22 ECJ, Case C-70/88 *European Parliament v Council of the European Communities*, ECLI:EU:C:1991:373, para 16–27.

Lisbon Treaty, such a reading would be *contra legem*; an extension of the partly privileged status of Article 263(3) TFEU to the EPPO would require an amendment of the Treaties.[23]

The aforementioned dependence on national justice systems is furthermore deepened by the EPPO's inability to initiate preliminary ruling proceedings on its own. This is not only problematic in view of Article 25(6) TFEU and several Member States' choice to task non-judicial bodies with decisions regarding the allocation of prosecution competences – bodies which therefore lack standing to launch a preliminary ruling proceeding in accordance with Article 267 TFEU.[24] Even more concerning is the fact that very few preliminary ruling proceedings have been initiated so far. This may indicate an overconfidence of national courts in their interpretation of the EPPO Regulation, and a disregard to Article 267 TFEU, Article 42(2) of the EPPO Regulation and the prerogative of the Court of Justice to interpret Union law, including the EPPO Regulation. However, any strengthening of the EPPO's standing to refer matters to the Court of Justice would need to be balanced by a corresponding strengthening of the defence's position in a similar vein – which might structurally modify the preliminary ruling proceeding to an adversarial interlocutory appeal proceeding.

4 Suggestions to strengthen the EPPO's independence and legal review

Building on the analysis of the positive relationship between the EPPO's independence and legal review, this article concludes with several suggestions for strengthening the EPPO's legislative framework to bring both foundational principles into better concordance.

First and foremost, as also highlighted by the compliance assessment of the EPPO Regulation,[25] all Member States should implement Article 25(6) of the EPPO Regulation in light of Recital 62. This means that the national authority deciding on the attribution of competence must be able to initiate a preliminary ruling proceeding before the Court of Justice itself, or, at

23 O Dörr, 'Artikel 263 AEUV' in E Grabitz, M Hilf and M Nettesheim, *Das Recht der Europäischen Union* (85th edn, CH Beck 2025) mn 17, 19; U Ehricke, 'Artikel 263 AEUV' in R Streinz (ed), *EUV/AEUV* (3rd edn, CH Beck 2018) mn 9.

24 Tipik and Spark Legal and Policy Consulting (n 3) 55–58.

25 Tipik and Spark Legal and Policy Consulting (n 3) 79–81.

minimum, that the EPPO has the option to bring the matter to a court which may then refer the matter to the Court of Justice.[26]

Modifications to Article 42 of the EPPO Regulation would be more ambitious. These could aim at expanding the involvement of the Court of Justice in EPPO investigations and proceedings. Although this may increasingly task European courts to apply national criminal law and procedure, it would further underscore the supranational, European dimension of EPPO proceedings, and could provide the additional judicial oversight necessary in view of the EPPO's independence – in light of some national criminal justice systems relying on other forms of oversight incompatible with an independent prosecution service. Moreover, such an increased involvement of European courts in EPPO proceedings could lay the foundation for what might, in the long run, evolve into a European investigative judge[27] or a European criminal court[28].

Looking ahead to potential Treaty amendments, in view of the EPPO's specific role, two modifications could strengthen its independence and the institutional balance vis-à-vis the Member States and all EU IOBAs: The EPPO could, similar to the EIB and the ECB (Article 271 TFEU), be granted the power to initiate infringement proceedings if Member States fail to fulfil their obligations under the EPPO Regulation. Even more importantly, the EPPO should gain a partly privileged status under Article 263(3) TFEU so that it has standing in all actions for annulment insofar as they serve the 'purpose of protecting [its] prerogatives'.

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26 See also H-H Herrnfeld, 'Article 25' in Herrnfeld, Brodowski and Burchard (eds) (n 1) mn 24.

27 See, for instance, M Böse, 'Ein europäischer Ermittlungsrichter – Perspektiven des präventiven Rechtsschutzes bei Errichtung einer Europäischen Staatsanwaltschaft' (2012) *Zeitschrift für rechtswissenschaftliche Forschung* 172, and the contribution by L Wörner in this volume.

28 Comprehensively M Langbauer, *Das Strafrecht vor den Unionsgerichten. Plädoyer für ein Fachgericht für Strafrecht* (Duncker & Humblot 2015).

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