

Judicial review in view of the EPPO's independence

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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 Herrfeld, 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 Bežjak 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 instructions⁹ pro-

5 On the discussions surrounding this hybrid model, see Herrfeld (n 4) mn 7–9.

6 Herrfeld (n 4) mn 31–33.

7 But see M Jahn, ‘Die Ermittlungsverfahrensanhängungs-„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) *Goldammer'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 Parliament²² 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 Ehrlicke, '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 judge²⁷ or a European criminal court²⁸.

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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