

# The relationship of the European Public prosecutor's office and national authorities of the member states

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**THE RELATIONSHIP OF THE EUROPEAN PUBLIC  
PROSECUTOR'S OFFICE AND NATIONAL  
AUTHORITIES OF THE MEMBER STATES**

Master Thesis

Mentor: izv. prof. dr. sc. Zoran Burić

Zagreb, August 2023

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I, Paula Lekić, under full moral, material and criminal responsibility, declare that I am the sole author of this thesis and that no parts of other people's academic work were used in the work in an illegal manner (without proper citation) and that I did not use any other sources than those mentioned in the thesis.

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October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (the EPPO Regulation).

## **ABSTRACT:**

This master thesis analyses main features of the recently established European Public Prosecutor's Office and how those features impact its relationship with national authorities. The introductory part gives a historical background on adoption of the EPPO Regulation, as well as a short overview of the body's structure and competences that gives the foundation for later chapters. The text moves on to examine in detail the relationship of the EPPO and prosecutorial authorities of the Member States - their division of competences, cooperation and risks of potential national influence on the EPPO's prosecutors (European Delegated Prosecutors). The last section focuses on judicial control over the EPPO provided for by the national courts and the Court of Justice of the EU, and the issues arising from the current framework in that regard.

***Key words:** The European Public Prosecutor's Office, EPPO, judicial review, independence of prosecutors, EU criminal law, EPPO Regulation, financial interests of the European Union*

## **SAŽETAK:**

Ovaj diplomski rad analizira glavne značajke nedavno osnovanog Ureda europskog javnog tužitelja i kako te značajke utječu na njegov odnos s nacionalnim tijelima. Uvodni dio daje povijesnu pozadinu donošenja Uredbe o Uredu europskog javnog tužitelja, kao i kratak pregled strukture i nadležnosti tijela i predstavlja temelj za daljnja poglavlja. Tekst prelazi na detaljnu analizu odnosa Ureda i tijela kaznenog progona država članica – njihovu podjelu nadležnosti, suradnju te rizike od potencijalnog nacionalnog utjecaja na tužitelje Ureda (Delegirani europski tužitelji). Posljednji odjeljak usredotočuje se na sudsku kontrolu nad Uredom koju provode nacionalni sudovi i Sud pravde EU-a te pitanja koja u tom pogledu proizlaze iz trenutnog pravnog okvira.

***Ključne riječi:** Ured europskog javnog tužitelja, EPPO, sudska kontrola, neovisnost tužitelja, kazneno pravo EU, Uredba EPPO, financijski interesi Europske unije*

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## **LIST OF ACRONYMS AND ABBREVIATIONS**

**Art.:** Article

**Charter:** Charter of Fundamental Rights of the European Union

**CJEU:** Court of Justice of the European Union

**Commission:** European Commission

**EDP:** European Delegated Prosecutor

**EPPO:** European Public Prosecutor's Office

**EPPO Regulation:** Regulation implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office

**EU or Union:** European Union

**OJ:** Official Journal of the European Union

**PIF:** Protection des intérêts financiers de l'Union / Protection of the Union's financial interests

**PIF crimes:** crimes affecting the Union's financial interests

**TEU:** Treaty on European Union

**TFEU:** Treaty on the Functioning of the European Union

## 1. Introduction

The European Union's competences have been gradually increasing in many areas, but criminal law represents an especially sensitive area since it is still perceived as an essential component of the core sovereign powers of the state.<sup>1</sup> In the centre of this field is criminal procedural law which has a particularly interesting position at the intersection of two sectors that were traditionally excluded from the European Union's harmonisation competences: criminal law and procedural law.<sup>2</sup> In order to combat crimes affecting the financial interests of the European Union (Hereinafter: the EU or the Union), the newly established European Public Prosecutor's Office (Hereinafter: the EPPO) is an independent body responsible for investigating, prosecuting and bringing to judgement the perpetrators acting against such interests. In relation to these offences, the EPPO exercises the functions of a prosecutor in the competent courts of the Member States and works alongside national criminal prosecution authorities. This situation is definitely something novel thus many questions arise from their mutual relationship. It is not the first body of EU criminal law, as there are already existing EU criminal justice agencies (Eurojust, OLAF, Europol) that have emerged as a response to organised and transnational crime.<sup>3</sup> Yet, the EPPO is unique as it is the first body of the EU with direct, coercive powers vis-à-vis individuals in the field of criminal law, including punitive ones.<sup>4</sup> This thesis is composed of six chapters. Firstly, as a certain introduction to main issues is needed, a short overview in Chapter 2 provides insight into historic and legislative development of the EPPO. The thesis moves on to Chapter 3 which addresses the general features of the EPPO - its structure and material and territorial competences. Key issues of the thesis - relationship of the EPPO with national prosecutorial and judicial authorities - will be laid out in Chapters 4 and 5. Chapter 4 discusses the complex relationship between the EPPO and national prosecutorial authorities - i.e. their division of competence, implementation of this new body in national structures, questions on the EPPO's independence in that context and the

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<sup>1</sup> Araceli Turmo, 'Towards European Criminal Procedural Law: An Introduction', *European Papers - A Journal on Law and Integration*, 2020, no. 5 (2021): 1247-1250., p. 1247

<sup>2</sup> Ibid.

<sup>3</sup> Christopher Harding and Jacob Öberg, 'The Journey of EU Criminal Law on the Ship of Fools – What Are the Implications for Supranational Governance of EU Criminal Justice Agencies?', *Maastricht Journal of European and Comparative Law* 28, no. 2 (April 2021): 192–211, p. 205.

<sup>4</sup> Valsamis Mitsilegas, 'European Prosecution between Cooperation and Integration: The European Public Prosecutor's Office and the Rule of Law', *Maastricht Journal of European and Comparative Law* 28, no. 2 (April 2021): 245–64, p. 248.



manner in which investigations and prosecutions are carried out. Chapter 5 focuses on judicial control over the EPPO by national courts and the Court of Justice of the European Union (Hereinafter: the CJEU), as well as main issues arising from the existing framework. In the conclusion, the main findings and ideas of the analysis are summarised.

## **2. Establishment of the European Public Prosecutor's Office**

### **2.1. History and Legislative Framework**

Initial idea for the establishment of EPPO was presented in 1997 in the *Corpus Juris*<sup>5</sup> - an academic report delivered by an expert group on cooperation in the area of European Criminal Law. The study suggested a scheme of measures to counter the non-enforcement of rules on offences against the EU's budget, including a common set of procedural rules for the investigation and prosecution and the establishment of a European Public Prosecutor.<sup>6</sup>

The protection of the financial interests entered the primary Community law for the first time with the Treaty on European Union in Maastricht in 1992.<sup>7</sup> Article 209a of Maastricht Treaty obliged Member States to “take the same measures to counter fraud affecting the financial interests of the Community as they take to counter fraud affecting their own financial interests” and “coordinate their action aimed at protecting the financial interests of the Community.”<sup>8</sup> This was a confirmation of the principle of assimilation established by the CJEU in the case *Commission v. Greece*.<sup>9</sup>

Finally, we come to the Treaty of Lisbon, or Treaty on the Functioning of the European Union<sup>10</sup> (Hereinafter: the TFEU) to be precise, which contains a direct legal basis for the creation of the EPPO in Art. 86. This article gave the possibility to the Council of EU or the Member States to establish EPPO in order to combat crimes affecting the financial interests of the Union.<sup>11</sup> This Treaty holds great importance as it gave the European Union unprecedented supranational

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<sup>5</sup> M. Delmas-Marty (ed.), ‘Corpus Juris: Introducing Penal Provisions for the Purpose of the Financial Interests of the European Union’ (Economica, 1997)

<sup>6</sup> Harding and Öberg, p. 207

<sup>7</sup> Lucija Sokanović, ‘Subsidy Fraud in Protection of Financial Interests of European Union - Achievements and Challenges’, *Journal of Eastern-European Criminal Law*, no. 2 (2015): 142-152., p. 144-145.

<sup>8</sup> Treaty on the European Union (‘Maastricht Treaty’), Official Journal of the European Union (Hereinafter: OJ) C 191 § (29 July 1992)

<sup>9</sup> *Commission of the European Communities v. Hellenic Republic*, Appl. no. 68/88 (CJEU, 21 September 1989), p. 24-25.

<sup>10</sup> Treaty on the Functioning of the European Union, OJ C 202 § (07 June 2016)

<sup>11</sup> Paragraph 1 authorises the Council to establish EPPO after consent of the European Parliament and by unanimous decision or, alternatively, allows for the initiative of a group of at least nine Member States to seek a Council decision, and to establish the EPPO by way of enhanced cooperation

legislative powers in the field of criminal law and criminal procedure, as well as abolished the pillar structure from Maastricht Treaty. By granting express and broad criminal jurisdiction to the supranational legal order of the EU, the period of exclusive national criminal law sovereignty had ended.<sup>12</sup> The Union's criminal policy is critical for the future development of the Area of Freedom, Security and Justice (AFSJ) which substitutes the former third pillar of police and judicial cooperation in criminal matters.<sup>13</sup>

## 2.2. The EPPO Regulation

Based on the above-mentioned Art. 86 of TFEU, the European Commission (Hereinafter: the Commission) presented the Proposal<sup>14</sup> in 2013. Rationale for the proposal was the apprehension for effective enforcement of the EU rules as the Commission believed that Member States are not honouring their above-mentioned obligations set by the Maastricht Treaty.<sup>15</sup> Same obligations were later also imposed by Art. 325 of the TFEU. The Commission's concerns were more than justified as there were 15 779 irregularities reported to the Commission in 2013, involving 1.76 billion € regarding the expenditure sectors of the EU budget.<sup>16</sup> For comparison, in 2018 that number increased to 2.5 billion €. <sup>17</sup> In addition, it

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<sup>12</sup> Zlata Đurđević, 'Lisabonski Ugovor: Prekretnica u Razvoju Kaznenog Prava u Europi', *Hrvatski ljetopis za kazneno pravo i praksu* 15, no. 2 (2008): 1077–1127., p. 1078.

<sup>13</sup> Jacob Öberg, 'Guest Editorial: EU Agencies in Transnational Criminal Enforcement: From a Coordinated Approach to an Integrated EU Criminal Justice', *Maastricht Journal of European and Comparative Law* 28, no. 2 (April 2021): 155–163., p. 156.

<sup>14</sup> European Commission, 'Proposal for a Council Regulation on the Establishment of the European Public Prosecutor's Office', COM/2013/0534 final - 2013/0255 (17 July 2013), <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A52013PC0534>, accessed 18 June 2023

<sup>15</sup> Mitsilegas, 'European Prosecution between Cooperation and Integration', p. 248.; European Commission, 'Staff Working Document. Impact Assessment Accompanying the Proposal for a Council Regulation on the Establishment of the European Public Prosecutor's Office', SWD (2013) 274 final, p. 81. - i.e. reluctance to report and/or initiate investigations and judicial proceedings <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52013SC0274>, accessed 22 June 2023

<sup>16</sup> European Commission and OLAF, 'Report from the Commission to the European Parliament and the Council, Protection of the European Union's Financial Interests — Fight against Fraud 2013 Annual Report', COM (2014) 474 final (17 July 2014), p. 8. - Between 2009 and 2013, the number of reported irregularities increased by 22%, while the related amounts increased by 48% [https://anti-fraud.ec.europa.eu/about-us/reports/annual-reports-protection-eus-financial-interests-pif-report\\_en](https://anti-fraud.ec.europa.eu/about-us/reports/annual-reports-protection-eus-financial-interests-pif-report_en), accessed 22 June 2023

<sup>17</sup> European Commission and OLAF, 'Report from the Commission to the European Parliament and the Council, 30th Annual Report on the Protection of the European Union's Financial Interests — Fight against Fraud 2018', (2018), p. 25. [https://anti-fraud.ec.europa.eu/about-us/reports/annual-reports-protection-eus-financial-interests-pif-report\\_en](https://anti-fraud.ec.europa.eu/about-us/reports/annual-reports-protection-eus-financial-interests-pif-report_en), accessed 22 June 2023

was perceived as crucial for the legitimacy of the Union that its limited financial resources are used in the best interests of EU citizens.<sup>18</sup>

The proposal followed the ideas from *Corpus Iuris* in regard to the structure and division of competence - EPPO was envisioned as a body of centralised, hierarchical structure and exclusive competence to prosecute crimes against EU's financial interests.<sup>19</sup> The proposal was met with resistance from some Member States, as it was quite an aggressive incursion on national sovereignty in a sensitive policy area, who expressed their concerns about the far-reaching implications of such an office on the functioning of national criminal justice systems.<sup>20</sup> This paradox between the will of the Member States to pursue integration, yet resist the significant transfer of decision-making powers to supranational level has been seen before<sup>21</sup> but it is quite expressed here precisely because of the sensitivity of this legal field. Nevertheless, the Commission persisted in their stance, pointing out low conviction rates and failures to recover illegally acquired funds.<sup>22</sup> In regards to the exclusive competence, the Commission explained the choice as a matter of efficiency as it would ensure a clear separation of tasks and serve to avoid parallel jurisdictions and investigations, aiming at stronger and more streamlined cooperation.<sup>23</sup> If enacted, this would have meant that national authorities would have to surrender their competence in relation to such offences.

The disagreements did not change the fact that the insufficient prosecution of offences against the EU's financial interests needed to be addressed, especially on a national level. At last, after many years of discussions and concessions, *Regulation implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office*<sup>24</sup> (Hereinafter: the EPPO

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<sup>18</sup> Harding and Öberg, p. 206.

<sup>19</sup> Jacob Öberg, 'A Federal European Prosecution Authority: From Vision to Reality?', in *The EU between Federal Union and Flexible Integration*, ed. Antonina Bakardjieva Engelbrekt et al. (Cham: Springer International Publishing, 2023), 185–214, p. 192.; Valsamis Mitsilegas, 'The Rocky Road to European Prosecution: Caught Between Co-ordination and Centralisation', in *EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe* (Hart Publishing, 2016), 83–123, p. 105.

<sup>20</sup> Harding and Öberg, p. 207-208.

<sup>21</sup> Öberg, 'EU Agencies', p. 158.

<sup>22</sup> European Commission, 'Communication from the Commission to the European Parliament, the Council and the National Parliaments on the Review of the Proposal for a Council Regulation on the Establishment of the European Public Prosecutor's Office with Regard to the Principle of Subsidiarity', COM(2013)851 (27 November 2013), p. 7. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52013DC0851>, accessed 20 June 2023

<sup>23</sup> The Council of the European Union, 'European Public Prosecutor's Office: A Constructive Approach Towards the Legal Framework', Doc.13863/13 (16 September 2013), p. 8.

<sup>24</sup> Council of the European Union, 'Regulation (EU) 2017/1939 of 12 October 2017 Implementing Enhanced Cooperation on the Establishment of the European Public Prosecutor's Office ('the EPPO')', OJ L 283/1

Regulation) was published in the Official Journal of the European Union on 31st of October 2017.

In the final version, the EPPO was created as a decentralised body with collegiate, intergovernmental structure and shared, concurrent competences.<sup>25</sup> This meant that Member States would have a stronger influence over the operations of the EPPO. It was a softened version from the proposal, in order to accommodate the concerns of Member States and ultimately enable an agreement being reached. Consequently, the changes that Member States had to make in their national system were not as significant. After a transition period, required mostly for bringing on the staff, the body became operational in June of 2021.<sup>26</sup> Since then, it has made a strong impact as it had 1117 active investigations, with estimated 14,1 billion € of total damages, and has also secured 92 indictments by the end of 2022.<sup>27</sup> The effectiveness of this body can be shown by the comparison that the EPPO has successfully seized more than 359 million € in 2022 - which represents 7 times the budget of the EPPO for that year.<sup>28</sup>

The EPPO was founded through enhanced cooperation, an instrument which allows a group of at least nine Member States to adopt rules of secondary law that binds only participating States.<sup>29</sup> Non-participating Member States are not bound by the legal acts resulting from said cooperation, but are free to join at any time.<sup>30</sup> Enhanced cooperation is a tool of *flexible (differentiated) integration* - a form of integration where legal rules do not apply to all Member States uniformly or at the same time.<sup>31</sup> Consequently, acts adopted within enhanced cooperation do not form part of the *acquis communautaire*<sup>32</sup> but are rather an example of *acquis particulier*. Currently, 22 Member States participate in enhanced cooperation on the EPPO as Denmark, Hungary, Ireland, Poland and Sweden chose not to do so.

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<sup>25</sup> Recital 13

<sup>26</sup> 'Press Release: Protecting the EU Budget: European Public Prosecutor's Office Will Start Operating on 1 June', *European Commission* (26 May 2021), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_2591](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2591), accessed 22 June 2023

<sup>27</sup> EPPO 2021 Annual Report (2022), p. 12.; EPPO 2022 Annual Report (2023), p. 12., available at: <https://www.eppo.europa.eu/en/documents>, accessed 1 August 2023

<sup>28</sup> EPPO 2022 Annual Report, p. 64.

<sup>29</sup> Art 20. of 'Consolidated Version of the Treaty on European Union' (hereinafter: the TEU), OJ C 326 § (26 October 2012); More detailed provisions on enhanced cooperation can be found in Articles 326 to 334 of the TFEU

<sup>30</sup> Art 20 (1) TEU

<sup>31</sup> Robert Böttner, 'The Instrument of Enhanced Cooperation: Pitfalls and Possibilities for Differentiated Integration', *European Papers - A Journal on Law and Integration*, 2022, no. 7 (18 February 2023): 1145-1164., p. 1146.

<sup>32</sup> Art 20 (4) TEU

### 3. Features of the European Public Prosecutor's Office

#### 3.1. Structure

The EPPO is an indivisible Union body operating as a single office on two levels - centralised level located in Luxembourg and decentralised level in participating Member States.<sup>33</sup> The Central Office includes the *European Chief Prosecutor*,<sup>34</sup> their *deputies*,<sup>35</sup> the *Administrative Director*<sup>36</sup> and one *European prosecutor* for each of the Member States that participates in the framework,<sup>37</sup> which together will form the *College*<sup>38</sup> and also perform certain functions within the *Permanent Chambers*.<sup>39</sup> Decentralised level consists of the *European Delegated Prosecutors* (Hereinafter: the EDPs) and their number varies from one state to another, with a rule of minimum of two per each Member State.<sup>40</sup>

In regards to the functions of above-mentioned bodies, in short, the central level monitors and supervises investigations and prosecutions at the national level. From all of the EPPO bodies, the most important tasks are performed by the European Delegated Prosecutors and Permanent Chambers as they have the most power to influence decisions in national proceedings.

**The European Delegated Prosecutors** are responsible for conducting investigations and criminal prosecution of cases within the jurisdiction of the EPPO<sup>41</sup> except in certain exceptional situations.<sup>42</sup> Only on this decentralised level, they have exclusive powers to make the decisions in the concrete criminal investigations and trials as they directly work with the evidence, witnesses, suspects, etc. On the other hand, the centralised level is responsible for handling administrative, strategic and organisational matters. Art. 28 (1) stipulates that EDPs may, in accordance with the Regulation and with national law, either undertake the investigation measures and other measures themselves or instruct the competent authorities in his/her Member State to do so. These authorities will mainly be the police, more on which will be explained later. The position of EDPs is specific as they are not temporary employees of the

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<sup>33</sup> Recital 21

<sup>34</sup> Art. 11 (1)

<sup>35</sup> Art. 11 (2)

<sup>36</sup> Art. 18-19

<sup>37</sup> Art. 12

<sup>38</sup> Art. 9

<sup>39</sup> Art. 10

<sup>40</sup> Art. 13

<sup>41</sup> Art. 13 (1)

<sup>42</sup> Art. 28 (4)

Union, but remain active members of the public prosecutor's office or judicial bodies in their respective Member States<sup>43</sup> and can perform a double mandate as both national and the EPPO's prosecutors.

**The Permanent Chambers** are given crucial prosecutorial powers to initiate, monitor and direct investigations, indict, dismiss a case, reopen an investigation, ensure coordination in cross-border cases, and refer a case to the national authorities.<sup>44</sup> Moreover, they have authority to reallocate, merge and split cases.<sup>45</sup> The matter of which chamber will preside over a particular case is resolved through the principle of random and automatic case allocation, ensuring an equitable distribution of cases among the chambers.<sup>46</sup> The emerging problem with these bodies is the issue of language, in other words, how will they adequately make all these important decisions if all the evidence is originally in another language.<sup>47</sup>

The EPPO has several other bodies, however, they will not be further addressed beyond their mentions as it falls outside the scope of this thesis.

The current structure of the EPPO does not correspond to the internal structure of the national prosecutor's offices in the Member States or the international prosecutor's office in the international criminal courts.<sup>48</sup> Namely, as a rule, the Prosecution's Office is a hierarchical, centralised and subordinated organisation.<sup>49</sup> This scheme was followed in the proposal, but as already mentioned, it was consequently changed. Deviations in favour of the Member States were necessary due to their fear of diminishing national sovereignty and maintaining the diversity of national criminal justice systems. The structural shift was accompanied by increased complexity, with additional layers of prosecutors being introduced between the central level and the work of the EDPs at national level.<sup>50</sup> Current complex structure

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<sup>43</sup> Art. 17 (2)

<sup>44</sup> Art. 10

<sup>45</sup> Art. 26

<sup>46</sup> Art. 19 of College of the European Public Prosecutor's Office, 'Internal Rules of Procedure of the European Public Prosecutor's Office as Adopted by Decision 3/2020 of 12 October 2020 of the College of the European Public Prosecutor's Office (EPPO) and Amended and Supplemented by Decision 85/2021 of 11 August 2021 and Decision 26/2022 of 29 June 2022 of the College of the EPPO', OJ C 181 §, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32023Q0523%2801%29>, accessed 24 June 2023

<sup>47</sup> Zlata Đurđević, 'Legislative or regulatory modifications to be introduced in participant Member States to the enhanced cooperation' (2018)

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> Mitsilegas, 'The Rocky Road', p. 104.

undermines the efficiency of the activities and unables taking swift decisions during the investigations.<sup>51</sup>

## 3.2. Material and territorial competences

### 3.2.1. Material competence

The EPPO competences are limited to criminal offences affecting the financial interests of the European Union, but what falls under that definition?

I) Material scope of the EPPO competences is defined in Art. 22 of the EPPO Regulation by referring to the *PIF Directive*<sup>52</sup> that defines which crimes are considered crimes affecting the EU budget. The Directive lists criminal offences such as subsidy fraud,<sup>53</sup> offences against Unions revenue,<sup>54</sup> money laundering,<sup>55</sup> bribery,<sup>56</sup> corruption and cross-border VAT fraud - so-called *PIF offences*. It should be pointed out that the EPPO only conducts cross-border investigations into crimes involving damages of over 10,000 € in EU funds.<sup>57</sup>

It is important to emphasise here that these crimes stem from a Directive, so implementation is needed in national systems. In other words, the EPPO must rely on criminal offences defined by criminal laws of the respective Member State of the designated European Delegated Prosecutor for a specific case. For this reason, participating Member States must provide lists with their relevant national offences as a part of their notifications from Art. 117. It should be highlighted that such a scheme can cause issues and uncertainty since national implementations are often divergent so there is a risk of incorrect transposition<sup>58</sup> but also may result in divergent criminalisation approaches.<sup>59</sup>

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<sup>51</sup> See: Valsamis Mitsilegas and Fabio Giuffrida, 'Raising the Bar? Thoughts on the Establishment of the European Public Prosecutor's Office', *CEPS Policy Insights*, No. 2017/39 (30 November 2017), p. 7

<sup>52</sup> Directive 2017/1371/EU of the European Parliament and of the Council of 5 July 2017 on the Fight against Fraud to the Union's Financial Interests by Means of Criminal Law, OJ L 198 §; PIF stands for Protection des intérêts financiers de l'Union (Protection of the Union's financial interests)

<sup>53</sup> Art. 3 (2)

<sup>54</sup> Ibid.

<sup>55</sup> Art. 4 (1)

<sup>56</sup> Art. 4 (2)

<sup>57</sup> Art. 22 (1)

<sup>58</sup> For more details see: Rosaria Sicurella, 'The EPPO's Material Scope of Competence and Non-Conformity of National Implementations', *New Journal of European Criminal Law*, 14, no. 1 (2023): 18–33.

<sup>59</sup> Mitsilegas and Giuffrida, p. 8-9.

II) Besides the competence stemming from the PIF Directive,<sup>60</sup> the EPPO is also competent for offences regarding participation in a criminal organisation as defined in the applicable national law implementing Framework Decision 2008/841/JHA,<sup>61</sup> if the focus of the criminal activity of such a criminal organisation is on the list of *PIF offences*.<sup>62</sup>

III) As for the third and most controversial element of material jurisdiction, EPPO shall also be competent for any other criminal offence that is *inextricably linked* to criminal conduct that falls within the scope of crimes stemming from the PIF Directive.<sup>63</sup> The main reasons for this extension are the implications of the *ne bis in idem* principle as well as the general need to carry out investigations in an efficient manner.<sup>64</sup> Notion of *inextricably linked crimes* has been criticised as being potentially very broad<sup>65</sup> since it leaves a lot of room for various interpretations which is detrimental to legal certainty. One of the proposed solutions to this issue, based on jurisprudence of the CJEU and Recital 54, is that two offences should be considered inextricably linked if the underlying facts are substantially identical, regardless of their legal classification, such that a decision on the merits of one would bar the prosecution and/or trial of the other.<sup>66</sup>

It should be noted that there are initiatives to extend EPPO's competences to include other "serious crimes having a cross-border dimension",<sup>67</sup> e.g. terrorism.<sup>68</sup> The motivation comes from the existing fragmented investigations and proceedings in different Member States which

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<sup>60</sup> Art. 22 (1)

<sup>61</sup> Council of the European Union, 'Council Framework Decision 2008/841/JHA of 24 October 2008 on the Fight against Organised Crime', <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32008F0841>, accessed 5 July 2023

<sup>62</sup> Art. 22 (1)

<sup>63</sup> Art. 22 (3)

<sup>64</sup> Recital 22 of Proposal for EPPO Regulation

<sup>65</sup> Öberg, 'A Federal European Prosecution Authority', p. 188.; Valsamis Mitsilegas, 'European Prosecution between Cooperation and Integration', p. 252.

<sup>66</sup> José Eduardo Guerra, 'The Material Competence of the EPPO and the Concept of Inextricably Linked Offences', *Eu crim - The European Criminal Law Associations' Forum*, no. 1 (2021): 49–50

<sup>67</sup> Legal basis for this initiative can be found in Art. 86 (4) of TFEU, and the extension would require a unanimous decision of the Council with the prior consent of the Parliament and the opinion of the Commission; see: Adam Juszcak and Elisa Sason, 'Fighting Terrorism through the European Public Prosecutor's Office (EPPO)? : What Future for the EPPO in the EU's Criminal Policy?', *Eu crim - The European Criminal Law Associations' Forum*, no. 1 (2019): 66–74

<sup>68</sup> Maja Munivrana Vajda, 'Questioning the Jurisdiction of the European Public Prosecutor's Office', *Hrvatski Ljetopis Za Kaznene Znanosti i Praksu* 27, no. 1 (2020): 117–19, p. 117.; for more detail see: 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' (12 September 2018)

[eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018DC0641&rid=6](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018DC0641&rid=6), accessed 2 July 2023



fail to address all aspects of cross-border terrorism.<sup>69</sup> Since the EPPO has a wider range of actions at its disposal, it could potentially become an effective tool in investigating, prosecuting and bringing to judgement terrorist crimes. On the other hand, some consider that a better path is to let the EPPO first settle into the existing judicial landscape and establish smooth cooperation with other EU actors, as well as with the national authorities, which will be vital for its functioning in practice, before taking a decision on extending its mandate.<sup>70</sup>

### 3.2.2. Territorial competence

The EPPO has territorial competence over crimes committed in the whole or in part within the territory of one or several Member States (meaning the States participating in the enhanced cooperation on the EPPO).<sup>71</sup> Since not all Union's Member States participate in the enhanced cooperation, there might be some difficulties in cases where cross-border crimes extend over a participating and a non-participating State. As a rule, the EDPs can order or request the undertaking of investigative measures on the whole territory of the European Union.<sup>72</sup> However, the execution of investigative measures largely depends on the conditions prescribed by the national laws of Member States.<sup>73</sup>

In so far as necessary for the performance of its tasks, the EPPO may establish and maintain cooperative relations with non-participating Member States which do not participate in enhanced cooperation, which may include concluding *working arrangements*<sup>74</sup> with their authorities.<sup>75</sup>

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<sup>69</sup> Munivrana Vajda, p. 118.

<sup>70</sup> Juszcak and Sason; Anže Erbežnik, 'EU Criminal Law and the Way Forward in the Case of the Functioning of the EPPO', *Hrvatski Ljetopis Za Kaznene Znanosti i Praksu*, 27, no. 1 (2020): 55–77., p. 75.

<sup>71</sup> Art. 23

<sup>72</sup> Based on the idea of European territoriality, see: Zoran Burić, 'Supranational Prosecuting Authority and the National Admissibility of Evidence', *Hrvatski Ljetopis Za Kaznene Znanosti i Praksu*, 27, no. 1 (2020): 209–213., p. 210.

<sup>73</sup> *Ibid.*, p. 211.

<sup>74</sup> list of concluded working arrangements available at:

<https://www.epo.europa.eu/en/documents?keywords=&category=5>, accessed 22 July 2023

<sup>75</sup> Art. 99

## 4. The European Public Prosecutor's Office and national prosecutorial authorities

### 4.1. Division of prosecutorial competences

Division of powers and competences has to be carefully assessed in order to avoid duplication of work so that resources are used in the most efficient way. On a national level, the EDPs bear the responsibility of conducting investigations and prosecutions and bringing the case to a final judgement. In doing so, they have the same powers as national prosecutors, in addition to the specific powers conferred to them by the EPPO Regulation.<sup>76</sup> All while adhering to the guidance provided by the relevant Permanent Chamber overseeing the case, as well as the instructions of the supervising European Prosecutor.<sup>77</sup>

The EPPO Regulation foresees shared, concurrent competences of the EPPO and national prosecution bodies. However, the EPPO has 'priority' competence, which is secured by the right of evocation.<sup>78</sup>

'Priority' competence and right of evocation mean that if the EPPO becomes aware that national authorities are already conducting an investigation into an offence falling within its jurisdiction, it will engage in consultations with those authorities and subsequently make a decision on whether to initiate its own investigation and request the transfer of proceedings from the competent authorities.<sup>79</sup> National authorities are obliged to refrain from proceeding in regard to these criminal offences until the EPPO decides whether to carry out an investigation, unless urgent measures are required.<sup>80</sup> In this manner 'priority' competence essentially becomes exclusive.<sup>81</sup> So in a nutshell, the EPPO has the authority to take over cases that domestic bodies are already investigating. The EPPO can decide to exercise its competence in which case the national authorities shall not exercise their own in respect to the same criminal conduct.<sup>82</sup> However, they are obligated to inform EPPO without delay of any conduct that could constitute an offence within the competence of the EPPO to allow it to exercise it.<sup>83</sup>

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<sup>76</sup> Art. 13 (1)

<sup>77</sup> Ibid.

<sup>78</sup> Art. 27

<sup>79</sup> Mitsilegas and Giuffrida, p. 10.; Article 27 (1), (3), (4), and (5)

<sup>80</sup> Recital 58; Art. 27 (2)

<sup>81</sup> Mitsilegas, 'European Prosecution between Cooperation and Integration', p. 249.; Hans-Holger Herrnfeld, 'Article 27: Right of Evocation', in *European Public Prosecutor's Office: Regulation (EU) 2017/1939 Implementing Enhanced Cooperation on the Establishment of the European Public Prosecutor's Office ('the EPPO')*, Ed. H.-H. Herrnfeld et Al. (Beck-Hart-Nomos, 2021), p. 243.

<sup>82</sup> Art. 25 (1)

<sup>83</sup> Recital 48

This is to prevent the double prosecution of the same case at national and supranational level and protect the right not to be tried or punished twice in criminal proceedings for the same criminal offence enshrined in Article 50 of the Charter of Fundamental Rights of the European Union<sup>84</sup> (Hereinafter: the Charter).

Whether a case will be later referred back to national prosecuting authorities will be up to the relevant Permanent Chamber to decide. Case shall be referred back when the offence under investigation no longer falls within the competence of the EPPO or when the impact on the Union's financial interests is limited (less than €100,000) and there is no need to investigate or to prosecute the case at Union level.<sup>85</sup>

Division of competence is determined by Articles 22 and 25, clearly outlining the EPPO's areas of jurisdiction. Thus, any matters falling outside of these competences remain under the jurisdiction of national authorities. However, in the case of disagreement over the questions of exercise of competence, the competent national authorities should decide on the attribution of competence.<sup>86</sup> This is just one of many examples where decisions are left to national authorities and the EU body does not have much influence. The only way the EU can influence in this context is the option of national courts sending a preliminary reference from Article 42 (2) to the CJEU for the interpretation of articles that determine jurisdiction.

There is a division of competence between different EDPs. A case shall, as a rule, be initiated and handled by an EDP from the Member State where the focus of the criminal activity is or, if several connected offences within the competences of the EPPO have been committed, the Member State where the bulk of the offences has been committed.<sup>87</sup> The establishment of jurisdiction based on notions of *focus of activity* and the place where the *bulk of the offences* was committed is controversial as it lacks clarity and has possible negative implications on legal certainty.<sup>88</sup>

As a side note, the Member States are obliged to provide EDPs with necessary resources, which also includes providing them with "secretarial support".<sup>89</sup> Some practical issues emerged from this arrangement since administrative staff will, in addition to their regular duties related to

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<sup>84</sup> Charter of Fundamental Rights of the European Union, OJ C 326 § (26 October 2012)

<sup>85</sup> see: Art. 34 (1) - (3)

<sup>86</sup> Recital 62; Art. 25 (6)

<sup>87</sup> Art. 26 (4)

<sup>88</sup> Munivrana Vajda, p. 119.

<sup>89</sup> Recital 113

national cases, provide administrative support to the EDPs.<sup>90</sup> Because of this, questions can be raised whether that staff will be impartial, will they have sufficient expertise, enough time and ultimately, pay equal attention to both duties.

Although this section is called the division of prosecutorial competences the actual situation is not so simple. National and the EPPO prosecutor are often the same person and all prosecutorial authorities are quite entwined with one another through different elements like applicable law, shared technical staff, etc. All the above make it more difficult for the EDPs to operate with complete independence from national authorities. Stable communication and cooperation between the EPPO and the national authorities will be fundamental in order to ensure a smooth division of labour.<sup>91</sup> Although the rules on competences are intricate, they strive to ensure that the EPPO performs its main task of protecting the interests of the EU budget, whilst also respecting the powers of national authorities in this sensitive area where they are better equipped and enjoy stronger legitimacy to prosecute the offences at issue.<sup>92</sup>

#### **4.2. Investigations and prosecutions**

While EU criminal law measures have exponentially increased over the past two decades, investigation is probably the stage where the most significant developments can be found.<sup>93</sup> The EPPO operates directly across all participating Member States, allowing for direct action and immediate information exchange, coordinated police investigations, fast freezing, seizure of assets and ordering of arrests across the EU.<sup>94</sup> This ultimately enables the development of a common investigation and prosecution policy which is ensured by the decision-making powers of the Permanent Chambers throughout certain steps of the proceedings.<sup>95</sup>

The EPPO Regulation does not provide for a uniform supranational set of investigative and procedural rules, rather, priority to specificities of the national legal orders of Member States is given. Hence, numerous provisions expressly refer to national law. Applicable law will be,

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<sup>90</sup> Hans-Holger Herrnfeld, 'Hibridna Struktura i Pravni Okvir Ureda Europskog Javnog Tužitelja: Problemi Provedbe u Državama Članicama', *Hrvatski Ljetopis Za Kaznene Znanosti i Praksu* 27, no. 1 (2020): 123-131., p. 127.

<sup>91</sup> Peter Csonka, Adam Juszcak, and Elisa Sason, 'The Establishment of the European Public Prosecutor's Office: The Road from Vision to Reality', *Eucrim - The European Criminal Law Associations' Forum*, no. 3 (2017): 125-135.

<sup>92</sup> Öberg, 'A Federal European Prosecution Authority', p. 194.

<sup>93</sup> Leandro Mancano, 'A Theory of Justice? Securing the Normative Foundations of EU Criminal Law through an Integrated Approach to Independence', *European Law Journal*, 27, no. 4-6 (November 2021): 477-501, p. 485.

<sup>94</sup> Juszcak and Sason

<sup>95</sup> Recital 36 and 78

in most cases, the law of Member State whose EDPs are handling the case.<sup>96</sup> Such explicit references to national law, as well as the general provision contained in Art. 5 (3), were necessary in order to fill the gaps in the Regulation which did not foresee the necessary legal framework for the operational activities of the EPPO.<sup>97</sup> In the Regulation there are no provisions about procedural requirements, form, guarantees and duration of investigative measures nor their suspension, review and remedies against them - it is all dependent on national law.<sup>98</sup> These references also enable the smooth integration of the EPPO into the criminal legal systems of the Member States.<sup>99</sup>

Nevertheless, the Regulation foresees the obligation of national laws to provide certain investigative measures, listed in Art. 30 (1), that the EDPs must be able to request or order. Furthermore, the possibility of states to define special provisions within their national criminal procedural law that will apply exclusively to investigations conducted by the EPPO is not excluded.<sup>100</sup>

In carrying out their mandate, the EPPO's bodies are encouraged to also work closely with other EU bodies and agencies such as Eurojust, Europol, and OLAF as well as third countries and international organisations.

#### **4.2.1. Relationship with the police**

All EU criminal justice agencies are required to fulfil their tasks in consideration of the security of European citizens. Same is applicable for the police in relation to their country's nationals. Police's primary role is to achieve and promote security at the national level, and, in order to do so, it has a number of legally defined powers which are limited locally.<sup>101</sup> Police procedures are based on legally defined powers that are exercised on the basis of the legitimate command of the superior in the police system, as well as orders coming from bodies like state attorneys and the courts.<sup>102</sup> Establishment of the EPPO brings a significant change in relation to police since the EDPs largely rely on the police and customs authorities for their work and are

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<sup>96</sup> Certain exceptions are provided for in Art. 31 (3) and Art. 32

<sup>97</sup> Herrnfeld, 'Hibridna Struktura', p. 127-128.

<sup>98</sup> Đurđević, 'Legislative or regulatory modifications'

<sup>99</sup> Ibid, p. 128.

<sup>100</sup> Ibid.

<sup>101</sup> Stjepan Glušić, 'Organisational and Other Challenges for the Police in Proceedings Conducted by the European Public Prosecutor's Office', *Hrvatski Ljetopis Za Kaznene Znanosti i Praksu*, 27, no. 1 (2020): 247-249., p. 247.

<sup>102</sup> Ibid.

authorised by the EPPO Regulation to issue them orders for execution of coercive measures.<sup>103</sup> These bodies ensure the execution of all instructions and carry out the measures assigned to them in accordance with national law.<sup>104</sup> The Member States are allowed a certain flexibility that enables them to take their national systems into account when conducting investigations and procedures in EPPO cases - when it comes to the roles and responsibilities of different criminal prosecution bodies.<sup>105</sup> The EDPs can instruct the police to undertake investigation measures or authorise them to take emergency measures, even if they do not expressly act according to the instructions of the EDP handling the case.<sup>106</sup>

This new way of ordering police investigations by a supranational body, raises certain questions on said orders. Namely, the order to conduct police work must be clear, specific and lawful.<sup>107</sup> However, according to the existing legal framework, there is no possibility for EPPO's orders to be controlled.<sup>108</sup> In accordance with this, some have pointed out the need to supplement certain laws with the aim of clarifying the relationship between the police (and other bodies that will participate in the procedures) and the EPPO which currently isn't quite clear and defined as it should be.<sup>109</sup> There are some other questions, for example, whether the number of existing police officers will be sufficient to investigate new criminal offences or whether police officers are adequately trained to deal with these types of cases.<sup>110</sup>

#### **4.2.2. Procedural safeguards**

All European bodies, including the EPPO, abide by the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights.<sup>111</sup> While regulating the investigative powers of criminal prosecution bodies, the establishment of an appropriate balance between the public interest in effective criminal prosecution of crimes and protection of human rights of persons affected by these powers is a perpetual concern.<sup>112</sup> EPPO investigations and prosecutions have consequences for affected individuals – in terms of legal

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<sup>103</sup> Recital 69

<sup>104</sup> Art. 28 (1)

<sup>105</sup> Herrnfeld, 'Hibridna Struktura', p. 129.

<sup>106</sup> Art. 28 (2)

<sup>107</sup> Glušić, p. 247.

<sup>108</sup> Ibid.

<sup>109</sup> Ibid., p. 248.

<sup>110</sup> Ibid.

<sup>111</sup> Art. 2 of the TEU

<sup>112</sup> Zlata Đurđević, Elizabeta Ivičević Karas, and Zoran Burić, 'Konferencija Projekt Za Ured Europskog Javnog Tužitelja (Nacrt Europskih Oglednih Pravila o Kaznenom Postupku)', *Hrvatski Ljetopis Za Kazneno Pravo i Praksu*, 19, no. 1 (2012): 363-369., p. 365-366.

certainty and foreseeability, protection from executive arbitrariness, effective judicial protection and defence rights.<sup>113</sup> It is a known fact that the police interrogation phase in a criminal procedure can be most detrimental to the rights of the suspect.<sup>114</sup>

For this reason, the EPPO Regulation offers a wide range of protection for suspects and accused persons involved in their investigations and proceedings which comes in three levels.<sup>115</sup> Firstly, protection is offered in primary EU law by the Charter, since all the EPPO's activities must be carried out in full compliance with this legal act, including the right to a fair trial and the rights of defence.<sup>116</sup> Secondly, rights are protected through secondary EU law, specifically with directives which are then implemented in respective national legal systems. They guarantee the following rights: right to interpretation and translation,<sup>117</sup> the right to information,<sup>118</sup> the right of access to a lawyer,<sup>119</sup> the right to legal aid,<sup>120</sup> and the presumption of innocence and the right to remain silent.<sup>121</sup> These Directives serve as common procedural safeguards necessary to ensure efficiency of cooperation mechanisms (EPPO, Eurojust, etc.).<sup>122</sup> They provide minimum protection, but the Member States are free to guarantee higher levels of protection. Finally, all persons involved in the proceedings have the procedural rights available to them under the applicable national law.

All activities of the EPPO must be carried out in full compliance with all three tiers. Possible issue regarding the last two is divergence of national law - both implemented from the Directives and autonomous - which can put certain individuals at disadvantage. The EPPO procedures will be conducted in different Member States according to national law, so this

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<sup>113</sup> Mitsilegas, 'European Prosecution between Cooperation and Integration', p. 248.; Öberg, 'EU Agencies', p. 163.

<sup>114</sup> Erbežnik, p. 63.

<sup>115</sup> Mitsilegas and Giuffrida, p. 11.

<sup>116</sup> Art. 41(1)

<sup>117</sup> 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, OJ L 280/1 §

<sup>118</sup> Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142/1 §

<sup>119</sup> Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the Right of Access to a Lawyer in Criminal Proceedings and in European Arrest Warrant Proceedings, and on the Right to Have a Third Party Informed upon Deprivation of Liberty and to Communicate with Third Persons and with Consular Authorities While Deprived of Liberty, OJ L 294/1 §

<sup>120</sup> Directive 2016/1919/EU of the European Parliament and of the Council of 26 October 2016 on Legal Aid for Suspects and Accused Persons in Criminal Proceedings and for Requested Persons in European Arrest Warrant Proceedings, OJ L 297/1 §

<sup>121</sup> Directive 2016/343/EU of the European Parliament and of the Council of 9 March 2016 on the Strengthening of Certain Aspects of the Presumption of Innocence and of the Right to Be Present at the Trial in Criminal Proceedings, OJ L 65/1 §

<sup>122</sup> Turmo, p. 1247-1248.

body will provide different fundamental rights protection in different Member States or, if they decide to provide the same standards based on harmonisation directives, this could create problems if the standard is very low for Member States with higher standards.<sup>123</sup> This is a core problem in regard to procedural rights - there will either be divergent protection or uniform protection but with low level of guarantees.

Furthermore, the downside in cross-border cases is that the suspect will be required to cope with a number of different rules concerning his/her rights, so that it could become rather difficult to organise an effective defence strategy.<sup>124</sup>

Lastly, costs for the defendant must be discussed. Namely, in cross-border cases handled by the EPPO, the suspect could often be obliged to hire an additional lawyer in each country in which the investigations and prosecutions take place which creates higher costs.<sup>125</sup> As a result, the balance of power between the prosecution and the defence could become distorted in cross-border cases, which, in turn, could result in a breach of equality between suspects who are prosecuted by the EPPO and those who are not.<sup>126</sup>

There are concerns that human rights are not sufficiently protected since the EPPO Regulation does proclaim various rights, but does not necessarily ensure them in practice sufficiently enough. A lot also depends on which national system will be applicable in a case, therefore not predictable for the organisation of defence and subsequently detrimental to the legal certainty and predictability.

EU defence rights benchmarks are real, legally enforceable standards in domestic legal orders and authorities, including courts in Member States, are under a duty to ensure the effective protection and exercise of these rights, including in the context of the operation of the EPPO.<sup>127</sup> The Member States must secure meaningful avenues for the exercise of given rights and an effective remedy at national level.

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<sup>123</sup> Erbežnik, p. 64.

<sup>124</sup> Mitsilegas and Giuffrida, p. 11

<sup>125</sup> François Falletti, 'The European Public Prosecutor's Office and the Principle of Equality', *Eu crim*, no. 1 (2018): 42–49.

<sup>126</sup> Ibid.

<sup>127</sup> Valsamis Mitsilegas, 'The European Public Prosecutor's Office between EU and National Law: The Challenge of Effective Judicial Protection', *Hrvatski Ljetopis Za Kaznene Znanosti i Praksu*, 27, no. 1 (2020): 79-88., p. 85.



### 4.2.3. Admissibility of evidence

It is evident that the significance of cross-border evidence collection within the EU is growing, and there is an increasing reliance of prosecutors and judges on evidence obtained in other Member States. In line with that ‘trend’, based on the *principle of free admissibility of evidence*, the admissibility of evidence presented by EPPO prosecutors to a national court cannot be challenged based on the fact that it was gathered in a different Member State or in accordance with the law of another Member State.<sup>128</sup> This rule aims to enhance the possibilities of admission of evidence gathered by the EPPO and does not allow the exclusion of evidence obtained under the principle of *locus regit actum*.<sup>129</sup> Thus, evidence presented by the EPPO to the trial court, where the court considers that its admission would not adversely affect the fairness of the procedure or the rights of defence as enshrined in Art. 47 and 48 of the EU Charter, will be admitted in the trial without any validation or similar legal process, even when the national law of the MS where the court is located provides for different rules on the gathering or presentation of such evidence.<sup>130</sup>

According to the European Court of Human Rights, absolutely inadmissible is only evidence obtained through torture, police incitement, self-incriminating statements or breaches of the right to remain silent.<sup>131</sup>

It could be argued that the only provision on admissibility does not settle the question sufficiently. The EPPO Regulation contains very limited provisions on evidence and the EU legislators have not made use of the possibility offered to them by Article 82 (2) TFEU to adopt legislation on minimum standards on the admissibility of evidence.<sup>132</sup> This would have been desirable since there are huge differences between the legal systems of participating MSs, non-participating MSs, and third countries.<sup>133</sup>

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<sup>128</sup> Art. 37 (1)

<sup>129</sup> Gordana Lažetić, ‘A Short Overview of Some Challenging Issues Regarding the Successful Functioning of the EPPO’, *Hrvatski Ljetopis Za Kaznene Znanosti i Praksu* 27, no. 1 (2020): 187-208., p. 198.

<sup>130</sup> Ibid.

<sup>131</sup> *Selmouni v. France*, Appl. no. 25803/94 (European Court of Human Rights, 28 July 1999); *Soering v. United Kingdom*, Appl. no. 14038/88, Series A, No. 161 (European Court of Human Rights, 7 July 1989); *Ireland v. United Kingdom*, Appl. no. 5310/71, Series A, No. 25; (European Court of Human Rights, 18 January 1978); *Hilal v. United Kingdom*, Appl. no. 45276/99 (European Court of Human Rights, 6 March 2001)

<sup>132</sup> Mitsilegas, ‘European Prosecution between Cooperation and Integration’, p. 259.

<sup>133</sup> Lažetić, p. 197.

### 4.3. Implementation of the EDPs in national structure

The question is whether incorporating a complex international mechanism into national criminal prosecution can lead to improved effectiveness and successfully achieve the goals of the EPPO which is the protection of the EU's financial interests.<sup>134</sup> Ms Le Bail, the former Director General of DG Justice of the Commission, underlined that the EDPs ('double-hatted' prosecutors) will be integral part of the EPPO while being embedded into the national justice systems.<sup>135</sup> Subsequently adopted format allowed the EDPs to function in a familiar legal and institutional framework.<sup>136</sup>

The Member States were required to take legislative measures and adjustments which ensured compliance with their obligations defined by the EPPO Regulation - primarily to ensure that their EDPs truly have the status and powers necessary to perform their role in conducting investigations in cases under the EPPO's jurisdiction. Once embedded in national structure, in the light of the principle of sincere cooperation, both the EPPO and the competent national authorities should support and inform each other with the aim of efficiently combatting the crimes.<sup>137</sup>

Since the EPPO Regulation in many provisions refers to national law, in most cases, no major changes by the Member States were necessary. The only considerable structural and regulatory modifications were needed in the Member States that have investigative judges that not only authorise investigative measures but co-conduct the investigation (e.g. France). This gives the investigating judge the ambiguous nature of an investigator and a judge that has often been criticised - it is not just an instance of control or authorisation of coercive measures but an actor who has the power to shape the investigative strategy.<sup>138</sup> In those systems, the EDPs will have to share the direction of the investigative strategy with the investigative judge and coordination will be required, so it is therefore for the Member States to ensure consistency between them.<sup>139</sup> One may wonder whether the EPPO Regulation may incentivise more general reflections on

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<sup>134</sup> Ivo Josipović, 'The European Prosecutor: A Big Step for the EU, a Small Step for Justice', *Hrvatski Ljetopis Za Kaznene Znanosti i Praksu* 27, no. 1 (2020): 111-115., p. 113.

<sup>135</sup> Council, 'A Constructive Approach Towards the Legal Framework', p. 8.

<sup>136</sup> Ibid.

<sup>137</sup> Recital 14

<sup>138</sup> Katalin Ligeti, 'The Structure of the EPPO: Features and Challenges', *Hrvatski Ljetopis Za Kaznene Znanosti i Praksu* 27, no. 1 (2020): 33-53., p. 48.

<sup>139</sup> Ibid., p. 48-49.; The Regulation itself does not impose any change on national criminal justice systems, since it expressly provides that EDPs may "order or request" some investigative measures, so that there is no reason to assume that EDPs cannot continue to act like their national colleagues who need to ask the investigative judge for the adoption of some investigative measures.

the role and powers of the investigative judge in criminal proceedings beyond the PIF domain.<sup>140</sup>

Next implementation issue is a financial one. The nature of proceedings for offences affecting the Union's financial interests is such that it is reasonable to expect that they will be lengthy and costly.<sup>141</sup> As most costs of the investigations and proceedings are borne by the Member States, dissatisfaction of the State in cases where the indictment is unsuccessful can be expected.<sup>142</sup>

Some authors even question whether the system of the EDPs is more effective than establishing national authorities tasked solely with elimination of corruption and organised crime (e.g. USKOK in Croatia).<sup>143</sup>

An overall minimalist approach to implementation was adopted by the EPPO Regulation, in the context of regulation of criminal procedures, as national procedural law is applicable in concrete criminal cases.<sup>144</sup> This means not many modifications were needed on States' part, which is a result of the differences in the criminal justice systems in the EU Member States on one hand and their reluctance to create genuine supranational prosecution on the other hand.<sup>145</sup> This does make it easier for the Member States but has negative implications on the EU integration and uniformity of solutions, as well as on rights of EU citizens in the EPPO proceedings. Since substantive European criminal law is likely to remain fragmented, the EPPO's investigations and prosecutions will need to navigate through diverse sets of substantive criminal legislations.<sup>146</sup>

#### **4.4. Independence of the EDPs**

The assumption is that the independence of institutional actors involved in the administration of criminal justice (mainly judges and prosecutors) vis-à-vis each other, and other State powers, is key to achieving justice as a value.<sup>147</sup> When the possible EPPO structures were being discussed during negotiations, the Commission strongly believed that collegiate structure

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<sup>140</sup> Ligeti, p. 49-50.

<sup>141</sup> Josipović, p. 114.

<sup>142</sup> Ibid., p. 114-115.

<sup>143</sup> Ibid., p. 113.

<sup>144</sup> Đurđević, 'Legislative or regulatory modifications'

<sup>145</sup> Ibid.

<sup>146</sup> Mitsilegas and Giuffrida, p. 9.

<sup>147</sup> Mancano, p. 477.

wasn't suitable for the gravely needed independence and efficiency of the EPPO.<sup>148</sup> They argued it would allow states to pursue their own national interests in the field of judicial cooperation, and in this way contravene the need to create a new and independent EU public prosecutor's office.<sup>149</sup>

Article 6 (1) proclaims that the EPPO shall be independent and all staff members shall act in the interest of the Union as a whole, and neither seek nor take instructions from any person external to the EPPO, any Member State of the European Union or any institution, body, office or agency of the Union in the performance of their duties under this Regulation.<sup>150</sup> The said bodies are obliged to respect this independence.<sup>151</sup> Independence is important for the EPPO in general, but it is especially important for the EDPs as their decisions directly affect the cases they are handling and thus heavily impact the individuals and their rights.

Main issue originates precisely from the independence of EDPs from national influence. As already explained, EDPs have a 'double hat' status where they can simultaneously perform their functions in relation to the EPPO while also performing the functions of national prosecutors. However, they may exercise national functions to the extent that this does not prevent them from fulfilling their obligations under the EPPO Regulation.<sup>152</sup> The main advantage of the 'double hat' status is anchoring the European office into the national systems and thereby ensuring a certain proximity to the field work of investigations.<sup>153</sup> On the other hand, this status raises pressing questions about whether they could really be "expected to independently serve two masters".<sup>154</sup> The fact that certain Member States have decided not to accept the institution of European Prosecutor also says a lot about the political sensitivity of the issue.<sup>155</sup>

Despite being expected to be independent from the respective Member States, the EPPO heavily relies on the existing structures and human resources of the Member States and is intertwined with national legal regimes in many ways.<sup>156</sup> The greater the entanglement, the

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<sup>148</sup> Council, 'A Constructive Approach Towards the Legal Framework', p. 8.

<sup>149</sup> Ligeti, p. 40.

<sup>150</sup> Art. 6 (1)

<sup>151</sup> Ibid.

<sup>152</sup> Art.13 (3)

<sup>153</sup> Matko Pajčić, 'How Independent Is the European Public Prosecutor's Office "de Facto"?', *Hrvatski Ljetopis Za Kaznene Znanosti i Praksu* 27, no. 1 (2020): 89-109., p. 97.

<sup>154</sup> Mitsilegas and Giuffrida, p. 5.

<sup>155</sup> Josipović, p. 114.

<sup>156</sup> Herrnfeld, 'Hibridna Struktura', p. 123-124.

greater the concern is about the actual independence the EDPs will enjoy when performing their duties.

Prosecutors have received significantly greater powers in recent years, so it is no surprise that more and more researchers consider prosecutors as possibly the most influential subjects in the criminal justice system.<sup>157</sup> Some authors point out that exercising an influence on the prosecution authority is easier, cheaper and more effective than influence on judiciary authority.<sup>158</sup>

In a situation of serving two masters, it can be assumed that the national influence is much stronger because the Member State and not the EU is the one that provides the job, the salary, and decides in many ways on his/her position and career in the long term.<sup>159</sup> There is a risk of political interference by highly positioned individuals from the government to pressure them to prosecute crimes that have never been committed or not prosecute crimes that have been committed.<sup>160</sup> To fulfil these objectives, they have various methods at their disposal: incentives (bribes, salary increases, promotions, etc.) or disincentives (salary cuts, demotions, disciplinary transfers, forced retirement, etc.).<sup>161</sup> Moreover, in certain Member States (such as Belgium and France), the Minister of Justice can issue orders or directives to the public prosecutor in regard to general aspects of prosecution policy or even individual cases in some circumstances.<sup>162</sup> In such systems the objectivity and impartiality of the exercise of the prosecutorial functions can be quite questionable.<sup>163</sup>

Although the EDPs are formally independent and free of instructions from anyone, hidden pressures on the EDP who is a prosecutor in the national criminal justice system could be strong and very effective.<sup>164</sup>

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<sup>157</sup> Pajčić, p. 91.

<sup>158</sup> Ibid., p. 95., 104.

<sup>159</sup> Ibid., p. 106-107.

<sup>160</sup> Ibid., p. 94-95.

<sup>161</sup> Ibid., p. 94.

<sup>162</sup> Ligeti, p. 45.

<sup>163</sup> Ibid.

<sup>164</sup> Pajčić, p. 106-107.

## 5. The European Public Prosecutor's Office and national judicial authorities

### 5.1. Judicial control over the EPPO

It is certain that rule of law is essential for protection of fundamental values on which the Union is founded and impartial courts are a core of this discussion.<sup>165</sup> Independence of courts is a precondition for effective judicial protection of rights based on EU law.<sup>166</sup> Freedom of prosecutors should always be accompanied by their accountability. Accountability entails making a body exercising power answerable to an external authority and with the possible consequence of sanction.<sup>167</sup> Prosecutors must exercise their functions fairly, impartially and objectively,<sup>168</sup> and respect the impartiality and independence of judges. Possibility of prosecutors' lack of impartiality, which was discussed in the previous chapter, justifies the need for an independent check by a judicial or administrative body. The establishment of accountability mechanisms should be designed to ensure democratic legitimacy. These mechanisms will be discussed throughout this chapter.

#### 5.1.1. Competences of national courts

An important mechanism of oversight of investigative powers which establishes checks and balances and protection of human rights is judicial control. Judicial supervision of EPPO comes from two different types of courts: the CJEU and national courts. The latter have a more significant role in the work of the EPPO, given that they authorise its investigative measures and the prosecution phase takes place before them.

I) Procedural acts of the EPPO that are intended to produce legal effects vis-à-vis third parties are subject to review by the competent national courts in accordance with the requirements and procedures laid down by national law.<sup>169</sup> The same applies to failures of the EPPO to adopt procedural acts which produce legal effects on third parties and are legally required to be adopted under the EPPO Regulation.<sup>170</sup> The national courts, therefore, provide ex-ante judicial approval of investigative measures in accordance with national laws. The admissibility of the

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<sup>165</sup> Mancano, p. 478.

<sup>166</sup> Ibid.

<sup>167</sup> For more on accountability see: Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework', *European Law Journal* 13, no. 4 (July 2007): 447–468.

<sup>168</sup> See: Consultative Council of European Prosecutors (CCPE), 'Opinion No.9 (2014) on European Norms and Principles Concerning Prosecutors' (17 December 2014), <https://rm.coe.int/168074738b>, accessed 10 July 2023

<sup>169</sup> Art. 42 (1)

<sup>170</sup> Ibid.

measures, as well as the form of their execution, is determined by the law of the Member State on the territory of which the investigative measure is undertaken.<sup>171</sup> These provisions aim to give national courts the jurisdiction that the Court of the European Union would normally have<sup>172</sup> so this is a peculiar situation where national courts examine the actions of an EU body. These reviewing bodies must strive to strike a fair balance between the interests relating to the needs of the investigation and the fundamental rights of the persons concerned.<sup>173</sup>

National courts supervise the conformity of the EPPO's activities with the national and EU law. If it is a matter of national law and a situation that has no link with EU law - they decide on their own applying solely national law; and if it is facts related to or based on EU law then courts can make references for preliminary rulings to the CJEU. In doing so, they must ensure effective exercise of defence rights enshrined in both EU and national law. Anyhow, it can be difficult to distinguish when certain actions of the EPPO are directed by Union law from those governed by national law.<sup>174</sup>

II) Furthermore, taking into account the legality principle, the investigations of the EPPO should as a rule lead to prosecution in the competent national courts in cases where there is sufficient evidence and no legal ground that bars the prosecution, or where no simplified prosecution procedure has been applied.<sup>175</sup> In principle, the trial will take place in the Member State of the EDP that handled the case, namely where investigations have been carried out.<sup>176</sup> Nevertheless, the relevant Permanent Chamber may deviate from this rule and bring the case to prosecution in a different Member State, if there are sufficiently justified grounds to do so, taking into account the criteria hierarchically listed in Article 26 (4) - (5). This option for the EPPO to change the forum has been criticised as hampering effective defence and as being contrary to the principle of foreseeability in terms of access to a lawful judge.<sup>177</sup> Such explicit indication of the method of determining jurisdiction and the taxative exceptions to the general rule, helps to somewhat reduce the risks of forum shopping attached to the existence of a European prosecuting authority coping with many different legal systems.<sup>178</sup> Still, there is room

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<sup>171</sup> Burić, p. 212.

<sup>172</sup> Herrnfeld, 'Hibridna Struktura', p. 130.

<sup>173</sup> Mancano, p. 485.

<sup>174</sup> Luca De Matteis, 'The EPPO's legislative framework: Navigating through EU law, national law and soft law', *New Journal of European Criminal Law* 14, vol. 1. (2023): 6-17

<sup>175</sup> Recital 81

<sup>176</sup> Art. 36 (3)

<sup>177</sup> Mitsilegas, 'European Prosecution between Cooperation and Integration', p. 257.

<sup>178</sup> Mitsilegas and Giuffrida, p. 7.

for criticism as there is a lack of adequate judicial review on the matter. In fact, the decision of which national law will be applicable, as well as subsequently what court shall have jurisdiction, is based on vague terms (*the focus of the criminal activity, the bulk of the offences, inextricably linked offences*) thus potentially arbitrary and there are no available supervision nor remedies against those decisions.

As it was stated previously, national courts must abide by the principle of free admissibility of evidence. However, they are allowed to assess the admissibility of the evidence in order to guarantee that its admission aligns with their obligations to uphold the fairness of the proceedings, protect the rights of the defence, and respect other fundamental rights of the defendants, as enshrined in the Charter and their national constitutional systems.<sup>179</sup>

### **5.1.2. Competences of the CJEU**

The CJEU has a quite limited role in reviewing the EPPO's work considering it is a body of the EU. It has two roles in the judicial supervision of the EPPO. Firstly, it shall review the legality of the EPPO's decisions to dismiss a case, insofar as they are contested directly on the basis of Union law.<sup>180</sup> Second key avenue of review is the preliminary reference mechanism under Art. 267 of TFEU. The CJEU is competent to give preliminary rulings concerning the validity of procedural acts of the EPPO (insofar as such a question of validity is raised before any court or tribunal of a Member State directly on the basis of Union law), the interpretation or the validity of provisions of Union law and 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.<sup>181</sup>

Besides mentioned main competences, the other powers that CJEU has been entrusted with are: jurisdiction in disputes relating to compensation for damage caused by the EPPO, disputes concerning staff-related matters, dismissal of the European Chief Prosecutor or European Prosecutors, review of decisions that affect the subjects' rights under Chapter VIII on data protection and decisions which are not procedural acts.<sup>182</sup> It is noticeable that most of the CJEU's powers are of subsidiary importance in relation to national courts.

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<sup>179</sup> Recital 80 the EPPO Regulation; Csonka et al.

<sup>180</sup> Art. 42 (3)

<sup>181</sup> Art. 42 (2)

<sup>182</sup> The competences of the CJEU are listed in: Art. 14 (5), Art. 16 (5), Art.42(4)-(7)



## 5.2. Issues rising from the current arrangement

There are certain issues that derive from the current framework of judicial review as national roles noticeably have a primary, predominant role while the CJEU function is secondary and somewhat of lesser impact.

Some authors argue that the lack of clarity in the relationship between EPPO and national authorities, as well as an excessive reliance on national law, results in ineffective judicial protection and remedies in the EPPO Regulation.<sup>183</sup> Ways of achieving effectiveness would be, for example, the protection through the work of the CJEU and proper applicability of EU benchmarks on the rights of the defence in the context of the operations of the EPPO.

### 5.2.1. Lack of jurisdiction for the CJEU

According to some, the main deficit in judicial protection in the EPPO context stems from very limited judicial review of the CJEU. Based on Article 42, it effectively only has jurisdiction in the EPPO's decision to dismiss a case and in preliminary rulings in specific issues. This means that key EPPO acts, including the decision to initiate an investigation/prosecution and decisions in conflicts of jurisdiction cases are not subject to direct review before the CJEU.<sup>184</sup>

The Commission's proposal clearly stated that, when adopting procedural measures in the performance of its functions, the EPPO would be considered as a national authority for the purpose of judicial review.<sup>185</sup> The Commission justified this stance on three grounds: the perceived specificity and difference of the EPPO from all other Union bodies and agencies which require special rules on judicial review,<sup>186</sup> the strong link between the operations of the EPPO and the legal orders of the Member States<sup>187</sup> and the need to respect the principle of subsidiarity.<sup>188</sup> Consequently, the responsibility of judicially reviewing all challengeable acts of investigation and prosecution carried out by the EPPO should be entrusted to national courts, while the CJEU should not be directly competent with regard to those acts pursuant to Articles 263, 265 and 268 of the TFEU.<sup>189</sup> Mitsilegas challenges this argumentation of the Commission, claiming primarily that the provisions outlined in the Article 86 (4) TFEU, which allow for

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<sup>183</sup> Mitsilegas, 'The EPPO between EU and National Law', p. 79.

<sup>184</sup> Ibid., p. 83.

<sup>185</sup> Art. 36 (1) of Proposal for EPPO Regulation

<sup>186</sup> Explanatory memorandum, paragraph 3.3.5. of Proposal for EPPO Regulation

<sup>187</sup> Ibid.

<sup>188</sup> Recital 5 of Proposal for EPPO Regulation; also see: Mitsilegas 'The EPPO between EU and National Law', p. 81-82.

<sup>189</sup> Explanatory memorandum, paragraph 3.3.5. of Proposal for EPPO Regulation

specific rules regarding judicial review of EU agencies in general and the EPPO in particular, should not be interpreted as a complete exclusion of EU judicial review for such bodies.<sup>190</sup> Additionally, the suspension of such review could be interpreted as a direct attack to the rule of law in the EU and could potentially challenge the obligation of the EU to uphold fundamental rights as enshrined in the ECHR and the Charter (in particular Articles 47 and 49 of the Charter).<sup>191</sup>

In regard to competences of national courts, the peculiar situation of them examining actions of an EU body was previously mentioned. This regime distorts the rule that the European Courts supervise the legality of acts performed by European bodies, while the national courts exercise judicial control over acts performed by the national authorities.<sup>192</sup> Therefore, it would have been assumed that the CJEU will have much greater power in judicial review in the EPPO context. To some extent, this deviation can be justified with a specific structure and division of competences within the EPPO.<sup>193</sup>

Nonetheless, the treatment of the EPPO as a national body for the purposes of judicial review disregards the fact that EPPO acts are adopted by an EU body, with the consequence being that the Regulation essentially creates a European agency lying outside European judicial control.<sup>194</sup> Minimising the jurisdiction of the CJEU in this manner raises concerns regarding the scrutiny and accountability of this EU agency as it lacks EU judicial review in relation to several crucial decisions that directly affect the rights and position of the individuals involved.<sup>195</sup> For this reason and in view of the limited jurisdiction of the CJEU regarding the direct review of EPPO acts, the preliminary reference mechanism will be crucial for national courts to ensure the development of EPPO operations in conformity with EU law.<sup>196</sup> However, national courts do need to consider to what extent will the CJEU be able to respond in a timely manner, when thinking in terms of resources.<sup>197</sup> Consequently, the question can be raised whether national courts have all the necessary expertise to handle cases stemming from the

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<sup>190</sup> Mitsilegas, 'The EPPO between EU and National Law', p. 82.

<sup>191</sup> Ibid.

<sup>192</sup> Luis de Lemos Triunfante, 'Judicial Review of EPPO Procedural Acts and Decisions: A Disruptive and Resilient Architecture?', *Unio EU Law Journal - The Official Blog* (6 May 2017), <https://officialblogofunio.com/2017/06/05/judicial-review-of-eppo-procedural-acts-and-decisions-a-disruptive-and-resilient-architecture/>, accessed 4 July 2023

<sup>193</sup> Lažetić, p. 201.

<sup>194</sup> Mitsilegas and Giuffrida, p. 13.

<sup>195</sup> Mitsilegas, 'The EPPO between EU and National Law', p. 83.

<sup>196</sup> Ibid., p. 87.

<sup>197</sup> de Lemos Triunfante

EPPO Regulation mostly on their own. It is necessary to keep in mind the specificity and complexity of the EPPO, as well as often an unclear relationship between the two sets of authorities in this context.

Some authors say that the fact that the judicial review of European public prosecutors' decisions is possible in national courts in relation to standards established by national law is contrary to the common EU rule on supremacy.<sup>198</sup> Supremacy, as established by the jurisprudence of the CJEU, means precisely that EU law (including any decision of an EU institution) cannot be assessed in relation to domestic standards, but only in relation to EU standards.<sup>199</sup>

Others take a different approach, saying that European Union judicial review should thus have applied as extensively as possible to the acts and decisions of the EPPO.<sup>200</sup> But on the other hand, in such a scenario, there would be an overlap and a consequent reduction in the effectiveness of judicial supervision. Also, it makes sense for the majority to be in the hands of national courts since they are much closer to all the elements of the case. Finally, the Regulation refers to national law extremely often, and there is no one more capable of applying national law than national courts themselves. There are arguments for both sides, which is understandable considering the hybrid structure of this body and the high degree of intertwining of national and supranational elements.

The system should have possibly been organised in a way that all significant decisions of the European public prosecutor that encroach on the rights of individuals are subject to subsequent control by the CJEU, and that prior approvals for the application of certain repressive measures are issued by national courts as per current arrangement.

On a more positive note, with national courts acting as a double standard, as both the enforcers of national and European law, the EPPO judicial review could constitute a unique opportunity for emancipation and greater relevance of the case-law of the national authorities.<sup>201</sup>

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<sup>198</sup> Erbežnik, p. 59

<sup>199</sup> Ibid.

<sup>200</sup> see: Mitsilegas and Giuffrida, p. 14.

<sup>201</sup> de Lemos Triunfante

### 5.2.2. Risks for procedural rights

The specificity of the EPPO in relation to other EU agencies consists of the fact that the EPPO is an operational body whose actions have the potential to significantly affect fundamental rights across the EU as it has direct powers vis-à-vis individuals. In that context, proper judicial review is even more imperative.

Lack of the proper EU judicial review of the EPPO would in particular be hard to reconcile with the right to effective judicial protection, which has an important role in EU constitutional law. In *Kadi II*<sup>202</sup>, the CJEU expressed the need for the European judiciary to ensure the full review of the lawfulness of all Union acts in the light of fundamental rights and mentioned, in particular, the respect for the rights of the defence and the right to effective judicial protection as enshrined in the Charter.

It is crucial to prioritise procedural safeguards and the rights of the defence in the operations of the EPPO. However, the EPPO Regulation offers limited provisions concerning judicial protection and remedies. In fact, it has no provisions on judicial review of investigative measures as it is left for national regulation. The judicial review of the investigative decisions with regard to its existence, frequency, remedies and so on, is also different among the Member States.<sup>203</sup> Therefore, the EU citizens are going to have different judicial protection against investigative measures ordered by the EPPO.<sup>204</sup>

With the three-layer protection of procedural rights, it should be emphasised that, in reality, further action is required by all actors at national level to ensure effective protection in compliance with EU law and national law.<sup>205</sup> Therefore, the EPPO Regulation does proclaim rights, but it is up to the national authorities to adhere to them. This is especially true with previously mentioned procedural directives, as the Member States must ensure they are fully and properly implemented.

The directives can enhance the protection of fundamental rights during the proceedings of the EPPO in different ways: a number of key provisions conferring rights in the directives have direct effect; the Commission has full powers to monitor the implementation of these directives and has the power to introduce infringement proceedings before the CJEU if it considers that

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<sup>202</sup> Joined Cases C-584/10 P, C-593/10 P and C-595/10 P - *European Commission v. Kadi* (CJEU, 18 July 2013).

<sup>203</sup> Đurđević, 'Legislative or regulatory modifications'

<sup>204</sup> *Ibid.*

<sup>205</sup> Mitsilegas, 'The EPPO between EU and National Law', p. 84.

the directives have not been implemented adequately; national criminal procedural law must be applied and interpreted in compliance and conformity with the directives; and, finally, the implementation of the directives must take place in compliance with the Charter.<sup>206</sup> While the inclusion of directives is appreciated, the majority of their provisions are a result of compromises among Member States. As a result, the rights outlined in these directives can sometimes be broad and lacking specificity, limiting their overall impact on national legal systems.<sup>207</sup> Consequently, suspects and accused individuals may still be subject to varying standards depending on the applicable national law. The individuals concerned by the investigations of the EPPO will receive different treatment according to the applicable national law and, in cross-border cases, this scenario can have adverse consequences on the right to organise an effective defence.<sup>208</sup> Another flaw of the directives is the lack of clear remedy in case of the violation of its provisions.<sup>209</sup> The question arises as to how much all these guarantees mean when there is no sanction for their non-compliance.

A lot is thus left on the shoulders of national systems, to ensure effective judicial protection and the effective exercise of procedural rights, with national standards required to develop in conformity with the growing EU acquis in the field.<sup>210</sup> National courts, therefore, have a key role and an essential task here. It could be said that it is only up to them to ensure that the rights are respected, but of course there are some apprehensions. Protection of human rights is not guaranteed at the same level in all the Member States. This is particularly relevant in the context of choice of forum that is the next issue being discussed.

### **5.2.3. Choice of forum**

Term *forum shopping* stands for the practice of choosing the court in which to bring an action based on a determination of which court is likely to provide the most favourable outcome.<sup>211</sup> In view of this problematic practice, the Regulation sets rules on which national court will have jurisdiction in the trial phase. The *choice of forum* decision is largely left to the discretion of the EPPO and has no subsequent judicial review at the EU level.<sup>212</sup> Given that the EPPO

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<sup>206</sup> Mitsilegas and Giuffrida, p. 11.

<sup>207</sup> Ibid., p. 12.

<sup>208</sup> Ibid., p. 20.

<sup>209</sup> Erbežnik, p. 71.

<sup>210</sup> Mitsilegas, 'The EPPO between EU and National Law', p. 86.

<sup>211</sup> 'Forum Shopping', in *Merriam Webster*, <https://www.merriam-webster.com/legal/forum%20shopping>, accessed 28 July 2023

<sup>212</sup> Mitsilegas and Giuffrida, p. 15.

primarily operates within the framework of national laws, the selection of the Member State for conducting investigations or prosecuting a case holds great importance. The fact that the choice of forum is not subject to any form of scrutiny at European level is a missed opportunity to enhance the legitimacy and efficiency of the newly established European prosecution.<sup>213</sup>

The lack of legal certainty regarding the choice of forum criteria due to vague terms can be seen as incompatible with the European Court of Human Rights approach on foreseeability in criminal proceedings and may be addressed to some extent by the CJEU by developing these criteria into autonomous concepts of EU law having a uniform EU law meaning.<sup>214</sup> However, this does not fully solve the issue of legal certainty for the defendant as the absence of detailed EU rules results in the EPPO having the discretion to pick and choose.<sup>215</sup> In this transnational space, the defendant is left in the dark regarding legal certainty, foreseeability and exercise of defence rights.<sup>216</sup>

The European Court of Human Rights has ruled that the absence of legal certainty regarding decisions on the choice of forum at the national level violates Article 7 of the European Convention on Human Rights<sup>217</sup>. In the case of *Camilleri v. Malta*, the Court found that national law providing for two different possible punishments depending on the procedure chosen by the Attorney General failed to satisfy the foreseeability requirement and to provide effective safeguards against arbitrary punishment as provided in Article 7.<sup>218</sup> The reasoning of that judgement is likely to apply to transnational choice of forum decisions, including decisions by the EPPO. This necessitates not only a clear procedure involving the defendant leading to the decision on the allocation of jurisdiction but also effective remedies at European Union level against choice and transfer of forum decisions by the EPPO.<sup>219</sup>

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<sup>213</sup> Ibid.

<sup>214</sup> Mitsilegas, 'European Prosecution between Cooperation and Integration', p. 257.

<sup>215</sup> Ibid.

<sup>216</sup> Ibid.

<sup>217</sup> Council of Europe, 'European Convention for the Protection of Human Rights and Fundamental Freedoms, as Amended by Protocols Nos. 11 and 14, Supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13' (04 November 1950), <https://www.refworld.org/docid/3ae6b3b04.html>, accessed 25 July 2023

<sup>218</sup> *Camilleri v. Malta*, Appl. no. 42931/10 (European Court of Human Rights, 22 January 2013)

<sup>219</sup> Mitsilegas & Giuffrida, p. 15.

## 6. Conclusion

In recent years, the need for a reduction of national sovereignty in favour of international and European authorities is expected in order to prosecute an ever-growing number of transnational criminal offences in a more effective way. By establishing the European Public Prosecutor's Office, the fight against crimes affecting the Union's financial interests is expected to be more consistent and coherent. If proven as such, its jurisdiction may soon be extended to cross-border terrorism, whose specifics and implications still require further research and analysis.

The EPPO is a long-awaited body in the area of EU criminal law, a traditionally very sensitive policy area. Its specificity lies in its ability to exercise coercive and punitive powers vis-à-vis individuals. It was rather complex to come to an agreement during negotiations that would satisfy both sides - the desire of the EU for effectiveness and independence of the EPPO, and concerns of the Member States over the impact of such a body on national sovereignty. The adopted framework foresees shared competences of the EPPO and national prosecution bodies, with the EPPO's 'priority' competence secured by the right of evocation.

The main question analysed in this thesis is the relationship of the EPPO and national (prosecutorial and judicial) authorities. The European Public Prosecutor's activity is legally deeply rooted in the national legal systems of Member States.

In regard to the prosecutorial authorities, the national bodies are heavily intertwined with the EPPO, especially in regard to the EDPs. They require infrastructure and human resources, but are dependent on the Member States in this aspect. Many wonder if the relationship of the EDPs vis-à-vis national authorities (i.e. prosecutors, police, technical staff) could have been defined more clearly. As I see it, more clarity would be preferable considering the powers and impact that this body has. This is relevant in the context of the EDPs reliance on police and customs authorities in their work and the EDPs ability to issue them orders for execution of coercive measures.

The effectiveness of EPPO as a whole depends largely on the proper implementation of the EDPs into the national systems. One of the core issues is their independence from national influence due to their 'double hat' status which allows them to be active members of both the EPPO and the national prosecution authorities. It raises questions whether they could really be expected to independently serve two masters. Although the EDPs are expected to be fully independent and free of instructions in their work, there are many ways in which they can fall

under national influence. On a more positive note, being embedded in national justice systems allows them to function in a familiar legal and institutional framework, as well as ensuring a certain proximity to the field work of investigation. The discussions on the EDPs' status are imperative as they are responsible for conducting investigations and criminal prosecution of cases within the jurisdiction of the EPPO, and as such, have powers to make various decisions impactful for individuals and their rights since they directly work with the evidence, witnesses, suspects, etc.

When it comes to the relationship of the EPPO with national judicial authorities, the national courts have a more predominant role in the judicial supervision of EPPO's decisions, while the role of the CJEU is somewhat limited in this aspect. This is quite a peculiar situation where national courts examine the actions of an EU body, which can be justified by the specific hybrid nature of the body. On the other hand, some wonder if the CJEU should have still been given a more significant role as key EPPO acts are left outside of its scope. In my opinion, broader powers of the CJEU would have been more beneficial for more uniform application of the EPPO Regulation's provisions and overall stronger judicial supervision - as the EPPO is currently an EU body laying quite outside EU control. In the judicial supervision framework, other two key issues arising are risks of inadequate protection of procedural rights and supervision of choice of the forum.

It can be noted that the EPPO Regulation regularly refers to national law so criminal laws remain to a high extent national. It is a result of differences between national legal systems and reluctance of the Member States to give up any further sovereignty in the field of criminal law. Subsequently, the EPPO legal order is fragmented with divergent investigation and prosecution methods, and divergent protection of procedural rights. It opens up questions on the equal position of the accused, legal certainty, uniformity and establishment of common principles. Due to the variety of the systems and different levels of human rights protection guarantees, a lot depends on the establishment of jurisdiction and the EPPOs choice of forum in the prosecution phase. The latter is left to its discretion without subsequent control which reduces legal certainty and foreseeability. In my view, the EPPO regulations should have contained more detailed provisions that would have minimised the different judicial protection against EPPO's investigative measures and not left the defendant in the dark in some aspects.

The work of the EPPO can be expected to redefine current perception of EU criminal justice as a predominantly nationally managed policy field and further the development of European



criminal law. As stated throughout the thesis, the EPPO certainly has shortcomings and challenges, however, it is definitely a step in the right direction and it remains to be seen how much more it can achieve in the future.

So, to conclude, what is the nature of the relationship of the EPPO with the national authorities? In short: it is complicated, intertwined, questionable in certain aspects and sometimes criticised as unclear. The EPPO relies heavily on national authorities in its operations (i.e. existing national laws, personnel, financially). Both sides should actively work on their mutual relationship, support and inform each other with the aim of efficiently combatting the crimes impacting financial interests of the EU.

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