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THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE: THE PROTECTION OF THE EU'S FINANCIAL INTERESTS AS SUPRANATIONAL INTEGRATION PROJECT

Abstract | After many years of debate, the European Public Prosecutor's Office has finally become a reality. With the adoption of Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the EPPO by the Council on 12 October 2017, the competences of this new EU body have been set out, whose creation was foreseen in the EU treaties. The EPPO shares with EUROPOL and EUROJUST the particularity that primary EU law presupposes its existence, although the last two EU agencies, that happen to operate as well in the area of home affairs, have already been in existence for an extensive period of time. Contrary to the said entities, EU agencies are only established when the need for a delegation of competences to specialized bodies arises. The considerable delay in the establishment of the EPPO may be interpreted as an indicator of its contentious nature, both among the Member States at the Council, as well as among the EU institutions in the framework of the legislative procedure that led to the adoption of the founding regulation. It is particularly important to bear this aspect in mind when examining the geographical scope of the EPPO Regulation, the organizational structure of the new EU body and the powers conferred upon it. The present paper will shed light on all these subjects with the aim of explaining the advantages that the establishment of the EPPO entails for the protection of the financial interests of the EU but also the obstacles that it is likely to face in the pursuance of its mission.

Keywords: European Public Prosecutor's Office, European Chief Prosecutor, European Delegated Prosecutors, EPPO Regulation, financial interests of the EU.

I. Introduction

After many years of debate, the European Public Prosecutor's Office («EPPO») has finally become a reality. With the adoption of *Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the EPPO by the Council on 12 October 2017*[1] («EPPO Regulation»), the competences of this new EU body have been set out, whose creation was foreseen in the EU treaties. The EPPO shares with EUROPOL and EUROJUST the particularity that primary EU law presupposes its existence, although the last two EU agencies, that happen to operate as well in the area of home affairs, have already been in existence for an extensive period of time. Contrary to the said entities, EU agencies are only established when the need for a delegation of competences to specialized bodies arises[2]. The considerable delay in the establishment of the EPPO may be interpreted as an indicator of its contentious nature, both among the Member States at the Council, as well as among the EU institutions in the framework of the legislative procedure that led to the adoption of the founding regulation. It is particularly important to bear this aspect in mind when examining the geographical scope of the EPPO Regulation, the organizational structure of the new EU body and the powers conferred upon it. The present paper will shed light on all these subjects with the aim of explaining the advantages that the establishment of the EPPO entails for the protection of the financial interests of the EU but also the obstacles that it is likely to face in the pursuance of its mission.

II. The establishment of the EPPO

At the time when the European Communities provided themselves with their own resources by adopting *Council Decision 70/243/ECSC, EEC, Euratom of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources*[3], concern arose about the protection of the Community's financial interests, since it did not grant the Community sanctioning power to protect them. For that reason, the Commission presented in 1976 a project to amend the Treaties related to the criminal protection of the Community's financial interests. The first initiative that opened the debate on this issue, contemplating the creation of a European Public Prosecutor, was the report *«Corpus Juris: Introducing penal provisions for the purpose of the financial interests of the European Union»* («Corpus Juris»), delivered in 1997 by an expert group, whose main proposals would later be collected in the *«Green Paper on criminal-law protection of the financial interests of the Community, and the establishment of a European Prosecutor«*, published by the Commission in December 2001. This text sought to generate a public debate on the practical repercussions of the creation of a European Public Prosecutor without intending, in any case, to create a complete and autonomous Community penal system. This is so because the Corpus Juris contemplated a mixed system, in which national and supranational elements were to be combined so that it were the Member States that would have had to apply criminal law, and not the Community itself.

The idea of creating a supranational body entrusted with the task of protecting the financial interests of the EU, as a project of regional integration, took shape at a time in which the *Treaty establishing a Constitution for Europe* was being debated. In the aftermath of the unsuccessful referenda in France and the Netherlands that brought the ratification process to an end, a period of reflection was initiated, eventually leading to the Treaty of Lisbon. This treaty took many of the basic ideas underlying the EPPO, however without specifying in detail how it would be organized and on the basis on which rules it would operate. Instead, it was assumed that these aspects would be regulated in an act of secondary EU law. Art. 86(1) of the Treaty on the Functioning of the European Union («TFUE») stipulates that regulations to be adopted «*shall determine the general rules applicable to the EPPO, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of*

[1] OJ 2017, L 283, p. 1.
[2] Kühn, W. M., "The phenomenon of agencification in the administration of the European Union", *Ukrainian Journal of Constitutional Law*, 2/2020, p. 44, examines various aspects related to the creation and the functioning of EU agencies.
[3] OJ 1970, L 94, p. 19.

evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions».

However, it is necessary to point out that the idea of creating an EPPO was not received with enthusiasm by all Member States, as some of them feared a loss of sovereignty[4]. This initial attitude is understandable given the fact the area of criminal law is traditionally connected with the notion of sovereignty. The norms of criminal law usually reflect the ethical values of a society and can therefore be considered deeply rooted in national culture[5]. Having said this, whilst it is true that the EU is obliged to respect the cultural traditions of the Member States according to Art. 3(3) TEU, the treaties leave no doubt that protecting the financial interests of the EU constitutes a legitimate objective that legislature can pursue at supranational level. Consequently, it would be logical to claim that this objective must prevail over potential national interests. This is all the more true when this diversity has the effect to actually hamper the protection of the financial interests of the EU. The principle of subsidiarity, enshrined in Art. 5(3) of the Treaty on the European Union («TUE»), according to which «*the EU shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at EU level*», would not impede such a course of action. In fact, difficulties in the protection of the financial interest of the EU were put forward as an argument in favor of the creation of the EPPO.

The EU was able to overcome the opposition of some Member States by resorting to the mechanism of enhanced cooperation laid down in Art. 20 TUE. Whilst unanimity at the Council would, in principle, have been required in order to adopt the EPPO Regulation, Art. 86(1) TFEU allows that at least nine Member States engage in such an enhanced cooperation and adopt the said Regulation. The legal consequence of resorting to such mechanism is that the EPPO Regulation only applies to the participating Member States but not to those outside of this group. The fact that Art. 86 TFEU expressly refers to the possibility of an enhanced cooperation (although it remains open in any policy area falling outside of the exclusive competences of the EU) shows that the Member States were aware of the opposition to this integration project among their ranks. Twenty Member States had initially agreed to be part of the enhanced cooperation. Since then, the Netherlands and Malta have joined it. This implies that, to date, five Member States remain outside the scope of the enhanced cooperation, namely Denmark, Hungary, Ireland, Poland and Sweden. Denmark, Ireland and the United Kingdom (before Brexit[6]) did not join the EPPO due to a derogation foreseen in Protocols N° 21 and 22 to the EU treaties that allowed these Member States to refrain from participating in the adoption of measures falling within the Area of Freedom, Security and Justice pursuant to Title V of Part Three of the TFEU. Whilst Denmark enjoys a permanent opt-out from the EU measures concerning criminal justice, Ireland, Hungary, Poland and Sweden can join at any time. Despite this situation, it is very possible that the EPPO will in practice have to seek judicial cooperation with at least some of these non-participating Member States («NPMS») and vice versa. It is worth mentioning in this context that the EPPO Regulation contains specific provisions on judicial cooperation with NPMS as well as third countries, what will be examined at a later stage in this paper.

The process leading to the actual establishment of the EPPO took some time to be completed. In that respect, it should be noted that whilst the EPPO Regulation entered into force on 31 October 2017, the EPPO did not start its operations before 1 June 2021. There are a number of reasons for this delay, mainly related to the regulatory and practical measures that had to be taken in the meantime. Firstly, the participating Member States had to adopt and publish, by 6 July 2019, the laws, regulations and administrative provisions necessary to comply with the *Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law*[7]

[4] Mitsilegas, V., EU Criminal Law, Oxford 2022, p. 464.
[5] Elholm, T., "EPPO and a common sense of justice", *Maastricht Journal of European and Comparative Law*, 2021, vol. 28(2), p. 215.
[6] Kühn, W. M., "Aspectos jurídicos y perspectivas políticas de una posible retirada de la Unión Europea por parte del Reino Unido", *Revista de la Secretaría del Tribunal Permanente de Revisión del Mercosur*, vol. 4, nº. 8, 2016, p. 64, presents an analysis of the legal and political aspects of Brexit.
[7] OJ 2017, L 198, p. 29.

(hereafter «PIF Directive») that, as will be explained in this paper, defines the material competence of this EU body. Secondly, the EPPO itself had to adopt the necessary internal legal acts, recruit staff, set up a case management system and conclude several working arrangements with national authorities and EU entities in order to ensure the proper implementation of the provisions of the EPPO Regulation.

III. Hybrid Organizational structure

The EPPO is defined by its founding regulation as «*an indivisible EU body operating as one single office with decentralized structure*». However, this short description is not enough to understand the institutional setup conceived by the EU legislator. One of the most remarkable aspects of the EPPO is its hybrid nature, as a single EU body that operates simultaneously at both the EU and the national level, which becomes evident through its organizational structure as well through its powers. Furthermore, contrary to other EU entities, the EPPO is anchored in the judicial systems of the Member States, while at the same time preserving its independence. In the interest of clarity, the organizational structure will be examined first, before looking in detail at the competences of each of the organs within the EPPO.

1. The central level

The central level of the EPPO comprises a College consisting of the European Chief Prosecutor, selected following an open call for candidates and appointed by the European Parliament and the Council of the EU for a non-renewable term of 7 years, and European Prosecutors (one from each participating Member State), appointed by their respective Member State. In October 2019, Laura Codruţa Kövesi was appointed as the first European Chief Prosecutor. In July 2020, the Council appointed the 22 European Prosecutors. The College establishes so-called Permanent Chambers that steer the operations carried out at national level. The Permanent Chambers are composed of a chairperson and two permanent members. They survey the investigations and guarantee the coherence of the EPPO's activities. The number of Permanent Chambers, their composition and the division of competences take due account of the functional needs of the EPPO and is laid down in its rules of procedure. The European Prosecutors basically assume coordinating and strategic tasks. They decide within the College in coordination with the Chief Prosecutor. It is safe to affirm that the EPPO's power lies not with the European Chief Prosecutor but with the College and above all the Permanent Chambers as organizational units within the EU body. The European Chief Prosecutor can nevertheless exercise some influence and power if it manages to persuade the members of the College of a certain course of action. Furthermore, it should mentioned that the European Chief Prosecutor, in her role as *primus inter pares*, not only assumes the said coordinating function at the College but also participates in the day-to-day work and decision-making within the Permanent Chamber it has been assigned to, as any other European Prosecutor.

The EPPO is structurally independent in terms of organization and planning, as it is not incorporated into another EU institution, agency or body. It is nonetheless accountable for its general work to the Council, the European Parliament as well as to the European Commission. Art. 7 of the EPPO Regulation imposes upon this EU body the duty to draw up and publicly issue an Annual Report on its general activities in the official languages of the institutions of the EU. It shall transmit the report to the European Parliament and to national parliaments, as well as to the Council and to the Commission. Furthermore, the European Chief Prosecutor is required to appear once a year before the European Parliament and before the Council, and before national parliaments of the Member States at their request, to give account of the general activities of the EPPO. In the latter case, the European Chief Prosecutor may be replaced by one of her two Deputy European Chief Prosecutors, who are appointed to assist it in the discharge of her duties and to act as replacement when it is absent or is prevented from attending to those duties. As any other public prosecutor, the EPPO is obliged to respect fundamental principles such as the principles of legality and proportionality as well as of due process. The European Chief Prosecutor can be dismissed only by a decision of

the Court of Justice of the European Union («CJEU»), following an application by any of the aforementioned EU institutions.

2. The decentralized level

The decentralized level is anchored in the judicial system of the participating Member State and is composed of the so-called European Delegated Prosecutors («EDPs»). Upon a proposal by the European Chief Prosecutor, the College shall appoint the EDPs nominated by the Member States. The EDPs act on behalf of the EPPO in their respective Member States and have the same powers as national prosecutors in respect of investigations, prosecutions and bringing cases to judgment, in addition and subject to the specific powers and status conferred on them, and under the conditions set out in the EPPO Regulation. The EDPs are responsible for those investigations and prosecutions that they have initiated, that have been allocated to them or that they have taken over using their right of evocation. The EDPs are also responsible for bringing a case to judgment, in particular they have the power to present trial pleas, participate in taking evidence and exercise the available remedies in accordance with national law. There are two or more EDPs in each Member State. They must be active members of the public prosecution service or judiciary of the Member States, entrusted with criminal investigations and prosecutions. The EDPs continue to exercise their duties as national public prosecutors and have therefore a double function; however, they are entirely independent from their national prosecution authorities[8]. This requirement is of particular importance, as, firstly, the status of the prosecuting authorities may vary from one national system to another (with either the judiciary or the public prosecution service assuming a prominent part) and, secondly, the public prosecution service may not enjoy the same level of independence from the executive branch of the State as the judiciary[9].

IV. Competence and tasks

1. Supervision and instructions

The European Prosecutors are those who, from a legal and organizational point of view, supervise the investigations and prosecutions on behalf of the competent Permanent Chambers at EU level, which the EDPs are in turn responsible for in their respective Member States of origin. As a rule, a European Prosecutor is in charge of the supervision of those EDPs who stem from his Member State of origin. Only exceptionally, for example due to a high number of investigations and prosecutions, may a European Prosecutor request that the supervision of certain investigations and prosecutions in his Member State of origin be assigned to other European Prosecutors. They constitute, from a functional point of view, a junction between the central office in Luxembourg and the decentralized level in their Member States. In this role, they facilitate the functioning of the EPPO as a single office. As a rule, the EDPs are bound by the instructions given by the Permanent Chambers and the European Prosecutors. As a consequence, national rules prescribing that a public prosecutor must comply with the instructions of his national superior, should not be applicable to EDPs.

2. Material competence

Pursuant to Art. 22 of the EPPO Regulation in connection with Art. 86(1) and (2) TFEU, the EPPO is in charge of combatting criminal offences affecting the financial interests of the EU. The PIF Directive, as implemented by national law, is relevant for the determination of the material competence of the EPPO. This body can investigate cases of fraud in connection with EU funding. The latter can comprise regional funds, financial resources of the common agricultural policy or other projects financed by the EU. A focus

[8] Petrasch, M., „Europäische Staatsanwaltschaft ante portas“, *Corporate Compliance Zeitschrift*, 3/2021, p. 128.
[9] Mitsilegas, V., *EU Criminal Law*, Oxford 2022, p. 457.

could lie on the manipulation of award procedures[10]. The EPPO will in particular have to investigate complex cases related to value added tax («VAT») carousel fraud. Art. 3(2) of the PIF Directive contains a definition of «*fraud affecting the EU's financial interests*», which essentially implies a damage to the EU budget inflicted by the fact of using public funds for purposes other than those specified by the law or a contract.

The efficient investigation of criminal offences punishable under EU law can make it necessary to extend the investigation carried out by the EPPO to other criminal offences punishable under national law when the latter are inextricably linked to criminal conduct causing damage to the financial interests of the EU. The EPPO is also in charge of prosecuting the violation of a criminal provision that, despite not falling within the scope of the PIF Directive, relates to the same facts. In general, competence and powers of the EPPO are far reaching. The EPPO is also competent for offences regarding the participation in a criminal organization if the focus of its criminal activity is to commit any of the offences referred to in the PIF Directive. However, the EPPO is not competent for criminal offences in respect of national direct taxes including offences inextricably linked thereto.

The EPPO Regulation contains important restrictions of the material competence. As regards VAT fraud, it states that the EPPO shall only be competent when the intentional acts or omissions defined in that provision are connected with the territory of two or more Member States and involve a total damage of at least EUR 10 million. Another restriction follows from Art. 25(2) of the EPPO Regulation, according to which where a criminal offence caused or is likely to cause damage to the EU's financial interests of less than EUR 10 000, the EPPO may only exercise its competence if the case has repercussions at EU level which require an investigation to be conducted by the EPPO; or officials or other servants of the EU, or members of the institutions of the EU could be suspected of having committed the offence. The EPPO shall, where appropriate, consult the competent national authorities or bodies of the EU to establish whether the criteria mentioned above are met. It is obvious that the provisions concerning the material competence aim at ensuring that the EPPO only intervenes if its involvement is justified by the nature and/or the gravity of the criminal offence, being the national authorities otherwise competent for investigation and prosecution.

3. Territorial competence

The EPPO is competent for the aforementioned criminal offences where such offences are committed in whole or in part within the territory of one or several Member States. A procedure initiated by a EDP or following the instructions of a Permanent Chamber is generally conducted by the EDP of the Member State in which the focus of the offence lies. In justified cases, a EDP from another Member State can be assigned, for example, when the suspected person has its habitual residence in that Member State, has the nationality of that Member State or the financial damage has been mainly produced there.

4. Initiation, termination of the investigation and prosecution

Where, in accordance with the applicable national law, there are reasonable grounds to believe that an offence within the competence of the EPPO is being or has been committed, a EDP in a Member State which according to its national law has jurisdiction over the offence shall initiate an investigation and note this in the case management system. The EPPO may be informed of those offences through a dedicated platform on its website (www.eppo.europa.eu)[11] but also through the intermediary of European and national institutions, including the judicial authorities already entrusted with an investigation. Once an offence has been notified to the EPPO, it has 20 days to initiate an investigation and, if an investigation is

[10] Kühn, W. M., "The reform of the EEA rules on public procurement", *Upphandlingsrättslig Tidskrift*, 2/2015, p. 150, provides an overview of the latest reform in this area of EU law.

[11] Members of the public are advised to go to the category "report a crime", in which they will find ample information on the criminal offences falling within the competence of the EPPO, as well as a web form to fill out if they wish to report a crime.

already being carried out at national level, the EPPO has a deadline of 5 days to exercise its right of evocation and to inform the national authorities of its decision.

When the handling EDP considers the investigation to be completed, it submits a report to the supervising European Prosecutor, containing a summary of the case and a draft decision whether to prosecute before a national court or to consider a referral of the case, dismissal or simplified prosecution procedure. The supervising European Prosecutor forwards those documents to the competent Permanent Chamber accompanied, if it considers it to be necessary, by its own assessment. The final task of the Permanent Chamber is to decide whether to bring a case to judgment or to close it. A case can be closed by a Permanent Chamber when the prosecution becomes impossible due to lack of evidence, prescription, the *ne bis in idem* principle, amnesty, immunity, etc. A possible investigation based on new facts shall remain unaffected thereby. A case is brought to court by the EDP in compliance with national law.

5. Lifting of privileges or immunities

Given that the EPPO will have to investigate and prosecute criminal offences affecting the financial interests of the EU - for example in the area of customs, VAT and public procurement, where both EU and national public servants exercise key functions - the privileges and immunities acknowledged to some high-ranking public servants might pose obstacles to the investigation. As immunities are not meant to offer impunity but rather aim at ensuring the fulfillment of a public servant's tasks by shielding him from undue interference, it is necessary that these immunities be lifted in specific cases in order to guarantee compliance with the law. The EU legislator seems to have been aware of these challenges, as Art. 29 of the EPPO Regulation provides that EPPO shall make a reasoned written request for the lifting of such privilege or immunity in accordance with the procedures laid down by respectively EU or national law.

V. Rights and procedural safeguards foreseen in EU law

1. Rights enshrined in the EPPO Regulation and harmonized minimal standards

The EPPO Regulation contains numerous rights and procedural safeguards applicable to suspects, accused persons and witnesses. The objective is to guarantee the legality of the activities carried out by this EU body as well as the strict respect of EU law. This requirement is important, as national law governs all aspects of the proceedings if not explicitly dealt with by this Regulation. More concretely, Art. 41(1) of the EPPO Regulation prescribes that these activities shall be carried out in full compliance with the rights enshrined in the Charter, including the right to a fair trial and the rights of defense. Among the rights guaranteed by the Charter that may prove relevant in cross-border investigations should be mentioned the presumption of innocence (Art. 47 of the Charter)[12], the principle of *ne bis in idem* (Art. 50 of the Charter)[13] and the principles of legality and proportionality of criminal offences and penalties (Art. 49 of the Charter)[14].

Furthermore, it is worth noting that Art. 41(2) of the EPPO Regulation refers to procedural rights that are already foreseen in a number of EU Directives:

- 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[15];
- Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings[16];

[12] CJEU order of 12 February 2019 in case C-8/19 PPU, RH, EU:C:2019:110.
[13] CJEU judgment of 26 February 2013 in case C-617/10, Åkerberg Fransson, EU:C:2013:105.
[14] CJEU judgment of 20 March 2018 in case C-524/15, Menci, EU:C:2018:197, paragraph 55.
[15] OJ 2010, L 280, p. 1.
[16] OJ 2012, L 142, p. 1.

• 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[17];

• Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings[18];

• Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings[19].

By referring to these Directives, the EU legislator recalls that minimum standards for procedural rights of suspects or accused persons apply in all Member States[20]. Consequently, it would be logical to assume that the differences in legislation from one Member State to another will not be particularly striking given the degree of harmonization that currently exists. However, it cannot be ruled out that these procedural rights might not be implemented entirely or correctly in all national legal systems. In such a case, the reference to the aforementioned Directives would allow suspects and accused persons to invoke those rights directly against the EPPO. It can be expected that the precise scope of the procedural rights guaranteed by EU law will be a contentious issue that will require a clarification by the CJEU by way of preliminary rulings pursuant to Art. 267 TFEU[21]. The interpretation given by the CJEU to the procedural rights guaranteed in other EU legal instruments that fall within the domain of judicial cooperation in criminal matters could be useful as well. It should not be forgotten in this context that the *Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States* provides for procedural safeguards such as the *ne bis in idem* principle that qualifies as a ground for mandatory non-execution of a European arrest warrant[22]. In the same vein, Art. 11 of the aforementioned Framework Decision guarantees the right of access to information for the requested person by demanding that he be informed of the warrant, its contents and of his entitlement to legal representation by the issuing Member State. The said principles as well as other concepts inherent to this domain as a whole should be interpreted uniformly in the interest of consistency.

The relation between the rights guaranteed by the aforementioned Directives and those foreseen in the EPPO Regulation is likely to be another matter of contention when interpreting EU law, in particular where there is an overlap of their material scope. To mention an example, Art. 41(2)(b) of the EPPO Regulation refers to the right of information and access to the case materials, as provided for in Directive 2012/13/EU, while also laying down the conditions of access to the «case file», which in turn is defined in Art. 45 of the EPPO Regulation. A potential conflict could arise if there were to be a contradiction between the provisions of Directive 2012/13/EU and those of the EPPO Regulation, thus requiring a clarification as to which provisions prevail in a concrete case. In that regard, it must be pointed out that, on the one hand, Art. 45(2) of the EPPO Regulation states that *«access to the case file shall be granted by the handling EDP in accordance with the national law of that Prosecutor's Member State»*, which implies that Directive 2012/13/EU might be relevant in so far as it imposes certain requirements on national law. As a matter of fact, Recital 31 of Directive 2012/13/EU lists some of the materials that may be contained in a case file (documents, photographs and audio as well as video recordings).

[17] OJ 2013, L 294, p. 1.
[18] OJ 2016, L 65, p. 1.
[19] OJ 2016, L 297, p. 1.
[20] Martin-Vignerte, E., "Procedural safeguards in EPPO cross-border investigations", *ERA Forum*, Trier 2020, p. 503.
[21] See, for example, CJEU judgments of 12 March 2020 in case C-659/18, VW (Right of access to a lawyer in the event of non-appearance), EU:C:2020:201; of 23 November 2021 in case C-564/19, IS (Illégalité de l'ordonnance de renvoi), EU:C:2021:949.
[22] Kühn, W. M., "Problemas jurídicos de la Decisión Marco relativa a la Orden de detención europea y a los procedimientos de entrega entre los Estados Miembros de la Unión Europea", *Revista General de Derecho Europeo*, n°12, 2007.

On the other hand, attention should be drawn to the fact that Art. 45(1) of the EPPO Regulation specifies that *«the case file shall contain all the information and evidence available to the EDP that relates to the investigation or prosecution by the EPPO»*. Questions could therefore be raised as regards the precise content of the «case file» to be made accessible to a suspect or a person accused in criminal proceedings. An answer could only be given by means of a systematic interpretation. Given the fact that Directive 2012/13/EU, firstly, imposes general requirements for criminal proceedings and, secondly, was adopted prior to the adoption of the EPPO Regulation that introduces specific provisions, it would be reasonable to assume that those conflicts would have to be solved by relying on the rule of interpretation *lex specialis derogat legi generali*. As a result, the provisions of the EPPO Regulation will have to prevail over those Directive 2012/13/EU if they contain specific rules as to how to implement the procedural right in question. An interpretation by the CJEU would be welcome, since a solution to these questions might not be always easy to find.

2. The European Convention on Human Rights

Where the case law of the CJEU does not provide sufficient guidance as to how to interpret the provisions of the EPPO Regulation requiring this EU body to handle criminal proceedings in compliance with the rule of law, in particular with the principles of due process, the case law of the European Court of Human Rights («ECtHR») is likely to fill those gaps. This concerns in particular the admissibility of evidence, an aspect that has been the subject of abundant case law under Art. 6(1) of the ECHR. Whilst Art. 37(1) of the EPPO Regulation states that evidence presented by the prosecutors of the EPPO or the defendant to a court shall not be denied admission on the mere ground that the evidence was gathered in another Member State or in accordance with the law of another Member State, it is not difficult to imagine circumstances that might potentially raise questions as to whether the evidence obtained in an investigation may be used in court. After all, Art. 37(2) of this Regulation recognizes the freedom of national courts to assess the weight of the evidence presented by the defendant or the prosecutors of the EPPO.

Consequently, there is a risk that national courts might develop different views on that respect. Furthermore, it is worth noting that Recital 80 recalls that national courts may apply *«the fundamental principles of national law on fairness of the procedure that they apply in their national systems».* The risk of a lack of uniformity as regards the admissibility of evidence might be contained by the minimum standards set by Art. 6(1) of the ECHR, as interpreted by the ECtHR. In the interest of completeness, it is worth recalling that these minimum standards would apply as well in circumstances in which the Member States were to «implement EU law», within the meaning of Art. 51 of the Charter, since these standards are recognized as having the status of general principles of EU law, according to Art. 6(3) TEU[23], despite the fact that the EU has not yet acceded as a contracting party to the ECHR[24] and therefore the latter does not constitute a legal instrument which has been formally incorporated into EU law[25].

[23] Kühn, W. M., "Responsabilidad extracontractual de la Unión Europea violación por parte de su Tribunal de Justicia del derecho fundamental a una duración razonable del proceso", *Revista de la Secretaría del Tribunal Permanente de Revisión del Mercosur*, vol. 6, nº. 12, 2018, p. 175.

[24] In its Opinion 2/13 of 18 December 2014, EU:C:2014:2454, adopted pursuant to Art. 218(11), the CJEU concluded that the draft agreement on the accession of the EU to the ECHR was not compatible with Art. 6(2) TEU or with Protocol (N° 8) relating to Art. 6(2) TEU on the accession of the EU to the ECHR.

[25] CJEU judgment of 20 March 2018 in case C-524/15, Menci, EU:C:2018:197, paragraph 22.

3. Procedural rights available under the applicable national law

Last but not least, it should be mentioned that according to Art. 41(3) of the EPPO Regulation, suspects and accused persons as well as other persons involved in the proceedings of the EPPO *«shall have all the procedural rights available to them under the applicable national law»*, including the possibility to present evidence, to request the appointment of experts or expert examination and hearing of witnesses, and to request the EPPO to obtain such measures on behalf of the defense. In other words, national law is likely to function as an additional «safety net» in the sense that it will guarantee protection in all aspects not dealt with by the EPPO Regulation. Furthermore, national legislation might potentially guarantee procedural rights that are not foreseen in EU law or the law of other Member States. More interestingly, national legislation might even offer more advantageous rights, which is not per se ruled out as long as it does not compromise the primacy, unity and effectiveness of EU law[26]. Given the fact that the issue as to how multiple sources of fundamental rights interact is far from being resolved[27], it can be expected that the CJEU will be called upon to defuse potential conflicts between EU law and national law related to the scope of protection, as it has already been the case in the past.

4. Data protection rules

The EPPO necessarily processes personal data in order to fulfil its mission. This is in particular the case when the EPPO transmits to other public entities personal data that has been collected during its investigations. The EPPO Regulation provides a set of data protection rules for operational purposes, so that this EU body does not need to rely on *Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data*[28]. However, an important exception applies to data processed for administrative purposes, such as human resources, budget and security related purposes. As a result, the EPPO's legal framework distinguishes between two main purposes of processing, namely operational and administrative, each of them with separate sets of rules. Whether the personal data in question is processed for operational or administrative purposes has consequences on a number of aspects, such as how and where the personal data is processed, for how long, whom it may be shared with, but also as regards the rights of data subjects and the reasons why they may be restricted.

According to the data protection rules laid down in the EPPO Regulation, personal data may only be used in compliance with EU law, in other words, processed lawfully and fairly, collected for specified, explicit and legitimate purposes and not further processed in a manner incompatible with those purposes. In order to ensure the efficient, reliable and uniform surveillance of the respect of the legal obligation, competences are conferred on the European Data Protection Supervisor («EDPS»)[29]. It can advise the EPPO and exercise control of the latter's activities that prove relevant for the protection of personal data. It is important noting in this context that the EDPS is expected to monitor the personal data processing according to the EPPO's special data protection regime[30].

[26] CJEU judgment of 26 February 2013, in case C-399/11, Melloni, EU:C:2013:107, paragraph 60.
[27] Christodoulou, H., « Le parquet européen: prémices d'une autorité judiciaire de l'Union européenne », *Nouvelle bibliothèque de thèses*, vol. 120, 2021, p. 250.
[28] OJ 2018, L 295, p. 39.
[29] EDPS, *Interpretation of the EPPO Regulation in view of EPPO's supervision by the EDPS*, report of 12 April 2021, provides an overview of the data protection rules applied by the EPPO.
[30] De Hert, P./Papakonstantinou, V., "Data Protection and the EPPO, *New Journal of European Criminal Law*, 2019, vol. 10(1), p. 38.

5. Procedural rights in the cases involving non-participating Member States and third countries

It is necessary to stress that the above explanations apply first and foremost to cross-border cases involving Member States that participate in the enhanced cooperation on the establishment of the EPPO. As will be explained further in this paper, the EPPO is supposed to cooperate as well with NPMS and third countries, which poses certain challenges for the protection of procedural rights. However, that does not mean that a suspect or an accused person will be totally deprived of procedural rights. The degree of protection might nonetheless vary depending if a case involves a NPMS or a third country, as shall be explained hereafter. Although Art. 41 of the EPPO Regulation, the cornerstone of the protection of procedural rights under this legal act, would not formally apply to a NPMS, there is little doubt that the consequences for the protection of procedural rights in criminal proceedings would not be entirely different, as a NPMS would in any case be bound by the Charter and the Directives harmonizing national legislation referred to above by virtue of its status as EU Member State. Merely those procedural guarantees explicitly enshrined in specific provisions of the EPPO Regulation would not apply. In addition, it can be maintained with certainty that the NPMS would have to respect the procedural rights guaranteed by other EU legal instruments of judicial cooperation already mentioned in this paper, such as those regulating the European arrest warrant and the European investigation order.

In the event that those legal instruments should exceptionally not apply to the NPMS in question, the *Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union*[31] could be invoked, which however provides very limited safeguards, namely the respect for basic principles of the Member State's national law and compliance with the ECHR. In this context, it must be borne in mind that the minimum standards of protection in criminal proceedings set by Art. 6(1) of the ECHR that every Member State ought to comply with would apply. The situation would only be considerably different if a third country were to be involved, depending on whether it is a party to the ECHR or not. Should this not be the case, merely the procedural rights guaranteed in the domestic legislation of that third country would apply, probably in implementation of international human rights agreements into domestic law. An example would be the *International Covenant on Civil and Political Rights*, whose Art. 14 recognizes and protects a right to justice and a fair trial. Art. 15 of the said covenant prohibits prosecutions under ex post facto law and the imposition of retrospective criminal penalties, and requires the imposition of the lesser penalty where criminal sentences have changed between the offence and conviction. Given that the said human rights essentially mirror those protected under the ECHR, it cannot be ruled out that an equivalent protection will be guaranteed.

6. Mechanisms of control and legal remedies

The mechanisms of control and the legal remedies provided for in the EPPO Regulation shall be briefly mentioned in connection with the procedural safeguards that suspects and accused persons may invoke in criminal proceedings. According to its Art. 42(1), procedural acts of the EPPO that are intended to produce legal effects vis-à-vis third parties shall be subject to review by the competent national courts in accordance with the requirements and procedures laid down by national law. The same applies to any failures of the EPPO to adopt procedural acts which are intended to produce legal effects vis-à-vis third parties and which it was legally required to adopt under this Regulation. Due to the importance of legal review for the safeguard of the rule of law in criminal proceedings, its various modalities shall be examined more closely hereafter in a dedicated chapter.

[31] OJ 2000, C 197, p. 3.

VI. Legal review

The respect of the rule of law, one of the values that the EU is founded on, as stated in Art. 2 TEU, requires that the acts adopted by the EPPO be subject to legal review. Art. 47 of the Charter and Art. 19 TEU guarantee, *inter alia*, the right to an effective legal remedy and the right to an independent and impartial tribunal previously established by law, as regards the protection of the rights and freedoms guaranteed by EU law[32]. The exclusion of such a review would therefore be not only a direct attack on the rule of law but would challenge the obligation of the EU to uphold fundamental rights, as enshrined in the ECHR and the Charter. It is worth recalling in this context that the EU still benefits from the so-called «Bosphorus presumption», developed in the case law of the ECtHR[33], according to which when a Member State implements its obligations arising from the membership in the EU, the Member State is presumed acting in compliance with the ECHR, provided that the protection of fundamental rights in the EU is equivalent to that provided by the ECHR. In that respect, Art. 52(3) of the Charter specifies that in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the ECHR. EU law may nevertheless provide more extensive protection. When it comes to providing legal review of acts adopted by the EPPO, the question of jurisdiction is a particularly sensitive and complicated one due to its hybrid nature. Reference has already been made to Art. 42(1) of the EPPO Regulation that confers on national courts the power to exercise judicial review of those procedural acts of the EPPO that are intended to produce legal effects vis-à-vis third parties. In other words, although established as a supranational EU body, for the purposes of judicial review, the EPPO acts as a national body. As a result, the role of the national judge in guaranteeing effective legal protection in the areas of operation of the EPPO is crucial[34].

An aspect that must be examined more closely is the jurisdiction assigned to the CJUE, given the fact that the EPPO is an «*indivisible EU body*», according to Art. 8(1) of this Regulation, after all and, consequently, subject to its jurisdiction unless otherwise regulated by EU law. It should be recalled in this context that, pursuant to Art. 19(1) TEU, the CJEU «*shall ensure that in the interpretation and application of the Treaties the law is observed*». These competences are laid down in paragraphs 2 to 8 of Art. 42 of the Regulation and require further scrutiny. Before going into details, it is safe to affirm that the role of the supranational judge remains residual. In any case, the supranational judge appears to play a less prominent part than the one assigned to his national counterpart when it comes to legal review. The EPPO Regulation provides that the CJEU has jurisdiction, under Art. 267 TFEU, to give preliminary rulings concerning the validity of procedural acts of the EPPO, in so far as such a question of validity is raised before any court or tribunal of a Member State directly on the basis of EU law. Furthermore, the CJEU has competence with regard to the interpretation or the validity of provisions of EU law, including the EPPO Regulation, and the interpretation of Art. 22 and 25 of this Regulation in relation to any conflict of competence between the EPPO and the competent national authorities. Moreover, the decisions of the EPPO to dismiss a case, in so far as they are contested directly on the basis of EU law, are subject to judicial review before the CJEU, in accordance with Art. 263(4) TFEU. The CJEU is also competent for compensation for damage caused by the EPPO, for arbitration based on clauses contained in contracts concluded by the EPPO, and for disputes concerning staff-related matters. Its jurisdiction encompasses the dismissal of the European Chief Prosecutor or European Prosecutors as well. Last not least, the judicial review of the CJEU covers decisions related to data protection, the right of public access to documents, decisions dismissing EDPs or any other administrative decisions.

The first case pending before the CJEU and concerning the interpretation of the EPPO Regulation is a reference for preliminary ruling lodged on 25 April 2022 in Case C-281/22, GK and Others[35], by which

[32] See CJEU judgment of 16 February 2022 in case C-156/21, Hungary v Parliament and Council, EU:C:2022:97, paragraph 157.
[33] See ECtHR judgment of 30 June 2005, Bosphorus Airways v Ireland, application n° 45036/98.
[34] Christodoulou, H., « Le parquet européen: prémices d'une autorité judiciaire de l'Union européenne », *Nouvelle bibliothèque de thèses*, vol. 120, 2021, p. 374.
[35] OJ 2017 L 283, p. 1.

the Oberlandesgericht Wien (Vienna Higher Regional Court, Austria) seeks clarification as to the extent of judicial review if it comes to cross-border investigations within the EPPO regime. In the case at issue, the Austrian court has to decide on appeals by natural and legal persons who were subject to searches in Austria. Investigations were conducted by the EDP in Munich, Germany (handling EDP), who sought assistance from his colleague in Austria (assisting EDP). The appellants contested the coercive measures in Austria as being inadmissible due to the lack of suspicion and proportionality and due to the infringement of fundamental rights. According to the referring national court, Arts. 31(3) and 32 of the EPPO Regulation are unclear as to which extent Austrian courts can verify the measure under their national law. On the one hand, it could be argued that the courts in the assisting Member State (in the case at hand, Austria) are not limited to a formal review, but must also verify the substantive provisions of this Member State. On the other hand, this would mean, according to the referring court, that cross-border investigations carried out under the EPPO Regulation might be more cumbersome than approving a measure in accordance with the EU's instruments on mutual recognition, notably the European investigation order. The referring national court also poses the question as to which extent decisions taken by courts in the Member State of the EDP handling the case (in the case at hand, Germany) must be recognized. The appellants, the Austrian EDP, the governments of Austria, France, Germany, the Netherlands and Romania as well as the Commission have submitted written observations. A date for the hearing has not yet been announced.

This pending case raises interesting legal questions as regards the scope of judicial review and the extent to which the principle of mutual recognition of judicial decisions applies in the Area of Freedom, Security and Justice[36]. For the sake of completeness, it should be pointed out that whilst there have already been a few cases before the General Court involving the EPPO, these cases only concerned the legality of the appointment of certain European Prosecutors and EDPs. More specifically, the candidates applying for these positions saw their applications rejected and therefore either requested interim measures against the decisions appointing the more successful competitors or the annulment of these decisions by the General Court[37]. However, to this date, none of these actions has been successful, an appeal filed before the CJEU having even been withdrawn. Given that these cases are not particularly interesting from a legal point of view, as they rather concern questions of procedure, it is advisable to await the Advocate General's Opinion and the CJEU's judgment in the aforementioned Austrian case in order to gain insight into how this jurisdiction assesses the legal nature of the EPPO.

VII. Issues arising from the interaction with national law

Rather than a supranational body that applies exclusively EU law, the EPPO comes across as a hybrid entity that relies extensively on national law in order to achieve its objectives. Indeed, whilst the PIF Directive (as transposed in national law) determines the criminal offences to be prosecuted and the EPPO Regulation lays down the competences and duties of this EU body, matters of criminal procedure are mainly determined by national law. Indeed, Art. 5(3) of the EPPO Regulation specifies that, as far as investigations and prosecutions on behalf of the EPPO are concerned, national law shall apply «*to the extent that a matter is not regulated by this Regulation*». In addition, it is clear that the factual power of the EPPO consists in the coordination that takes place within the Permanent Chambers, while the frontline powers rest with the EDPs who remain deeply embedded in their national criminal justice systems. Against this background, it is safe to claim that the drafters of the EPPO Regulation have obviously envisaged keeping interference in the procedural autonomy of the Member States to a minimum.

[36] Kühn, W. M., "The Principle of Mutual Recognition of Judicial Decisions in EU Law in the Light of the Full Faith and Credit Clause of the US Constitution", *Boletín mexicano de derecho comparado*, vol 47, n° 140, 2014, p. 449, explains the origins of the principle of mutual recognition of judicial decision in US constitutional law.

[37] GC orders of 23 February 2022 in case T-603/21 R, WO/EPPO, not published, EU:T:2022:92; of 13 June 2022 in case T-334/21, Mendes de Almeida/Council, EU:T:2022:375.

1. The EU legislator's choice in favor of an intergovernmental model

This is particularly obvious for the decentralized structure that, as already mentioned, includes a College consisting of the Chief Prosecutor and European Prosecutors from each participating Member State. The model initially conceived in the Commission's proposal[38] envisaged a more centralized, vertical and hierarchical setup with a European Public Prosecutor on the top and EDPs located in the Member States. Pursuant to the Commission's proposal, the EDPs would be in charge of the investigations and prosecutions under the direction and supervision of the European Public Prosecutor. The legislative history leading to the adoption of the EPPO Regulation shows that the Member States opposed this model on the grounds of an alleged breach of the principle of subsidiarity. For that reason, despite the Commission's insistence in keeping the model suggested, the proposal was modified in favor of the current one that has a clear intergovernmental setup[39]. Indeed, the EPPO Regulation confers the real power not on the European Chief Prosecutor but on the College. Likewise, it should be recalled that the Permanent Chambers in charge of taking case-related decisions are dominated by prosecutors appointed as representatives of their Member States. Whilst the European Chief Prosecutor can be outvoted in the College, it can still exercise some influence, provided that it has the necessary support of the other members[40].

From an analytical point of view, it is legitimate to ask whether the College structure that underlies the current model is, to some extent, a remnant from pre-Lisbon times, when cooperation in criminal matters would follow an intergovernmental approach[41]. The creation of a more centralized and hierarchical structure, with the Chief Prosecutor (or the «European Public Prosecutor», according to the terminology used in the proposal) may have been more in line with the changes that the EU treaties have undergone in the past decade. On the other hand, it could be argued that the creation of a College composed of public prosecutors of every Member State, each of them being familiar with the legal and factual situation in their respective Member States, has the advantage of guaranteeing, firstly, a sense of ownership over the investigations and, secondly, the necessary accountability for the results obtained in those investigations. Indeed, it is hard to imagine how a rather small, centralized unit based in Luxembourg could have possibly steered investigations in the whole territory of the EU. Against that background, the approach followed by the EU legislator appears to have been a sensible one.

2. The institutional anchoring of the European Delegated Prosecutors in the national judicial systems

Whilst the fact that EDPs are anchored in the judicial system of their Member States may have some advantages for the performance of their tasks, such as proximity to the place in which the criminal offences have been committed, as well as knowledge of the procedural possibilities a prosecutor has, certain aspects give nonetheless rise to criticism. This is, for instance, the case for the «dual hat» that EDPs are obliged to wear, according to Art. 13(3) of the EPPO Regulation. This provision states that the EDPs may also exercise functions as national prosecutors, to the extent that this does not prevent them from fulfilling their obligations under this Regulation. It could be argued that it might be difficult in practice for a EDP to exercise

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

[39] Weyembergh, A./Briere, C., "Towards a European Public Prosecutor's Office (EPPO)", European Parliament, Study for the LIBE Committee, Directorate-General for internal policies, Policy Department C (Citizen's rights and constitutional affairs), Brussels 2016, p. 8, explain that the overall analysis of the EPPO Regulation "reveals a number of weaknesses and shortcomings", most of them being "the direct or indirect result of the Member States' willingness to renationalize the EPPO as much as possible, and to keep the strongest control possible over its activities".

[40] Wade, M., "The EPPO and the pitfalls of actuarial justice", *Maastricht Journal of European and Comparative Law*, 2021, vol. 28(2), p. 270.

[41] Ligeti, K., "The structure of the EPPO: features and challenges", *Croatian Annual of Criminal Sciences and Practice*, 2020, vol. 27, n° 1, p. 40.

his functions as a «part-time EU public prosecutor» and that a EDPs' duties towards the EPPO risk being neglected. This might be the reason why some Member States have already decided against this option.

The aforementioned provision tries to cater for this issue by specifying that the EDPs shall inform the supervising European Prosecutor of such functions. In the event that a EDP at any given moment is unable to fulfil his functions as a EDP because of the exercise of such functions as national prosecutor, he shall notify the supervising European Prosecutor, who shall consult the competent national prosecution authorities in order to determine whether priority should be given to their functions under this Regulation. The European Prosecutor may propose to the Permanent Chamber to reallocate the case to another EDP in the same Member State or that he conduct the investigations himself in accordance with Art. 28(3) and (4) of the EPPO Regulation. It remains to be seen how these provisions will be applied in practice and whether they are enough to ensure that the «double responsibility» borne by the EDPs does not compromise their efficiency.

3. The incomplete harmonization of substantive criminal law

As already mentioned, the material competence of the EPPO is defined by a reference to the PIF Directive, which aims at harmonizing the substantive criminal law of the Member States in a specific area. This entails, by definition, leaving a certain margin of maneuver to the Member States as to how they implement the PIF Directive. In addition, it is worth drawing the attention to the fact that Art. 1 of this Directive states that it «establishes *minimum rules* concerning the definition of criminal offences and sanctions with regard to combatting fraud and other illegal activities affecting the EU's financial interests», which means that the Member States may adopt stricter rules with a view to protect the said interests[42]. The diversity of definitions that may arise from this significant leeway granted to national legislature might prove incompatible with the principle *nullum crimen sine lege*, enshrined in Art. 49(1) of the Charter, according to which *«no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed.»* This provision, that corresponds to Art. 7 of the ECHR, is an expression of the rule of law and, as such, is of paramount importance in the area of criminal law.

Against this background, it cannot be ruled out that this legal issue might be raised in the framework of criminal proceedings. Whilst the harmonization of substantive criminal law might still be an issue for some Member States concerned about a potential loss of sovereignty, such an approach should nevertheless be contemplated in the future in order to prevent a possible scenario in which the compatibility of the EPPO Regulation with primary law might be questioned before the CJEU, for example in the framework of a preliminary ruling procedure, pursuant to Art. 267 TFEU. In this context, it should not be forgotten that, according to Art. 5(1) of this Regulation, the EPPO shall ensure that its activities respect the rights enshrined in the Charter. Given that the issue of compliance with fundamental rights has the potential to undermine the legitimacy of the EPPO and, ultimately, to hamper its functioning, it should be addressed with priority.

4. Diversity of national procedural rules

In view of the fact that the EPPO relies for its investigations and prosecutions on provisions of national law in so far as a matter is not regulated by the EPPO Regulation, differences in national procedural rules might make the investigation and the prosecution of crimes less predictable. Those differences might affect various aspects of the procedure, such as the admissibility of evidence and the availability of legal remedies, with consequences for the safeguard of the rights of the defendants. Indeed, the lack of clarity

[42] Lažetić, G., "A short overview of some challenging issues regarding the successful functioning of the EPPO", *Croatian Annual of Criminal Sciences and Practice*, 2020, vol. 27 n° 1, p. 191, explains that the view that the EU criminal justice system is far from harmonized and that it strongly depends on its interaction with the national legal systems of the Member States needs to be accepted.

might prove detrimental to this objective, as the suspects have a right to know the applicable rules. Moreover, the potential existence of more favorable procedural rules in some Member States is likely to increase the risk of «forum shopping» in favor of the EPPO. In order to prevent an arbitrary choice of forum, the EPPO regulation sets outs certain rules. Art. 5(3) stipulates that, unless otherwise specified, the applicable law is the law of the Member State of the EDP handling the case. Art. 26(4) states that, as a principle, a case shall be initiated and handled by the EDP from the Member State where the focus of the criminal activity is or, in case of connected offences, by the EDP from the Member State where the bulk of the offences was committed. A deviation from this rule is allowed, however only under strict conditions. More concretely, it should be duly justified taking into account the criteria listed in order of priority, i.e. residence and nationality of the suspect/accused and place where the main financial damage occurred.

Art. 37 of the EPPO Regulation states that evidence presented by the prosecutors of the EPPO or the defendant to a court shall not be denied admission on the mere ground that the evidence was gathered in another Member State or in accordance with the law of another Member State. This provision promotes a principle of «free movement of evidence» across the EU, based on a mutual recognition of evidence, which is fully consistent with the overarching concept of an Area of Freedom, Security and Justice, as foreseen in the EU treaties. However, it is worth noting in this context that Recital 80 introduces an important caveat by stating that the said principle applies *«provided that the trial court considers its admission to respect the fairness of the procedure and the suspect or accused person's rights of defense under the Charter.»* Furthermore, it should be pointed out that the same recital specifies that it *«in respecting the different legal systems and traditions of the Member States as provided for in Art. 67(1) TFEU, nothing in this Regulation may be interpreted as prohibiting the courts from applying the fundamental principles of national law on fairness of the procedure that they apply in their national systems.»* It follows from this clarification regarding the interpretation to be given to the EPPO Regulation that the powers of the prosecutors are again limited by national law in so far as the EPPO is obliged to verify that the applicable rules on procedure do not prevent the admission of evidence. The possibility that there might be important differences in that respect among the Member States is liable to affect the efficiency of the EPPO's prosecution in cross-border cases. A possible solution to this issue would be for the EU legislator to adopt Directives aimed at harmonizing the national rules on the admission of evidence.

5. Use of autonomous concepts with a view to address the reality of national law

Where the EPPO Regulation does not specifically refer to national rules[43], declaring them applicable, but rather uses autonomous concepts of EU law, the EPPO faces the challenge of having to «translate» those concepts into the terminology of national law. Despite the fact that the EPPO Regulation is directly applicable in the legal systems of all Member States, according to Art. 288 TFEU, the EU legislator appears to have opted for framing a number of concepts in sufficiently open and general terms in order to allow the EPPO and its aides at the decentralized level to identify the equivalent concepts in national law. This approach often used in EU legislation is a response to the diversity of legal systems and the impossibility of harmonizing the entirety of national rules by means of Directives[44]. As such, it can be used to refer to public authorities, procedures[45], specific legal statuses and other concepts of criminal procedure likely to exist in

[43] See CJEU judgment of 22 June 2021 in case C-439/19, Latvijas Republikas Saeima (Points de pénalité, EU:C:2021:504, paragraph 81, in which the case-law is reproduced, whereby terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the EU.

[44] See CJEU judgment of 24 November 2020 in case C-510/19, Openbaar Ministerie (Faux en écritures), EU:C:2020:953, regarding the concept of "executing judicial authority" within the meaning of Council Framework Decision 2002/584/JHA on the European arrest warrant.

[45] An example is the recourse to "simplified prosecution procedures" pursuant to Art. 40 of the EPPO Regulation if the applicable national law provides for such a procedure aiming at the final disposal of a case on the basis of terms agreed with the suspect. The

one way or another in all (or at least in most) Member States. It is also a way to ensure that the provisions of the EPPO Regulation be applied effectively notwithstanding this legislative diversity. It is logical that the use of autonomous concepts of EU law requires a uniform interpretation, a task that would primarily fall within the responsibility of the EPPO as the authority in charge of applying the EPPO Regulation, obviously under the control of the CJEU as the supreme interpreter of EU law. In addition, it seems necessary from a practical point of view to adopt implementing rules at national level, specifying those autonomous concepts, or at least to develop certain administrative guidelines explaining what the equivalent concepts of national law would be, hereby allowing national authorities to better understand the provisions of the EPPO Regulation. Such an approach would be consistent with EU law, as it would not undermine its primacy and direct effect.

6. Sentencing and sanctions

Whilst the EPPO is in charge of the prosecution of crimes, sentencing and sanctions remain the exclusive competence of national courts, which will decide in each case based on national law. Art. 325(1) and (2) TFEU, which is a directly applicable provision, merely lays down general requirements by obliging the Member States *«to counter illegal activities affecting the financial interests of the EU through effective and deterrent measures, and to take the same measures to counter fraud affecting the financial interests of the EU as they take to combat fraud affecting their own financial interests»*[46], hereby essentially declaring the principles of effectiveness and equivalence applicable to the area of criminal justice. These principles certainly set limits to the procedural and institutional autonomy of the Member States in the interest of a more effective enforcement of EU law at national level[47].

However, their main disadvantage is that compliance can often only be verified retrospectively and on a case-by-case basis in the framework of court proceedings. They cannot be considered an appropriate substitute for non-existing precise requirements in EU legislation, despite the groundwork laid with the adoption of the PIF Directive, which establishes minimum rules concerning sanctions. This circumstance might have as a consequence that some offences will be sanctioned more severely or leniently in some Member States than in others. For example, an offence might be sanctioned by imprisonment in one Member State and by a simple administrative fine in another one. Although legally possible given the great diversity of legal traditions and ethical views throughout the EU, as well as due to the absence of more advanced harmonization in this area, this divergent judicial practice might be hard to justify from a perspective of material justice.

For that reason, it cannot be ruled out that the EPPO might, in the long term, attempt to influence the sanction and the sentencing by requesting sentences of a specific severity or through plea-bargaining, where it is permitted. The EPPO might as well request from the national court to apply a specific sanction foreseen in guidelines reflecting the judicial practice of certain Member States and the CJEU case law in fraud cases[48]. It is likely to assume that the EPPO will strive to achieve a certain degree of coherence with a view to raise awareness of the gravity of the prosecuted offences and to create the necessary deterrent effect. This development will certainly depend on the EPPO's ability to implement a prosecution strategy across the EU.

EPPO Regulation refers to the criteria that the Permanent Chamber has to take into account when deciding to apply such a simplified procedure (seriousness of the offence, willingness of the suspected offender to repair the damage caused) and allows the College to adopt guidelines on the application of these criteria.

[46] CJEU judgment of 5 December 2017 in case C-42/17, M.A.S. und M.B., EU:C:2017:936, paragraph 30.

[47] CJEU judgment of 17 January 2019 in case C-310/16, Dzivev a.o., EU:C:2019:30, paragraph 30.

[48] Elholm, T., "EPPO and a common sense of justice", *Maastricht Journal of European and Comparative Law*, 2021, vol. 28(2), p. 224.

VIII. Cooperation

1. The cooperation with other EU bodies

The EPPO may establish and maintain cooperative relations with institutions, bodies, offices or agencies of the EU in accordance with their respective objectives in so far as necessary for the performance of its tasks. Cooperation expressly includes the exchange of information. There are practical reasons for foreseeing such cooperation, namely the possibility of taking advantage of specialized knowledge and resources available to other EU bodies. Mutual assistance is very common among EU agencies, to the point that it is often explicitly envisaged in the EU treaties or in the founding regulations. Where this is not the case, the principle of sincere cooperation, enshrined in Art. 4(3) TEU, may be invoked. The EU bodies operating in the area of home affairs, in particular those involved in the fight against criminality, are most likely to become «privileged partners». Whilst the EPPO Regulation itself envisages such cooperation and contains specific provisions to that effect, details are set out in working arrangements of a technical and/or operational nature to be concluded between the EPPO and the counterpart, as is the case of many EU agencies. Art. 99(3) of the EPPO Regulation contains a caveat, specifying that the working arrangements may neither form the basis for allowing the exchange of personal data nor have legally binding effects on the EU or its Member States.

It should be stressed that cooperation with the EPPO is also essential for the EU bodies operating in this area, as they do not have the power to autonomously initiate an investigation. Since the mission of the latter is essentially limited to support and to coordinate, respectively, competent national prosecutors and national police forces that are investigating and prosecuting serious crimes, and they can only act upon request, they necessarily rely on the EPPO's power to launch its own investigations and prosecutions. To some extent, the EPPO with its investigative and prosecuting powers fills a sensitive gap at EU level as regards the fight against cross-border crime. Notwithstanding this positive aspect, it is worth noting that the EPPO and the EU bodies operating in the area of home affairs share a common trait that could be regarded as a gap intentionally created by the EU legislator in order to preserve national sovereignty, which is the lack of coercive powers. Instead, Recital 69 of the EPPO Regulation stipulates that this EU body should rely on national authorities, including police authorities, hereby reproducing what is already laid down in primary law, namely the exclusive responsibility of the competent national authorities as regards the application of coercive measures.

a) EUROJUST

Eurojust is a EU agency operating on the basis of Art. 85 TFEU and *Regulation (EU) 2018/1727 of the European Parliament and the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation, replacing and repealing Council Decision 2002/187/JHA*[49] («EUROJUST Regulation») that works with national authorities to combat a wide range of serious and complex cross-border crimes involving two or more countries. The cases brought to Eurojust concern crimes such as terrorism, cybercrime, trafficking in human beings, drug trafficking, crimes against the financial interests of the EU, migrant smuggling, environmental crime, money laundering, swindling and fraud. Eurojust offers operational support throughout the different stages of cross-border criminal investigations, providing prompt responses, an on-call coordination service that is permanently operational and assistance with the preparation of judicial cooperation requests, including official translations. Furthermore, Eurojust can accommodate complex forms of assistance and coordination mechanisms, which may be combined as required to support major operations. Eurojust can coordinate parallel investigations, organize coordination meetings, involving the judicial authorities and law enforcement concerned, set up and/or fund joint investigation teams

[49] OJ 2018, L 295, p. 138.

(«JITs») in which judicial authorities and law enforcement work together on transnational criminal investigations, based on a legal agreement between two or more countries and plan joint action days, steered in real time via coordination centers held at Eurojust, during which national authorities may arrest perpetrators, dismantle organized crime groups and seize assets.

EUROJUST is undoubtedly a privileged partner for the EPPO. Their relations are explicitly addressed in Art. 100 of the EPPO Regulation. Specific provisions regarding their cooperation are laid down in the EUROJUST Regulation as well. In operational matters, the EPPO may associate EUROJUST with its activities concerning cross-border cases, including by sharing information, such as personal data, on its investigations. The EPPO may invite EUROJUST or its competent national member(s) to provide support in the transmission of its decisions or requests for mutual legal assistance to, and execution in, Member States of the EU that are members of EUROJUST but do not take part in the establishment of the EPPO, as well as third countries. Furthermore, it is foreseen that the EPPO shall have indirect access to information in EUROJUST's case management system. EUROJUST has its headquarters in The Hague, a circumstance that had urged some voices to call for the seat of the EPPO to be placed in the same city. It remains to be seen whether the geographical distance will pose obstacles to the cooperation.

As already indicated in the introduction, EUROJUST shares the particularity with the EPPO that the EU treaties presuppose their existence. Interestingly, Art. 86 TFEU stipulates that «*the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a EPPO from Eurojust*». The last part of the sentence raises questions as regards the feasibility of such an approach, given the fact that both are EU entities independent from one another[50]. In view of the sensitivity involving the creation of the EPPO and the lengthiness of the process leading up thereto, it cannot be ruled that it might not have been completely clear at that time of drafting of the Treaty of Lisbon how this objective would have been achieved. In any case, Recital 10 of the EPPO Regulation provides some clarifications in the sense that, in the EU legislator's view, «*this implies that this Regulation should establish a close relationship between them based on mutual cooperation*». In order to ensure such cooperation, the European Chief Prosecutor and the President of EUROJUST are required to meet on a regular basis to discuss issues of common concern. The details specifying the extent to which the EPPO may rely on the support and resources of the administration of EUROJUST have been regulated by means of a working arrangement concluded in February 2021.

A number of provisions of the EUROJUST Regulation hint at the risk of possible overlaps in the competences of both EU agencies, which is the reason why Art. 100(1) of the EPPO Regulation specifies that cooperation shall take place «*within their respective mandates*». In general, as it can be inferred from Recital 8 of the EUROJUST Regulation, this EU agency appears to rather exercise a subsidiary competence, for instance where crimes involve Member States which participate in enhanced cooperation on the establishment of the EPPO and NPMS (at the request of the EPPO or the NPMS), whenever the EPPO is not competent or where, although the EPPO is competent, it does not exercise its competence. For obvious reasons, the NPMS may continue to request EUROJUST's support in all cases regarding offences affecting the financial interests of the EU.

b) OLAF

The European anti-fraud office («OLAF») is a directorate-general of the Commission that combats fraud, corruption and other similar illicit activities in the EU. It is responsible for monitoring the affairs of the EU institutions and investigating any possible instances of fraud, corruption and financial misconduct within the EU institutions in order to protect the financial interests of the EU. OLAF conducts its investigations in close cooperation with the relevant agencies of the Member States. According to its recently

[50] Espina Ramos, J., "The relationship between Eurojust and the European Public Prosecutor's Office", *The European Public Prosecutor's Office - The challenges ahead*, Madrid 2018, p. 87.

amended legal framework[51], OLAF investigates the following matters: all areas of EU expenditure (the main spending categories are structural funds, agricultural and rural development funds, direct expenditure, and external aid); EU revenue, in particular customs and illicit trade in tobacco products and counterfeit goods; suspicions of serious misconduct by EU staff and members of the EU institutions. The investigations carried out by OLAF aim at enabling financial recoveries, disciplinary and administrative action, prosecutions and indictments. It must be pointed out that OLAF has no law enforcement powers, nor does it have any power to bring a prosecution. Instead, OLAF may make recommendations to jurisdictions that a prosecution should be brought[52]. The EPPO, on the contrary, has those prosecuting powers, what makes it a precious ally in order to bring criminal offences to justice.

The relationship between the EPPO and OLAF is based on mutual cooperation within their respective mandates and on information exchange. OLAF tends to give priority to investigations carried out by public prosecutors. As a rule, where the EPPO conducts a criminal investigation, OLAF shall not open any parallel administrative investigation into the same facts. In the course of an investigation by the EPPO, the EPPO may request OLAF, in accordance with OLAF's mandate, to support or complement the EPPO's activity in particular by providing information, analyses (including forensic analyses), expertise and operational support[53]. Where the EPPO does not conduct any investigations, it may provide information to OLAF for the purpose of conducting administrative investigations, enabling the latter to consider taking adequate administrative measures. Due to its power to carry out administrative investigations with the EU institutions, agencies and bodies (but also in countries the EU has a special relationship with), OLAF constitutes a sort of «administrative arm» that the EPPO can rely on. Details of this cooperation are laid down in a working arrangement concluded on 5 July 2021.

c) EUROPOL

EUROPOL is the EU's law enforcement agency, whose remit is to help make Europe safer by assisting law enforcement authorities in the Member States. Based in The Hague, EUROPOL operates in accordance with the provisions laid down in *Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol)*[54] («EUROPOL Regulation»). The objectives of this EU agency are to support law enforcement authorities by facilitating exchanges of information, providing criminal analyses, as well as helping and coordinating cross border operations; to become the EU's criminal information hub by identifying common information gaps and investigation priorities; to develop further as a EU center for law enforcement expertise by pioneering new techniques, as well as facilitating knowledge sharing and quality training in specialist areas like terrorism, drugs and euro counterfeiting.

The EPPO shall establish and maintain a close relationship with EUROPOL as well. To that end, both entities have concluded a working arrangement in January 2021 setting out the modalities of their cooperation within the limits of their respective legal frameworks and mandates. Where necessary for the purpose of its investigations, the EPPO shall be able to obtain, at its request, any relevant information held by EUROPOL concerning any offence within its competence, and may also ask EUROPOL to provide analytical support to a specific investigation conducted by the EPPO. The cooperation may, additional to this exchange of information, in particular include the exchange of specialist knowledge, general situation reports, information on criminal investigation procedures, information on crime prevention methods, the

[51] Regulation (EU, Euratom) 2020/2223 of the European Parliament and of the Council of 23 December 2020 amending Regulation (EU, Euratom) N° 883/2013, as regards cooperation with the European Public Prosecutor's Office and the effectiveness of the European Anti-Fraud Office investigations (OJ 2020, L 437, p. 49).

[52] Niblock, R., „Cooperation with EU agencies and bodies under the EU-UK Trade and Cooperation Agreement: Eurojust, OLAF and the EPPO, *New Journal of European Criminal Law*, 2021, vol. 12(2), p. 280.

[53] Landwehr, O., "External relations of the EPPO: cooperation with OLAF", *Croatian Annual of Criminal Sciences and Practice*, 2020, vol. 27 n° 1, p. 245.

[54] OJ 2016, L 135, p. 53.

participation in training activities as well as providing advice and support, including through analysis, in individual criminal investigations.

2. The cooperation with non-participating Member States

As already explained, the creation of the EPPO took place as an enhanced cooperation on the basis of Art. 86(1) TFEU, which implies that some Member States do not participate in this project. Nonetheless, this fact alone is not a valid reason for preventing cooperation, in particular in such an important area as the fight against crime. Furthermore, it must be borne in mind that, irrespective of the specific distribution of competences within any legal order, the protection of the financial interests of the EU is a concern shared by all Member States. Aware thereof, Art. 105 of the EPPO Regulation lays down provisions regulating the EPPO's relations with NPMS that shall be explained here in detail. This shows that non-participation does not prevent cooperation, as Art. 105 of the EPPO Regulation expressly states that the EPPO may conclude working arrangements with those Member States, which may in particular concern the exchange of strategic information and the secondment of liaison officers to the EPPO. Moreover, it is stipulated that the EPPO may designate, in agreement with the competent authorities concerned, contact points in NPMS in order to facilitate cooperation in line with the EPPO's needs.

Another question is whether a NPMS is legally obliged to cooperate with the EPPO if the EPPO were to seek judicial cooperation with them in any given case. Problematic in this context is the fact that, according to Art. 20(4) TEU, *«acts adopted in the framework of enhanced cooperation shall bind only participating Member States»*, which could, in principle, be invoked as an argument against that view. In that regard, it must be held, first, that Art. 105(3) of the EPPO Regulation appears to contain an implicit assumption that judicial cooperation between the EPPO and the NPMS will require the adoption of a separate legal instrument, a solution liable to provide for some legal certainty. However, setting out the details of cooperation in separate legal instruments with the ensuing diversity of rules might make the relations with the authorities of the NPMS more difficult, unless the EPPO opts for using a sort of «template» or «model agreement» aimed at reducing the heterogeneity of applicable rules. Second, it should be noted that this provision obliges the Member States that take part in the enhanced cooperation to notify the NPMS that the EPPO will act as a competent authority in criminal matters falling under the competence of the EPPO. By so doing, it is guaranteed that the NPMS is aware of the fact that the EPPO has henceforth assumed the role formerly exercised by a national authority and, consequently, acts as a sort of «legal successor» as far as the prosecution of a certain category of crimes is concerned. This provision is useful, as it might not always be obvious which authority is in charge, in particular at the beginning of the EPPO's operations.

The crucial question that remains open to discussion concerns the legal effect of such a unilateral notification. In the author's view, the principle of sincere cooperation, enshrined in Art. 4(3) TEU, speaks in favor of a legal obligation upon the NPMS to cooperate with the EPPO[55]. The purpose of the notification is to indicate the authorities in charge and consequently to ensure the proper functioning of the system under which the financial interests of the EU are meant to be protected. The same applies for the conclusion of the agreement in question, without which any cooperation would not be possible. In view of the fact that, according to the principle of sincere cooperation, «*the Member States shall facilitate the achievement of the EU's tasks and refrain from any measure, which could jeopardize the attainment of the EU's objectives*», it is logical to assume that Member States must actively cooperate with the EPPO whenever their involvement is required. More importantly, they must refrain from putting obstacles to the EPPO's activities.

In this context, it is interesting to observe that Recital 110 of the EPPO Regulation apparently requires the Commission to play an active role in fostering sincere cooperation by means of «proposals», in order to ensure effective judicial cooperation in criminal matters between the EPPO and the NPMS. In view

[55] See Opinion of Advocate General Pikamäe in case C-404/21, INPS and Repubblica italiana, EU:C:2022:542, regarding the role of the principle of sincere cooperation and the possibility to invoke this principle in order to overcome regulatory gaps.

of the lack of clarity as to how to attain these objectives, it cannot be ruled out that it will be for the Commission to develop the necessary mechanisms. This task could entail providing technical support in the drafting of the legal instrument referred to above that shall lay down the rules governing the cooperation. The role of the CJEU could be to specify the scope of this principle by way of an interpretation of Art. 4(3) TEU[56]. More concretely, the CJEU could provide guidance as to what the Member States must do in order to ensure that the EPPO can exercise its functions effectively. In general, the Commission, as «guardian of the EU treaties», is destined to assume a central role at enforcing compliance by means of infringement proceedings, on the basis of Art. 258 TFEU, against those Member States that might be reluctant to act in a spirit of sincere cooperation, whether they are NPMS or not[57].

The EPPO's role as «legal successor» of national prosecuting authorities in investigation cases might pose practical difficulties when it comes to exchanging information and other ways of mutual support. In view of the fact that the EPPO shall be the competent authority in respect of cases falling within its jurisdiction, it would logical to assume that the EPPO will be the contact point for any requests for assistance. Difficulties might arise if evidence from a specific Member State is requested by a NPMS for the purpose of an investigation although the central level of the EPPO does not have that evidence itself. The submission of that evidence would necessarily have to involve the decentralized level and would require a high degree of cooperation, as the EPPO would be entirely dependent on the national authorities.

Another issue that the EPPO is likely to encounter is the risk of parallel proceedings at supranational and national levels if a NPMS happens to investigate in the same or in a related matter. This might potentially lead to conflicts of jurisdiction. In order to avoid an unnecessary duplication of efforts and a waste in resources, it might be advisable to relinquish jurisdiction in favor of either the EPPO or the national authority of the NPMS. Since the protection of the financial interests of the EU remains a common interest of all Member States, there is no objective reason for keeping criminal proceedings running in parallel. However, it is worth noting in that respect that whilst Art. 26(1) of the EPPO Regulation obliges a EDP to initiate an investigation where there are reasonable grounds to believe that an offence is being or has been committed in a Member State (so-called «principle of legality»), there is no provision allowing the closure of a case on the grounds that the same case is being or has been investigated by the authorities of a NPMS. This situation might prove inconsistent with the *ne bis in idem* principle enshrined in Art. 50 of the Charter. Therefore, the EPPO and the respective NPMS will necessarily have to coordinate their course of action in the interest of an efficient prosecution and the safeguard of fundamental rights.

In addition to the above considerations, it is important to stress that other mechanisms of judicial cooperation in criminal matters, such as the European arrest warrant and the European investigation order, continue to apply to most of the NPMS. The same is the case for the *Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union*[58], whose aim is to encourage and facilitate mutual assistance between judicial, police and customs authorities on criminal matters and to improve the speed and efficiency of judicial cooperation. Therefore, the EPPO could rely on these mechanisms in criminal proceedings through the intermediary of a EDP acting in accordance with the provisions of his national legal system. This is one of the many examples in which the EDP's double function as national and European prosecutor might prove beneficial for the fulfillment of the EPPO's tasks.

3. The cooperation with third countries

The cooperation with third countries is an area that plays an important role, in particular bearing in mind the many projects financed by the EU in those countries, which are generally subject to the scrutiny

[56] Franssen, N., "The future judicial cooperation between the EPPO and non-participating Member States", *New Journal of European Criminal Law*, 2018, vol. 9(3), p. 294.

[57] See Codruta Kövesi, L., "Wir holen das Geld zurück, das den EU-Finanzministern durch die Lappen geht", *Die Presse* (article from 2 September 2022), in which the Chief Prosecutor explains that the Commission is the instance that intervenes on behalf of the EPPO if Member States does not respond to requests for information.

[58] OJ 2000, C 197, p. 3.

of the Court of auditors in view of the proper allocation of resources. It is obvious that the protection of the financial interests of the EU cannot stop at its external borders. Having said that, it is not difficult to imagine how much more challenging must be the investigations concerning fraud, corruption and any other illegal activity affecting those financial interests if these crimes are committed in third countries, in which the influence of the EU and its Member States is limited, as it touches upon the sovereignty of those third countries. The same applies for the recovery of ill-spent EU money. For that reason, cooperation with the competent judicial authorities of third countries is crucial. To mention a practical example, it is known that the United Kingdom will continue to receive funds from the EU despite the fact that it is no longer a Member State. In order to fight against irregularities, fraud and other criminal offences affecting the financial interest of the EU, the *Trade and Cooperation Agreement*[59] («TCA») concluded with the United Kingdom contains specific provisions that confer certain powers of investigation to both the Commission and OLAF in the territory of what is now a third country[60]. Interestingly, the TCA does not mention the EPPO at all, which is not surprising in view of the United Kingdom's initial opposition to this integration project. However, it cannot be ruled out that the EPPO might nevertheless intervene indirectly in certain cases that involve funding under EU programs[61], namely through the intermediary of its EDPs acting within their respective national judicial systems. The following explanations will shed light on how this might happen in practice.

Given the fact that dealing with a supranational body might be an unfamiliar situation for some third countries, it is necessary to ensure that the EPPO will be accepted as an equal partner and that its role will not be undermined, for example by addressing the judicial authorities of the Member States instead. Whereas the principle of sincere cooperation, enshrined in Art. 4(3) TEU, may be interpreted as imposing a legal obligation upon any NPMS to cooperate with the EPPO in its quality as «legal successor» of national authorities of participating Member States as regards the prosecution of specific criminal offences, as suggested in this paper, nothing equivalent applies to the external relations with third countries. Therefore, unless otherwise prescribed, nothing prevents third countries from resuming their cooperation with the EU Member States and ignoring the EPPO's existence. In order to offset these disadvantages, the EU legislator has developed a number of mechanisms that will be explained in detail below.

As a general rule, the EPPO can exercise its competence when offences against the financial interests of the EU falling within the material scope of the EPPO Regulation have been committed in the territory of one or several Member States. This follows from the principle of territoriality in criminal law («territorial theory») that has been adapted with a view to take into account the conferral of competences to a supranational body that has taken place with the adoption of the EPPO Regulation. The extent of the EPPO's exterritorial jurisdiction is defined in Art. 23(b) and (c) of the EPPO Regulation. According to these provisions, the EPPO shall be competent where the offences were committed by a national of a Member State, provided that the Member State in question has jurisdiction for such offence when committed outside of its territory, or outside the territories of one or several of the Member States by a person who was subject to the Staff Regulations or to the Conditions of Employment, at the time of the offence, provided that a Member State has jurisdiction for such offences when committed outside its territory. This essentially implies that the EPPO has competence in this situation where EU citizens and EU officials are involved. It is an adaptation to a supranational environment of the well-known principle of criminal law, whereby a State has jurisdiction over its national wherever he may be and hence can hold him accountable for his criminal misdeed wherever committed («personal theory»). As a result, locally employed staff, contractors, interims, seconded national experts and trainees who are not EU citizens and who are not subject to the Staff Regulations or Conditions of Employment in principle do not fall under the EPPO's competence[62].

[59] OJ 2021, L 149, p. 10.
[60] Art. UNPRO 4.2(1) TCA
[61] Art. UNPRO 4.2(12) TCA
[62] Franssen, N., "The future judicial cooperation between the EPPO and third countries", *New Journal of European Criminal Law*, 2019, vol. 10(2), p. 171.

Whilst the mandate of the EPPO with regard to criminal offences linked to third countries is set out in Art. 23 of the EPPO Regulation, it should be reminded that the EPPO will have to exercise its extraterritorial jurisdiction in compliance with international law and, in particular, within the legal framework created by means of bilateral agreements with those third countries, aimed at making the necessary judicial cooperation possible. Cooperation in criminal matters, often articulated in form of «mutual legal assistance», might potentially take place on the basis of already existing agreements concluded in the framework of the Council of Europe and the United Nations. However, given the special nature of the EPPO as a supranational body in the service of the EU (and the participating Member States), it is obvious that the EU had to resort to a number of techniques in order to enable the EPPO to assume its external role as its representative in criminal matters. In other words, a legal solution had to be developed in order to ensure that the EPPO would be recognized as a partner in this judicial cooperation. This was of particular importance, as «cooperation» within the meaning of the EPPO Regulation implies a number of activities, such as the exchange of strategic information, the designation of contact points in third countries and the secondment of liaison officers. With Art. 104 of the EPPO Regulation, the EU legislator has come up with three creative solutions that still have to stand the test of practice.

The first solution envisaged by Art. 104(3) of the EPPO Regulation consists of the conclusion of specific international agreements, which is the traditional way in international relations to establish judicial cooperation. This provision states that international agreements with one or more third countries concluded by the EU or to which the EU has acceded in accordance with Art. 218 TFEU in areas that fall under the competence of the EPPO, such as international agreements concerning cooperation in criminal matters between the EPPO and those third countries, shall be binding on the EPPO. This EU body honors the commitments entered into by this supranational organization in its relations with third countries, as far as its area of responsibility is concerned.

However, there might be situations in which an agreement enabling the EPPO to act on behalf of the EU and its Member States might not yet exist. Considering the fact that the EPPO has been established not long ago, this might be the most common scenario at this point in time. Art. 104(4) of the EPPO Regulation caters for those situations, specifying that the Member States shall, if permitted under the relevant multilateral international agreement and subject to the third country's acceptance, recognize and, where applicable, notify the EPPO as a competent authority for the purpose of the implementation of multilateral international agreements on legal assistance in criminal matters concluded by them, including, where necessary and possible, by way of an amendment to those agreements. This provision takes into account the fact that the designation of the EPPO as the counterpart of a third country's authorities will generally be subject to the latter's acceptance, as otherwise such a course of action would run counter to the principle «*pacta tertiis nec nocent nec prosunt*» in public international law, laid down in Art. 34 of *Vienna Convention on the Law of the Treaties*, according to which a treaty does not create either obligations or rights for a third State without its consent[63].

The aforementioned provision of the EPPO Regulation must be interpreted in the light of Recital 109 that calls upon the Member States to act in a spirit of sincere cooperation by facilitating the exercise by the EPPO of its functions, pending the conclusion of new international agreements by the EU or the accession by the EU to multilateral agreements already concluded by the Member States, on legal assistance in criminal matters. It is important noting in this context that the EU legislator seems to have been perfectly aware of the fact that the objective to allow the recognition of the EPPO as the authority in charge on the EU's side might actually face factual or legal obstacles, in certain cases even requiring the amendment of agreements already in force. The second solution laid down in Art. 104(4) of the EPPO Regulation rests on the idea that the EPPO is the legal successor of the national authorities, a concept that has already been discussed in this paper in connection with the relations between the EPPO and the NPMS. In any case, it appears that for this concept to be successfully implemented in the area of external relations of the EU, it

[63] Fitzmaurice, M., "Third Parties and the Law of treaties", *Max Planck Yearbook of United Nations Law*, vol. 6, 2002, p. 44; CJEU judgments of 25 February 2010 in case C-386/08, Brita, EU:C:2010:91, paragraph 44 and of 21 December 2016 in case C-104/16 P, Council v Front Polisario, EU:C:2016:973, paragraph 100.

should be necessary to allow the EPPO to exhort the Commission and the Council to conclude agreements with a number of third countries of interest.

Having said this, it would be perhaps naive to assume that third countries would unconditionally accede to the EU's demands to recognize the EPPO as their counterpart when it comes to the investigation and the prosecution of criminal offences. The EU legislator seems to have taken this issue into account by including a third solution in Art. 104(5) of the EPPO Regulation. According to this provision, in the absence of an agreement pursuant to paragraph 3 or a recognition pursuant to paragraph 4, the handling EDP, in accordance with Art. 13(1) of the Regulation, may have recourse to the powers of a national prosecutor of his/her Member State to request legal assistance in criminal matters from authorities of third countries, on the basis of international agreements concluded by that Member State or applicable national law and, where required, through the competent national authorities. In that case, the EDP shall inform and where appropriate shall endeavor to obtain consent from the authorities of third countries that the evidence collected on that basis will be used by the EPPO for the purposes of this Regulation. In any case, the third country shall be duly informed that the final recipient of the reply to the request is the EPPO.

This approach is based on the idea that EDPs have a double function, as they exercise simultaneously the competences of a national prosecutor and those of a prosecutor subject to the instructions of the EPPO, acting in defense of the financial interests of the EU. In their capacity as active members of the public prosecution service or judiciary of the Member States, EDPs may be «borrowed» by the EPPO in so far as they are required to exercise their prerogatives foreseen in national law in order to attain the EPPO's missions. This includes resorting to all legal possibilities set out in the international agreements his respective Member State is a party of. It is possible to infer from the manner in which all three avenues are listed that, firstly, there is a hierarchy between them and, secondly, the «borrowing» of an EDP for the benefit of the EPPO constitutes an ad hoc solution that only applies under the condition that the other two avenues are barred. Furthermore, it is necessary to point out that the EU legislator has stressed that this approach requires the EDP to act in full transparency to both the suspect and the authorities of the third country. Indeed, mutual trust between the EPPO and the latter can only be fostered if consent with this course of action if granted. As ingenious as this third approach might appear, it is obvious that, in the interest of legal certainty, mutual trust should lead in the long term to the conclusion of an agreement setting out the terms of the cooperation and specifically foreseeing the intervention of the EPPO.

It should be stressed that cooperation within the meaning of Art. 104 of the EPPO Regulation implies the possibility to provide information or evidence in the possession of either the EPPO or the third country. However, this provision expressly does not cover the extradition of persons suspected of having committed a criminal offence, as the EU legislator was of the opinion that such a faculty should be left to the Member States, not just because of the fact that the EPPO will not have its own detention facilities or police officers, but because extradition has traditionally been regarded as a sensitive area where national authorities prefer to be in charge of the decision-making themselves due to the implications on their bilateral relations with third countries. Furthermore, it should be recalled that a few Member States are barred from extraditing their own nationals by virtue of their constitutional law[64], just to mention a few considerations in support of allowing the Member States to keep this faculty despite the EPPO being in charge of an investigation. The third avenue of cooperation with third countries, laid down in Art. 104(5) of the EPPO Regulation and described above, might prove useful in the future, as the EPPO would be able rely on the EDPs embedded in their national judicial system as well as on other national resources (infrastructure, staff, equipment, etc) for the purpose of requesting an extradition. Indeed, Art. 104(7) of this Regulation states that where it is necessary to request the extradition of a person, the handling EDP may request the competent authority of its Member State to issue an extradition request in accordance with applicable treaties and/or national law.

As for the cooperation with third countries taking place on a contractual basis, it should be observed that the EPPO Regulation distinguishes between «international agreements» and «working arrangements»

[64] See CJEU judgment of 2 April 2020 in case C-897/19 PPU, Ruska Federacija, EU:C:2020:262, paragraph 13.

as the two possible legal instruments. Those falling within the first category are legally binding instruments concluded by the EU as a whole pursuant to Art. 218 TFEU that set out the terms of the cooperation, whereas the instruments referred to in Art. 104(1) in conjunction with Art. 99(3) of the EPPO Regulation merely deal with technical and/or operation matters that aim to facilitate cooperation and the exchange of information between the parties thereto, as already explained in this paper. To the present date, the EPPO has concluded working arrangements with the judicial authorities of a number of third countries, such as the USA, Moldova, Ukraine, Albania, Georgia and North Macedonia. The EPPO has prioritized the conclusion of working arrangements with the authorities of those third countries that it considers particularly relevant for the fulfilment of its mission. The conclusion of those working arrangements is possible due the fact that the EPPO has been given legal personality according to Art. 3(2) of the EPPO Regulation, which allows this EU body to enter into legal commitments in its own name instead of relying on the EU's legal personality. In that respect, the EPPO is similar to other EU agencies and bodies that, as part of the wider phenomenon of «agencification» in EU public administration, carry out various tasks, even beyond the EU's external borders[65]. By spelling out the subject matter of the working arrangements that may be concluded, the EU legislator has apparently aimed at preventing the risk that EPPO might overstep its competences.

IX. General aspects concerning the functioning of the EPPO

1. Working languages

As many other EU institutions, agencies and bodies, the EPPO has established its working language by Decision of 30 September 2020 on internal language arrangements, adopted on the basis of Art. 107(2) of the EPPO Regulation that requires a two-thirds majority of the College members. According to this Decision, the working language for the operational and administrative activities of the EPPO shall be English. Having said this, the Decision in question takes into account the fact that French is currently the working language of the CJEU by stipulating that the said language shall be used along with English in the relations with this judicial institution.

2. Legal personality and capacity

Further to the legal personality referred to above, the EPPO has in each of the Member States the legal capacity accorded to legal persons under national law according to Art. 106(1) of the EPPO Regulation, which allows it, for example, to conclude contracts for the acquisition of goods and services in the framework of tender procedures. This is necessary in order to be able to operate as a EU body in the Member State but particularly in Luxembourg, where it has its headquarter. In this context, it should be mentioned that Art. 106(2) of the EPPO Regulation refers to an important requirement for any EU institution, agency and body, namely the conclusion of headquarters agreement with the host Member State. It follows from this provision that the necessary arrangements concerning the accommodation provided for the EPPO and the facilities made available by Luxembourg, as well as the specific rules applicable in that Member State to the Members of the College, the Administrative Director and the staff of the EPPO, and members of their families shall be laid down in the said headquarters agreement. The agreement in question has been concluded on 27 November 2020.

3. Luxembourg as «judicial capital» of Europe

[65] Kühn, W. M., "The phenomenon of agencification in the administration of the European Union", *Ukrainian Journal of Constitutional Law*, 2/2020, p. 44.

Pursuant to Art. 341 TFEU, the seat of the institutions of the EU shall be determined by common accord of the governments of the Member States. Although this provision refers exclusively to the «institutions» within the meaning of Art. 13 TEU, the Member States appear to have interpreted it as encompassing agencies and bodies as well. However, the CJEU has recently made clear that the competence to determine the location of the seat of a body, office or agency of the EU «*lies not with the Member States but with the EU legislature, which must act to that end in accordance with the procedures laid down by the substantively relevant provisions of the EU treaties*»[66]. This makes perfectly sense, as the power to adopt the founding act of any of the entities referred to above logically implies the competence to take a decision on its geographical location. Founding acts usually expressly specify the seat of the entity in question, as is the case in Art. 106 of the EPPO Regulation. In this context, it should be pointed out that the question as to which legal bases are applicable in connection with the establishment of EU bodies, offices of agencies has already been extensively discussed elsewhere by the author, so that readers are kindly invited to consult this source[67]. The question regarding the specific legal basis for the establishment of the EPPO has been explained in the introduction to this paper.

The (political) choice of Luxembourg as the host city of a future EPPO was taken at the European Council of 12 and 13 December 2003, simultaneously with the selection of The Hague as the host city of EUROJUST, even though the wording of Art. 86 TFEU (*«establish a European Public Prosecutor's Office from Eurojust»*) could suggest that both entities would have to be based in the same city. On the other hand, this phrase could be interpreted as referring to the structure and powers of the new EU body and not necessarily to its headquarters. However, as has already been explained in this paper, the Council has opted for making of the EPPO not just a department or internal service of EUROJUST but rather an autonomous EU body with whom it maintains close ties. Consequently, the decision taken by the Council has cleared away with any ambiguity that could have remained concerning the legal nature of the EPPO. As far as the location of the headquarters is concerned, it is worth noting that the aforementioned Decision of December 2003 refers to an earlier Decision of the representatives of the Governments of the Member States, adopted of 1967, in which it is explicitly stated that *«shall be located in Luxembourg the judicial and quasi-judicial bodies»*[68]. Against this background, it is safe to affirm that this earlier Decision had paved the way for the subsequent selection of the headquarters of the EPPO throughout the process that led to its establishment[69]. This interpretation is confirmed by Recital 121 of the EPPO Regulation, which refers explicitly to both Decisions. With the establishment of the EPPO in Luxembourg City, besides the CJEU, the EFTA Court[70] and the Court of Justice of Benelux[71], this city deserves henceforth being regarded as the «judicial capital of Europe».

4. Transparency and public access to documents

The EPPO must comply with the entirety of rules related to good administration enshrined in Art. 41 of the Charter, in particular with those concerning transparency and public access to documents, in

[66] See CJEU judgment of 14 July 2022 in case 743/19, Parliament v Council, EU:C:2022:569, points 73 and 74.
[67] Kühn, W. M., "The phenomenon of agencification in the administration of the European Union", *Ukrainian Journal of Constitutional Law*, 2/2020, p. 44.
[68] Decision (67/446/EEC) (67/30/Euratom) of the representatives of the Governments of the Member States of 8 April 1965 on the provisional location of certain Institutions and departments of the Communities (OJ 152, 13/7/1967, p. 18).
[69] Andreone, F., "L'institution du Parquet européen", *Revue de l'Union européenne*, n° 61, January 2018, p. 52.
[70] Kühn, W. M., "The draft protocol on the creation of the Court of Justice of Mercosur - A new milestone in the judicialization of regional integration law", *Journal of the Belarusian State University. International Relations*, 2017, N° 2, p. 55, provides a comparative study of the procedurals applied by various international courts.
[71] The Treaty of March 31, 1965 relating to the institution and statute of a Benelux Court of Justice entered into force on January 1, 1974. The permanent seat of the Court is in Luxembourg, where it holds hearings. The Court is an international court whose essential role is to promote uniformity in the application of the legal rules which are common to the Benelux countries in a wide variety of fields such as intellectual property law (trademarks and service marks , designs and models), civil liability insurance for motor vehicles, penalty payments, visas, collection of tax debts, protection of birds and equal tax treatment.

addition to the rules related to the EPPO's operational activities in the framework of criminal investigations and prosecutions. Art. 109(1) of the EPPO Regulation therefore provides that *Regulation (EC) N° 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents*[72] shall apply to documents other than case files, including electronic images of those files, that are kept by the EPPO in accordance with Art. 45 of the EPPO Regulation. Furthermore, as has already been mentioned in this paper, this EU body will have to abide by the rules on the protection of personal data, a subject particularly sensitive in the area of criminal investigations and prosecutions, and to cooperate with the European Data Protection Supervisor, whose participation is explicitly foreseen in several provisions of the EPPO Regulation.

5. Staff rules

The rights and obligations of EPPO staff are governed by Art. 96 to 98 of the EPPO Regulation. According to Art. 96(1), the *Staff Regulations and the Conditions of Employment of Other Servants of the EU («CEOS»)*, and the rules adopted by agreement between the institutions of the EU for giving effect to those Staff Regulations and the CEOS shall apply to the European Chief Prosecutor and the European Prosecutors, the EDPs, the Administrative Director and the staff, unless otherwise provided in the EPPO Regulation. Art. 96(4) requires the College of the EPPO to adopt implementing rules to the aforementioned legal acts. This has occurred with College Decision of 28 April 2021. In this context, it is worth noting that the European Chief Prosecutor and its deputies, as well as the European Prosecutors, are engaged as «temporary agents» in accordance with Art. 2 CEOS, whereas EDPs are engaged as «special advisers» in accordance with Art. 5, 123 and 124 CEOS. A «special adviser» is a person who, by reason of his special qualifications and notwithstanding gainful employment in some other capacity, is engaged to assist one of the institutions of the EU either regularly or for a specified period and who is paid from the total appropriations for the purpose under the section of the budget relating to the institution which he serves. Furthermore, according to Art. 98, the EPPO may make use, in addition to its own staff, of «seconded national experts» or other persons put at its disposal but not employed by it. The «seconded national experts» shall be subject to the authority of the European Chief Prosecutor in the exercise of tasks related to the functions of the EPPO. By College Decision of 22 September 2021, the EPPO has adopted rules governing the engagement of this type of staff. Finally, it should be mentioned that *Protocol N° 7 on the Privileges and Immunities of the EU* applies to the EPPO and its staff.

The recruitment of suitable staff has encountered some difficulties at the beginning, related mainly to the insufficient funding of this EU body[73] and the high cost of living in Luxembourg, both factors that have made of the EPPO not necessarily an attractive employer. Whilst it was initially assumed that some staff members of the Commission and EUROJUST would voluntarily seek assignment at the EPPO, this scenario has so far failed to materialize. In general, recruitment of suitable staff in Luxembourg appears to meet difficulties, a situation that has led several actors such as the Court of auditors and trade unions representing EU staff to demand tangible solutions, including a corrector coefficient for Luxembourg, distinct from the one currently applicable to Brussels. Another difficulty that the EPPO had to face were the delays in the appointment of EDPs by some Member States, in particular Slovenia[74], a situation which had to be addressed through political intervention at various levels. At this point in time, the process of appointments must be considered complete.

6. Case management system and other IT tools

Having a case management system is of utmost importance for prosecutors. In particular, such a system must take into account the special nature of the EPPO, allowing the sharing of information between

[72] OJ 2001, L 145, p. 43.
[73] "EU Commission blocking hiring of staff, says EPPO", *Luxembourg Times* article of 22 September 2021.
[74] Wahl, T., "EPPO appointed EDPs from Slovenia", *eucrim*, 4/2021, p. 209.

the central and decentralized level. Given the fact that the work of the EPPO is carried out in electronic form, a major focus in the year 2021 was precisely on developing the case management system and making it ready for the operational start. It is described as a complex set of tools and applications that allows the European Prosecutors, EDPs and designated EPPO staff to work in compliance with the EPPO Regulation and the internal rules of procedure. It enables the transfer of cases to and from national authorities, the reception and processing of information from other sources (including private parties), automated translation and all of the case-related workflows. The case management system allows the EPPO to operate as a single office, making the case files administered by EDPs available to the central level for the exercise of its decision-making, monitoring, directional, and supervisory tasks. In addition to the case management system, the EPPO developed and rolled out several IT tools to facilitate and support operations: a platform for secure transfer of information (EPPOBox); crime report forms for the automated import of information; an information exchange tool with other judicial organizations such as EUROJUST, EUROPOL and OLAF; and an eTranslation system for the automatic translation of the registered cases.

X. The future of criminal justice

1. The possible extension of the EPPO's mandate to other serious crimes

One of the major advantages of establishing the EPPO lies in the fact that a supranational body vested with powers of investigation and prosecution will potentially manage to overcome the barriers typically posed by differences in terms of legal system, language and culture. Driven by the interest in protecting the common good, the EPPO will pursue its mission with the support of the EU Member States. Furthermore, assigning those powers to a specialized EU body could expect an increase in efficiency. Based on the premise that these expectations are realistic, one cannot resist the impression that the EU legislator has fallen short in exploiting the EPPO's full potential. Whilst the EU's financial interests are certainly a matter of general concern that can be affected by criminal acts that transgress national boundaries, there are other not less important interests that deserve equivalent protection. In this context, it is worth referring to Art. 83(1) TFEU, a provision that allows the EU to establish «*minimum rules concerning the definition of criminal offences and sanctions*» in connection with serious crimes having a cross-border dimension, such as terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organized crime.

It is therefore surprising that the EPPO has seen a clear limitation of its mandate from the very moment of its inception. On the other hand, it should be pointed out that Art. 86(4) TFEU contains a clause in principle allowing for an extension of its powers to include serious crimes having a cross-border dimension by means of a simplified amendment of the EU treaties[75]. This aspect is a legislative novelty and marks a major breakthrough with regard to previous projects mentioned in this paper that were restricted to the protection of the EU's financial interests[76]. This raises the question as to whether an extension of the EPPO's powers would be feasible as to include the fight against environmental crime[77], organized crime and terrorism. The answer to this question depends on legal and political factors. Although there are currently no indications that there is a political will among the EU Member States to make use of faculty possibility, a recourse to Art. 86(4) TFEU remains a legal option[78]. According to this provision, a decision of the European Council is necessary, adopted unanimously after obtaining the consent of the Parliament and

[75] Suhr, O., *EUV/AEUV Kommentar* (Calliess/Ruffert), 6th edition, Munich 2022, Art. 86 TFEU, paragraph 23.
[76] Martín Pascual, E., "Últimos avances en la cooperación judicial penal: la cooperación reforzada permite la creación de la Fiscalía Europea a partir del Reglamento (UE) 2017/1939", *European Papers*, 6/2018, vol. 2018, n° 2.
[77] Soriano, C. "Défendre les intérêts financiers de l'Union européenne n'est rien d'autre qu'un acte démocratique", *Actu-Juridique.fr* (article from 18 August 2022), explains in her quality as French EDP to be in favor of an enlargement of the EPPO's mandate in order to include the fight against environmental crimes.
[78] Di Francesco Maesa, C., "EPPO and environmental crime: May the EPPO ensure a more effective protection of the environment in the EU?", *New Journal of European Criminal Law*, 2018, Vol. 9(2), p. 192.

after consulting the Commission. The decision to be taken would have as effect to amend Art. 86(1) TFEU that merely mentions the fight against the EU's financial interests as the EPPO's mission.

Considering that the EPPO has been established on the basis of an enhanced cooperation, this would lead to question as to what is to be understood by a «unanimous» vote, more concretely, whether the consent of all EU Member States would be required or only those participating Member States would be entitled to decide in support of such an extension of powers. Although Art. 86 TFEU is a *lex specialis* in respect of the rules of Title III of Part VI concerning enhanced cooperation, is this provision which explicitly states the rules on enhanced cooperation apply. As a consequence, the general rules apply as far as they do not conflict with the specific provisions laid down in Art. 86 TFEU. Since neither paragraph 1 nor paragraph 4 contains any guidance, it is necessary to resort to the general provision of Art. 330 TFEU, which clearly stipulates that «*unanimity shall be constituted by the votes of the representatives of the participating Member States only*». Further guidance can be found in the interpretation of the provisions on enhanced cooperation given by the CJEU in the case concerning the creation of the Unitary Patent, where it declared that «*when the conditions laid down in Article 20 TEU and in Articles 326 TFEU to 334 TFEU have been satisfied […], provided that the Council has not decided to act by qualified majority, it is the votes of only those Member States taking part that constitute unanimity*»[79]. In other words, it could be argued that a unanimous vote by the Member States participating in enhanced cooperation would be sufficient to extend the competence of the EPPO to other serious crimes having a cross-border dimension such as those referred to above, while the other Member States would have to abstain from voting[80]. Once the competences of the EPPO would have been extended, it would not be possible to have a variable geometry approach within the EPPO in a way that Member States would participate in different parts of its competence. In the same way, non-participating Member States that might later join the EPPO would have to participate in it as a whole.

Such an approach would obviously require a legislative amendment of the EPPO Regulation itself, with a view to specify the crimes falling within the EPPO's jurisdiction. Whilst EU legislature foresees minimum rules concerning the definition of criminal offences and sanctions, the principle *nullum crimen sine lege*, already mentioned in this paper, requires crimes, for which a sanction is foreseen, to be defined beforehand. Art. 2 of the EPPO Regulation would have to be amended in order to include a precise definition of «cross-border terrorism» and to provide the necessary terminological clarifications related to prosecutions in that area. In particular, Art. 4 and 22 of the EPPO Regulation, which set out the EPPO's tasks and material competence, would have to be amended, whereas the provisions pertaining to institutional and organizational aspects could remain untouched. An extension of the EPPO's mandate would also require adjustments in terms of budget and recruitment policy, as specialized staff would have to be hired. Having said this, these considerations remain strictly theoretical as long as there is no political will among the participating Member States to embark on that path[81]. However, it should be mentioned that the Commission has submitted in September 2018 a communication to the European Parliament and the European Council containing an initiative to extend the competences of the EPPO to cross-border terrorist crimes[82], in which a number of proposals are made, including some of the amendments mentioned above. Although this «communication» does not legally qualify as a «legislative proposal» in the strict sense, the institutional history of the EU teaches us that the relevance of this type of initiatives should not be underestimated. In any case, it would be wise to carry out a preliminary assessment of such a need before eyeing an extension of the EPPO's mandate[83].

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[79] See CJEU judgment of 16 April 2013 in joined cases C-274/11 and C-295/11, Spain and Italy v Council, EU:C:2013:240, paragraph 35.

[80] Suhr, O., *EUV/AEUV Kommentar* (Calliess/Ruffert), 6th edition, Munich 2022, Art. 86 TFEU, paragraph 25.

[81] Schnichels, D./Seyderhelm, J., „Die Reform des europäischen Umweltstrafrechts", *Europäische Zeitschrift für Wirtschaftsrecht*, 19/2020, p. 832.

[82] European Commission, *"A Europe that protects: an initiative to extend the competences of the European Public Prosecutor's Office to cross-border terrorist crimes"*, Communication to the European Parliament and the European Council of 12 September 2018, COM(2018) 641 final.

[83] Munivrana Vajda, M., "Questioning the Jurisdiction of the European Public Prosecutor's Office", *Croatian Annual of Criminal Sciences and Practice*, 2020, vol. 27 n° 1, p. 118.

2. European Criminal Court and European Criminal Defense?

The establishment of the EPPO has already led to further demands in academic circles for the creation of a European Criminal Court and an institutionalized European Criminal Defense[84]. The idea of a European Criminal Court is explained by the concern for sufficient safeguards to control EUROJUST, EUROPOL, the European Judicial Network («EJN»), OLAF and, in particular, the EPPO in the future. This concern is reflected in the Treaty of Lisbon, more concretely in Art. 12, lit c) TEU and Art. 263 (1), sentence 2 and (5) TFEU. The idea of an institutionalized European Criminal Defense is explained by the concern to maintain a certain balance in procedural terms (so-called «equality of arms») in cross-border criminal proceedings. The importance of the rights of defense was emphasized by the legally binding nature of the judicial rights of the Charter, in particular in Art. 47 of the Charter. The preparation and gradual implementation of the *«Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings»*[85] also takes the importance of the rights of defense into account. As has already been explained in detail in this paper, Art. 41 of the EPPO Regulation refers to the rights of suspects and accused persons that apply at EU and national level. Although there is currently no legal basis for a European Criminal Court or an institutionalized European criminal defense system in the EU treaties, the concerns referred to above should be taken into consideration as far as possible in the further development of the EPPO and the rights of suspects and accused persons in criminal proceedings.

XI. Looking back at the first year of operation

On 24 March 2022, the EPPO published its first annual report[86], which gives account of the office's operational activities from 1 June to 31 December 2021. The report provides an overview of and statistical data on the operational activities of the central office in Luxembourg and all 22 participating Member States. It also outlines typologies identified in EPPO cases and recovery actions regarding the proceeds of criminal activity. In the first seven months of operation, the EPPO processed 2832 crime reports. 576 investigations were opened, and 515 investigations were active by the end of the year. The estimated damage to the EU's budget was around €5.4 billion, whereby €147 million were seized upon request by the EPPO. 95 European Delegated Prosecutors have been appointed, who work in 35 EPPO offices in the 22 participating Member States. Nevertheless, it should be borne in mind that these numbers are updated on a regular basis by the EPPO in order to better reflect the current state of affairs.

The EPPO's success can be best measured by the number of convictions that prosecutions have so far led to in Croatia, Bulgaria, Latvia and Germany, often involving criminal activity in other Member States as well, such as Czechia and Romania. The convictions are essentially related to subsidy fraud in connection with the allocation of funds from the European Agricultural Fund for Rural Development, procurement fraud and VAT carousel fraud[87]. The sanctions imposed on the perpetrators of these criminal offences include several years of imprisonment as well as fines. These cases are reported by the EPPO in official press releases and very often echoed by the general press, contributing to an increased visibility of the EPPO's activities in the public sphere.

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[84] Magnus, D., „Europäische Staatsanwaltschaft - Vorzüge und Schwächen des aktuellen EU-Verordnungsvorschlags", *Zeitschrift für Rechtspolitik*, 6/2015, p. 183; Christodoulou, H., « Le parquet européen: prémices d'une autorité judiciaire de l'Union européenne », *Nouvelle bibliothèque de thèses*, vol. 120, 2021, p. 386.

[85] Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (OJ 2009, C 295, p. 1).

[86] Available under : https://www.eppo.europa.eu/sites/default/files/2022-03/EPPO_Annual_Report_2021.pdf

[87] Wahl, T., "Convictions in EPPO Cases: April-July 2022", *eucrim*, online article of 15 July 2022, provides a brief overview of the convictions referred to in this paper.

XII. Conclusions

The establishment of the EPPO constitutes without any doubt a milestone in the institutional history of the EU. A supranational body has been set up, endowed with the powers to prosecute criminal offences that affect the financial interests of the EU. An important gap in the institutional framework has been filled in so far as the EPPO will complement the activities carried out by other EU entities with investigative powers such as OLAF, EUROPOL and, most importantly, EUROJUST. The expected synergy effects resulting from the cooperation between these entities will contribute to a more efficient fight against crime across national borders. The statistics related to the number of prosecutions as well as to the amount of money seized by the EPPO and the supporting national authorities within such a short period of time give reason for optimism. The good results obtained by the EPPO to this date will hopefully convince the Member States that its creation EPPO was a good investment and that cooperation truly pays off. As any newly created body, the EPPO must find its place in the complex institutional framework of the EU and demand to be recognized as a valuable partner by all Member States, in a spirit of sincere cooperation. Both the Commission and the CJEU are likely to play a crucial role in the pursuit of this objective.

The EPPO's success will hopefully motivate EU legislature to embark on more ambitious projects such as the extension of this EU body's mandate, in order to include the fight against other criminal offences having cross border relevance, for example organized crime, terrorism and environmental crime. For this purpose, a preliminary assessment of such a need should be carried out. Furthermore, it would be worthwhile envisaging tackling issues likely to hamper the EPPO's functioning, such as the current fragmentation of the rules on procedural and substantive criminal law. A decisive approach should be undertaken with a view to create a uniform set of rules governing the criminal procedure, going beyond of what is already set out in the EPPO Regulation. Furthermore, an effort should be made to further harmonize the typification of criminal offences in the interest of legal certainty, hereby preventing the risk that criminal proceedings be considered in breach of the *nullum crimen sine lege* principle. Moreover, it would be advisable for the EPPO to develop a sort of guidance for national courts on how severely criminal offences should be sanctioned, so as to foster a coherent judicial practice throughout the EU, eventually preventing the risk of forum shopping. All these measures would be beneficial to the Area of Freedom, Security and Justice in so far as they would strengthen the trust of EU citizens in the institutions administering justice. It is necessary to stress in this context that the creation of the EPPO represents a contribution to an increased accountability of the EU towards its citizens and must therefore be considered a profoundly democratic act.

According to recent public statements made by the European Chief Prosecutor, the objective of the EPPO for the next year is to consolidate the achievements made so far. Whilst these achievements are indeed remarkable, as the statistics show, the present paper has presented a number of issues that the EPPO should raise with the EU institutions involved in the legislative process with a view to improve its effectiveness.

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