Co-funded by the Justice Programme
(2014-2020) of the European Union

Grant Agreement number: 101008165 — EULAW
JUST-AG-2020 / JUST-JTRA-EJTR-AG-2020

D3.1 HANDBOOK

A practical guide on the EPPO for defence lawyers who deal with cases investigated and prosecuted by the EPPO in their day-to-day practice.
It includes case studies.

Please share your views on the handbook at the following link:

https://docs.google.com/forms/d/e/1FAIpQLSe525GPTPvKJZaG4vqeyiG0iRx38iC9yJkq4_lvdu9ieqIVKQ/viewform

The questionnaire is anonymous.

It will help us to fine-tune the handbook on the daily practice of your profession.

	Date
First issue	18/01/2022
Issue after the Request of revision by the EC Ref. Ares(2022)1742499 - 09/03/2022	13/04/2022 (approved by the European Commission)
Issue after proof-reading	28/07/2022

This handbook is a deliverable of the European project
EULAW: EUropean LAWyers training on EPPO, co-funded by the European Union within the Justice programme 2014-2020
and implemented by the Consortium composed by:

Fondazione Lelio e Lisli Basso-Onlus
Project Leader

Rosaria Sicurella,
Project's Scientific Coordinator (P.I.)
Full Professor of Criminal Law and European Criminal Law,
Department of Law, University of Catania, Italy
Martina Costa,
Researcher
Legal Consultant of the Italian Ministry of Interior

Université du Luxembourg

Katalin Ligeti
Scientific supervisor
Professor of European and International Criminal Law
Faculty of Law, Economics and Finance
Panayiotis Constantinides
Project Officer and Researcher
Research and Development Specialist in European Criminal Law
Faculty of Law, Economics and Finance

Sveučilište u Zagrebu - Pravni fakultet

Zlata Đurđević
Scientific supervisor
Full Professor of Criminal Procedure, European Criminal Law,
Human Rights Lawand International Criminal Procedure
and Cooperation
Marin Bonacic
Researcher
Associate Professor of Criminal Procedure, International Criminal
Procedure and Cooperation, Misdemeanor Law

Interneshaval Ligal Advayz Tsentar (ILAC)

Petya Mitreva
Scientific supervisor
Chief Assistant, Department of Criminal Law of the Faculty of Law
at University of National and World Economy, Bulgaria,
Lawyer at Sofia Bar Association
Ginka Hristova
Project officer
CEO at ILAC

Unione Camere Penali Italiane (UCPI)

Paola Rubini
Scientific supervisor
UCPI Deputy President;
Ghedini Longo Law Firm, Padua.
Federico Cappelletti
Project officer
Co-head of the UCPI Europe Observatory,
Cappelletti Law Firm, Venice

Consejo General de la Abogacia Espanola (CGAE)
Salvador Guerrero Palomares
Scientific supervisor
PhD, Associated Professor Procedural Law, Malaga University.
Member of the CCBE's Criminal Law Committee.
Lawyer at GUERRERO ABOGADOS, Marbella
Julen Fernández Conte
Project Manager

The handbook is edited by Rosaria Sicurella, Zlata Durdevic, Katalin Ligeti, Martina Costa

AUTHORS

Barletta Amedeo	*PhD, Lawyer, Barletta Law Firm, Italy* *Co-head of the UCPI Europe Observatory*	*Ch. II, sec. 4.4 (Italy)* *Ch. III, Case studies 2, 3 (scenario and answers)*
Bojić Ines	*Lawyer in Zagreb, Croatia*	*Ch. II, Case study 1 (answers)*
Bonačić Marin	*EULAW Researcher* *Associate Professor* *Department of Criminal Procedural Law* *Faculty of Law, University of Zagreb*	*Ch. II, sec. 4.3 (Croatia)* *Ch. IV, sec. 1, 2, 3, 4, 5, 6*
Byl Theo	*Investigating Judge, Belgium*	*Ch. IV, Case study 4 (scenario)*
Cappelletti Federico	*EULAW Project officer* *Co-head of the UCPI Europe Observatory,* *Lawyer, Cappelletti Law Firm, Venice*	*Supervision of:* *Ch. II, sec. 4.4 Italy* *Ch. III, Case studies 2, 3 (scenario and answers)*
Constantinides Panayiotis	*EULAW Project Officer and Researcher* *Research and Development Specialist in European Criminal Law* *Faculty of Law, Economics and Finance*	*Ch. II, sec. 4.1 Luxembourg* *Ch. IV, sec. 7, 8* *Ch. V*
Costa Martina	*EULAW Researcher.* *Legal Consultant of the Italian Ministry of Interior*	*Ch. I (co-author with Sicurella R.)* *Ch. III (co-author with Sicurella R.)*
Costa Ramos Vânia	*Criminal Lawyer, Portugal*	*Ch. IV, Case study 4 (scenario)*
De Matteis Luca	*Acting Head of the Legal Service, EPPO*	*Ch. IV, Case study 6 (answers)*
Đurđević Zlata	*EULAW Scientific supervisor* *Full Professor, Head of the Department of Criminal Procedural Law* *Faculty of Law, University of Zagreb*	*Ch. II, sec. 1, 2*
Echanove Gonzalez de Anleo Julia	*OLAF*	*Ch. V, Case study 8 (scenario)*

Galati Concetto Daniele	*PhD, Lawyer, Galati Law Firm, Italy*	*Ch. II, sec. 4.4 (Italy)* *Ch. III, Case studies 2, 3 (scenario and answers)*
Garamvölgyi Balázs	*Prosecutor General's Office, Hungary*	*Ch. V, Case study 8 (scenario)*
Guerrero Palomares Salvador	*EULAW Scientific supervisor* *PhD, Associated Professor Procedural Law, Malaga University* *Member of the CCBE's Criminal Law Committee.* *Lawyer at GUERRERO ABOGADOS, Marbella*	*Supervision of:* *Ch. II, sec. 4.5 Spain* *Ch. IV, Case study 4 (answers)* *Ch. V, Case study 8, (answers 1 – 10)*
Herrnfeld Hans-Holger	*Independent Consultant, Austria* *former Senior Federal Prosecutor, Germany*	*Ch. II, Case study 1 (scenario and answers)* *Ch. IV, Case study 6 (scenario and answers)*
Hristova Ginka	*EULAW Project officer* *Lawyer, CEO at ILAC*	*Ch. II, sec. 3, 4.2 Bulgaria* *Ch. IV, Case study 5 (scenario and answers)* *Ch. IV, Case study 7 (scenario and answers)* *Ch. V, Case study 8 (answers 11 – 14)* *Ch. V, Case study 9 (scenario and answers)*
Konforta Marijana	*Expert Advisor in the Croatian Bar Association*	*Ch. II, Case study 1 (answers)*
Laptoš Tamara	*European prosecutor, EPPO*	*Ch. II, Case study 1 (scenario and answers)*
Ligeti Katalin	*EULAW Scientific supervisor* *Professor of European and International Criminal Law* *Faculty of Law, Economics and Finance*	*Ch. II, sec. 4.1 Luxembourg* *Ch. IV, sec. 7, 8* *Ch. V*
Mirandola Sofia	*Judicial Cooperation Advisor, Eurojust*	*Ch. V, Case study 8 (scenario)*
Mitreva Petya	*EULAW Scientific supervisor* *Chief Assistant, Department of Criminal Law of the Faculty of Law at University of National and World Economy, Bulgaria,* *Lawyer at Sofia Bar Association*	*Supervision of:* *Ch. II, sec. 3, 4.2 Bulgaria* *Ch. IV, Case study 5 (scenario and answers)* *Ch. IV, Case study 7 (scenario and answers)* *Ch. V, Case study 8 (answers 11 – 14)* *Ch. V, Case study 9 (scenario and answers)*

Naydenova Krystina	*Paralegal, ILAC*	*Ch. II, sec. 3, 4.2 Bulgaria* *Ch. IV, Case study 5 (scenario and answers)* *Ch. IV, Case study 7 (scenario and answers)* *Ch. V, Case study 8 (answers 11 – 14)* *Ch. V, Case study 9 (scenario and answers)*
Răzvan Radu Florin	*Principal Legal Officer, EPPO*	*Ch. IV, Case study 6 (answers)*
Requejo Naveros Mayte	*PhD, Associated Professor Criminal Law in Universidad Pontificia Comillas-ICADE* *Lawyer, Perez-LLorca, Madrid*	*Ch. II, sec. 4.5 Spain* *Ch. V, Case study 8 (answers 1 – 10)*
Rubini Paola	*EULAW Scientific supervisor* *UCPI Deputy President;* *Lawyer, Ghedini Longo Law Firm, Padua*	*Supervision of:* *Ch. II, sec. 4.4 (Italy)* *Ch. III, Case studies 2, 3 (scenario and answers)*
Sicurella Rosaria	*EULAW Scientific Coordinator (P.I.).* *Full Professor of Criminal Law and European Criminal Law, Department of Law, University of Catania, Italy*	*Ch. I (co-author with Costa M.)* *Ch. III (co-author with Costa M.)*
Simonato Michele	*Legal and Policy Officer, EPPO*	*Ch. IV, Case study 4 (scenario)*
Sixto Seijas Estefania	*Lawyer, Criminal and international law expert*	*Ch. IV, Case study 4 (answers)*
Tankein Slavi	*Managing partner, ILAC*	*Ch. II, sec. 3, 4.2 Bulgaria* *Ch. IV, Case study 5 (scenario and answers)* *Ch. IV, Case study 7 (scenario and answers)* *Ch. V, Case study 8 (answers 11 – 14)* *Ch. V, Case study 9 (scenario and answers)*
Vítková Petra	*European delegated prosecutor, EPPO*	*Ch. II, Case study 1 (scenario and answers)*

TABLE OF CONTENTS

ABBREVIATIONS AND ACRONYMS

AFSJ	Area of Freedom, Security and Justice
AG	Advocate General
Art/Arts	Article/Articles
CCP	Code of Criminal Procedure
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CMS	Case Management System
COM	Communication
CONT	Committee on Budgetary Control (European Parliament)
COPEN	Working Party on Judicial Cooperation in Criminal Matters
EAEC (Euratom)	European Atomic Energy Community
EAW	European Arrest Warrant
EC	European Community
ECA	European Court of Auditors
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECP	European Chief Prosecutor
ECSC	European Coal and Steal Community
ECtHR	European Court of Human Rights
EDP	European Delegated Prosecutor
EEC	European Economic Community
EFSA	European Food Safety Authority
EHRR	European Human Rights Reports
EIO	European Investigation Order
EP	European Prosecutor
EPPO	European Public Prosecutor's Office
ETS	European Treaty Series
EU	European Union
EUCO	European Council
Eurojust	European Union Agency for Criminal Justice Cooperation
Europol	European Union Agency for Law Enforcement Cooperation
FD	Framework Decision
FRA	European Union Agency for Fundamental Rights
GDPR	General Data Protection Regulation
JHA	Justice and Home Affairs
LIBE	Committee on Civil Liberties, Justice and Home Affairs (European Parliament)
MP	Member of Parliament
MS	Member State
NPMS	Non-participating Member States
OJ	Official Journal of the European Union
OLAF	European Anti-Fraud Office
PC/PCs	Permanent Chamber/Permanent Chambers
PIF	Protection des intérêts financiers
Rec.	Recital
TEC	Treaty of the European Community
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
VAT	Value Added Tax

CHAPTER I: INTRODUCTION

by Costa. M, Sicurella R. (co-authors)

1. Preliminary remarks

The establishment of a common area of freedom, security and justice (AFSJ) offers EU citizens an area without internal frontiers, in which they enjoy free movement. National investigation and prosecution, however, have a limited and fragmented impact within the AFSJ. Therefore, the need of new appropriate measures with respect to the prevention and combating of crime emerges.

The EU has progressively increased its role in the selection of the fundamental interests to be protected by criminal law and, in parallel, has developed new tools for doing so. This is particularly true when it comes to the field of financial interests. Although the financial interests have always been considered fundamental interests of a European nature, the push for an expansion of EU law into this area has been counteracted by MSs' reluctance to lose their discretion over criminal matters.

The establishment of the EPPO – envisaged by Art 86 TFUE – as the EU body responsible for investigating, prosecuting, and bringing to judgment those who commit offences against the Union's financial interests, represents a clear turning point in the history of European integration. The protection of its financial interests is of special importance because any violation of them poses a serious threat to the implementation and development of EU policies, as well as to the sound functioning of the EU institutions. This threat will become even more serious as soon as the investments provided by the Next Generation EU plan start to flow into the region.

According to the 32nd annual report on the protection of the EU's financial interests (PIF Report) a total of 1,056 irregularities – affecting revenue as well as expenditure – were reported in 2020 as fraudulent and had a combined financial impact of €371 million (i.e., approximately 0.2% of the overall budget). Notwithstanding the amount of the damage, national investigations and prosecutions do not take place or are not effective. In fact, on the one hand, MSs still under-prioritize the protection of EU finances; on the other hand, the transnational nature of most cases makes it difficult for national authorities to deal with them due to the traditional difficulties posed by judicial cooperation among MSs.

In accordance with the principle of subsidiarity, it has been found that an effective fight against crimes affecting the financial interests of the EU can be better achieved at a supranational level, through an Office entitled to coordinate and supervise investigations within the territory of MSs, where it will bring the cases before their Courts, overcoming the delays and difficulties deriving from traditional judicial cooperation tools.[1] A clear and complete understanding of the EPPO and its functioning is essential for all the officers and legal practitioners who will soon relate with this institution in their everyday practice.

2. The EU's budget

The EU's budget finances European programmes and actions in all policy areas. Within the framework and limits established by the multiannual financial frameworks (MFF), the annual budget lays down the EU's

[1] Cfr. Understanding n. 12, Council Regulation 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office [2017] OJ L283/1 ('EPPO Regulation').

expenditures and revenues. The EU's budget is currently financed at 98% from own resources and, each year, revenues must cover expenditures.

The EU's financial interests are defined by Art 2(3) EPPO Regulation as 'all revenues, expenditures and assets covered by, acquired through, or due to the Union budget and the budgets of the institutions, bodies, offices and agencies established under the Treaties and budgets managed and monitored by them'. The notion of EU financial interest – referred to in Arts 86 and 325 TFUE – is built upon the *acquis* of previous secondary law instruments (PIF Convention and PIF Directive) and jurisprudence (*Taricco I*).[2] The EU and its Member States share responsibility for protecting the Union's financial interests and fighting fraud. While national authorities are entrusted with the management of approximately 74% of EU expenditure and the collection of the EU's traditional own resources, the Commission oversees both areas, sets standards and verifies compliance.

Art 311 TFUE states that the European Union 'shall provide itself with the means necessary to attain its objectives and carry through its policies . . . [and] the budget shall be financed wholly from own resources.' The aim of the Treaties is to provide financial autonomy, requiring at the same time budgetary discipline. On this basis, Council Decision 2020/2053 on the system of own resources of the European Union lays down implementing measures for such schemes. The origin of the own resources system and the urgency to protect it date to the 1970s, when the Council Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources (Luxembourg Decision) was issued. Notwithstanding that, no common legal instruments were available at that time to contrast those crimes more effectively.

The EU's budget is currently financed through the following sources of revenue:

- own resources, which constitute most of the revenues:
  - GNI-based own resources (72% in 2020);
  - traditional own resources (TOR), (i.e., customs duties and levies: 14.5% in 2020);
  - VAT-based own resources (12.3% in 2020);
  - starting from 2021, a contribution based on the amount of non-recycled plastic packaging waste in each country;
- other sources (1.2% in 2020):
  - tax and other deductions from EU staff remuneration;
  - contributions from non-EU countries to certain programmes;
  - interest on late payments and fines;
  - any surplus from the previous year.
  - As far as the expenditures are concerned, these allow the EU to finance its policies and institutions. EU expenditure is managed through three types of management and different actors are involved in each:
    - shared management: national authorities manage the expenditure jointly with the European Commission;
    - direct management: the European Commission and its agencies manage the EU budget;
    - indirect management: expenditure is managed by other international organizations, national agencies or non-EU countries.

The ultimate responsibility for implementing the budget lies with the Commission, which must ensure that all the expenditures are recorded, accounted for and eventually recovered, in cooperation with MSs, where undue payments have been made.

3. Protecting EU financial interests through criminal law

The EU's financial interests can be adversely impacted by irregularities – i.e., a breach of rules – both on the revenue and the expenditure side. Not all irregularities, however, qualify as criminal offences. The latter occur in case of an intentional breach of the rule, whereas an incorrect application of a rule constitutes a mere irregularity. Fraud, corruption and other offences concern:

- all EU expenditure: the main spending categories are Structural Funds, agricultural policy and rural development funds, direct expenditure and external aid;
- some areas of EU revenue, mainly customs duties;
- suspicions of serious misconduct by EU staff and members of the EU institutions.

Common legal instruments to contrast these crimes more effectively have been developed in recent decades, together with the evolution of European competences over criminal matters. In 1989 the ECJ

[2] Judgment of the Court of 8 September 2015, Taricco et al., C‑105/14, EU:C:2015:555 (Taricco I).

delivered its pivotal decision on the Greek maize case,[3] affirming that, following the basic principle of sincere cooperation in Art 5 EEC Treaty – now Art 4(3) TUE – whenever Community legislation does not envisage a specific penalty or, for that purpose, refers to national law, MSs must treat European interests in an equivalent manner to domestic interests (principle of assimilation).[4] Art 209A of the Maastricht Treaty then imposed on MSs only an obligation of assimilation. However, international fraud was considered to be 'matter of common interest' according to Art K1 of TUE, the so called 'third pillar' of the EU, thus justifying an intervention to harmonize criminal response of the MSs but within the limits of the third-pillar system.

No legal instruments were available until 1995, when the PIF Convention was adopted,[5] and from that moment on the legal and institutional framework has been progressively developed, with the adoption of two Additional Protocols[6] and the establishment of OLAF in 1999. The Convention provided a harmonized legal definition of fraud – covering fraud in the expenditure as well as in the revenue – and required their signatories to adopt effective, proportionate, and dissuasive criminal penalties for fraud affecting the EU's financial interests. In cases of serious fraud, these penalties must have included custodial sentences that may give rise to extradition in certain cases. In addition to that, each EU country was requested to take the necessary measures to establish its jurisdiction over the offences described under the convention. The text specified that where cases of fraud involved two or more countries, those countries should have cooperated effectively in 'the investigation, the prosecution and the enforcement of the penalties imposed by means, for example, of mutual legal assistance, extradition, transfer of proceedings or enforcement of sentences passed in another EU country' (Art 6 PIF Convention).

The first Protocol to the Convention, adopted in 1996, differentiated also between 'active' and 'passive' corruption of public officials. It also defined an 'official' (both at national and EU levels) and harmonized the penalties for corruption offences. As to the liability of legal persons, the Convention required to enact national legislation to allow heads of businesses or any persons having power to take decisions or exercise control within a business (i.e., legal persons) to be declared criminally liable. The Second Protocol, adopted in 1997, further clarified the Convention regarding the issues of the liability of legal persons, confiscation, and money laundering.

In 2012, the European Commission submitted a proposal for a PIF Directive, aimed at strengthening administrative and criminal law procedures to fight fraud against the Union's financial interests, which was eventually adopted in 2017,[7] offering an explicit definition of the EU financial interests in its Art 2. The latter covers also the infringements of the common VAT systems, when linked to the territory of two or more MSs and involving losses totalling at least €10 million. The text provides a common definition of a number of offences against the EU budget and relevant general provisions (*see* Chapter III). The PIF Directive, for many aspects, constitutes a 'lisbonization' of the PIF Convention, but departs from it for its binding nature, thus improving the level of harmonization, which was not fully ensured by the Convention. It also presents some innovative features, such as the inclusion of VAT and procurement-related frauds, as well as misappropriation. As for the general provisions, the notions of 'national official of a third country' and *de facto* official (Art 4 PIF Directive) constitute a novelty too.

4. The way towards the creation of the EPPO

In 1995, the European Commission's General Directorate for financial control appointed a group of experts – led by Professor Mireille Delmas-Marty – to draft guiding principles in relation to the criminal law protection of the EU's financial interests within the framework of a single European legal area. The report was then delivered in 1997 under the title: 'Corpus Juris: Introducing penal provisions for the purpose of the financial interests of the European Union'.

[3] Judgment of the Court of 21 September 1989, Commission of the European Communities v Hellenic Republic, C-68/88, EU:C:1989:339.

[4] Ibid., paras. 24-25.

[5] Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests [1995] OJ C 316/48 ('PIF Convention').

[6] Council Act of 29 November 1996 drawing up, on the basis of Art K.3 of the Treaty on European Union, the Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the protection of the European Communities' financial interests [1996] OJ C 151/1; Council Act of 19 June 1997 drawing up the Second Protocol of the Convention on the protection of the European Communities' financial interests [1997] OJ C221/11.

[7] Directive 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 [2017] OJ L 198/29 ('PIF Directive').

The study analyzed comparatively the criminal law of the MSs, as well as horizontal and vertical cooperation issues. Next, it proposed a new criminal law system combining national and Community provisions, to overcome the interstate cooperation regime in favour of tools applicable indifferently within the entire European territory (Varvaele, 2000), still making national law applicable in case of a lacuna in the Corpus. Indeed, the European Prosecutor represented a component of a more complex proposal, whose main objective was the creation of a comprehensive protection for EU financial interests, thanks to the definition of applicable substantive law, constituted by general principles of criminal law and specific definition of offences (Sicurella, 2013).

In 1997, the Amsterdam Treaty marked a significant step forward in the PIF sector providing in Art 280 TEC ' . . . Member States shall take the same measures to counter fraud affecting the financial interests of the Community as they take to counter fraud affecting their own financial interests . . . The Council . . . shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Community with a view to affording effective and equivalent protection in the Member States.' Nevertheless, it also stated that those measures 'shall not concern the application of national criminal law or the national administration of justice', thus excluding direct EU competence for adopting criminal law provisions. As a result, Art 280 TEC could not be regarded as the appropriate legal basis for implementing the Corpus Juris's proposals.

In 2001, the European Commission published the Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Public Prosecutor, noting that the scale and the specificity of these crimes required a repressive response and a genuine prosecution, so that the credibility of EU integration would not be compromised. The Green Paper's aim was indeed to develop the content of secondary legislation. The Commission departs from the high level of criminal law harmonization proposed by the Corpus Juris, opting for a minimal harmonization proportionate to the specific objective of the criminal protection of the financial interests, therefore limiting the proposal to the set of essential rules requested to create the European Prosecutor and make it functional (De Angelis, 2020). As a result, the proposal tends to separate the establishment of the EPPO *per se* and the elaboration of common criminal law provisions, the latter being left open to several mode of realization (Sicurella, 2013).

Notwithstanding the failure of the adoption of the Constitutional treaty[8] – where a legal basis was provided – the 2007 reform confirmed the addition of the definition of the legal basis for the establishment of the EPPO. The Lisbon Treaty (December 2009) includes Art 86 into the TFEU. Art 86 TFUE does not fully clarify how the EPPO would be integrated within the broader context of EU institutions and national ones. Also, it foresees a Regulation dealing mainly with structural and procedural matters, rather than substantive law ones. The actual establishment of the Prosecutor Office is delegated to the secondary legislator and its original denomination ('European Prosecutor') 'has been abandoned for seeming to overly empower one person (monocratic) and replaced by "European Public Prosecutor's Office"' (Kuhl, 2017, p. 135).

The Commission strongly supported the EPPO project, sustaining the political and academic debate, and in 2013 submitted an ambitious proposal[9] for its establishment. However, 14 national parliaments triggered the activation of the yellow card procedure against it. After review of the parliaments' reasoned opinions, the Commission concluded that the proposal complied with the principle of subsidiarity and decided to maintain it. This notwithstanding, subsequent negotiations did not proceed smoothly, and, in February 2017, the Council registered the absence of unanimity in support of the proposal.

5. Establishment, tasks and general principles

As the defection of several MSs impeded the unanimous agreement on the proposal establishing the EPPO (Alvarez, 2018), the only way out for the negotiators was to resort to an enhanced cooperation based on Art 86(1) TFEU. On a general note, Art 20 TEU and Art 329 TFEU allow a minimum of nine MSs to set up advanced integration or cooperation in a particular field within the EU structures (but without the participation of the unwilling MSs) when, as a whole, it cannot achieve the goals of such cooperation within a reasonable period. In any case, this procedure does not permit an extension of powers for the new mechanism outside those permitted by the Treaties. Therefore, MSs are entitled to differentiate the development of their integration and achievement of goals, with the precise intention to overcome stalemate where a particular proposal is blocked by one or more MSs that do not want to take part. In order to proceed with the enhanced cooperation,

[8] The ratification process of the Constitutional Treaty was interrupted, even though 15 MSs had already ratified it, when France and the Netherlands rejected it in their referenda. Consequently, other Member States, such as Denmark, postponed their ratification process.

[9] Commission, 'Proposal for a Regulation of the Council setting up the EPPO' COM (2013) 534.

the Council grants authorization, as a last resort, on a proposal from the European Commission and after obtaining the consent of the European Parliament. In April 2017, 16 Member States notified their intention to launch enhanced cooperation, in accordance with Art 86 TFEU; later on, four more Member States have joined. On 5 October 2017, the Parliament gave its consent to the text agreed by the twenty Member States, and the Council adopted the EPPO Regulation on 12 October 2017. The Regulation entered into force on 20 November 2017 and, in accordance with its Art 120, the Office shall be competent only for those crimes committed after this date

The Regulation has scaled down the model proposed by the Commission. MSs wished to maintain close control over and retain guiding influence of their respective national judiciaries, moving towards a collegiate structure of the EPPO. The final text departs from the monocratic and hierarchical EPPO model originally proposed by the Commission, raising concerns in terms of swiftness and efficacy of the proceedings. While the College has no operational competence (Art 9(2) EPPO Regulation), it is the European Prosecutor – acting within a Permanent Chamber – who will supervise proceedings related to his or her own MS (Art 12(1) EPPO Regulation), in close connection with the corresponding EDPs. Also, the rules concerning conflicts of competence might be often solved in favour of the national authorities, since the EPPO Regulation attributes to them the responsibility to decide over these conflicts (Salazar, 2017).

With respect to the set of offences established as under the EPPO's material competence, Arts 4 and 22 of the EPPO regulation refer to the relevant provisions of the PIF Directive adopted in 2017. Consequently, it is extremely important to analyze the repercussions that the adoption of the PIF Directive has on the EPPO; in particular, the subsequent timely transposition by each MS.[10] Indeed, moving from the Commission's proposal, the Regulation does not provide the EPPO with an exclusive competence but with a shared one, relying on a right of evocation of investigations initiated in one of the participating MSs. Thus, the concrete exercise of its competence ends up being circumscribed by several thresholds and limits.

As far as investigative powers are concerned, the Commission Proposal of a single judicial area and EU-wide investigative powers was rejected; as a result, the EPPO will rely on national investigative measures without automatic European admissibility of the judicial decision and measures taken. This implies the risk that even from a procedural standpoint the structure and the functioning of the office will be fragmented (Kuhl, 2017).

The EPPO Regulation is binding and directly applicable only to those MSs which participate in enhanced cooperation. According to the definition provided by Art 2(1) of the EPPO Regulation and for its purposes '"Member State" means, except where otherwise indicated, in particular in Chapter VIII, a MSs which participates in enhanced cooperation on the establishment of the EPPO, as deemed to be authorized in accordance with the third subparagraph of Art 86(1) TFEU, or by virtue of a decision adopted in accordance with the second or third subparagraph of Art 331(1) TFEU'. As to non-participating MSs, Art 327 TFUE states, 'Any enhanced cooperation shall respect the competences, rights and obligations of those Member States which do not participate in it. Those Member States shall not impede its implementation by the participating Member States.' At the time of writing:

- 22 MSs are part of the mechanism;[11]
- four are non-participants (may join any time);[12]
- one enjoys an opt-out from the AFSJ area.[13]

The ECP was appointed by the Council on 14 October 2019 and later confirmed by the European Parliament. The Council then appointed 22 European Prosecutors, one for each of the participating EU MSs, on 27 July 2020. The EPs and the ECP gave solemn oath before the ECJ on 28 September 2020. The decision on recruitment and working conditions of the EDPs was taken by the EPPO on 29 September 2020. In compliance with Art 120 of the EPPO Regulation, on 7 April 2021, the ECP submitted to the European Commissioners for Justice and Budget Administration her proposal to start the EPPO's operational activities. In turn the European Commission verified the recurrence of the conditions laid down in Regulation (EU) 2017/1939 and that the Office was set up and ready to undertake its tasks, adopting the implementing decision on 26 May 2021 which determined that the EPPO would have assumed its investigative and prosecutorial tasks on 1 June 2021, as it eventually did.

Notwithstanding the uncompleted process of EDPs' selection, the EPPO can start to work in any case, even if only one EDP has been nominated (or in any case fewer than the number agreed with the MS). On 6 July

[10] As of April 2021, all Member States bound by the Directive (26) have notified its full transposition into national law.

[11] Namely: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Romania, Slovenia, Slovakia, and Spain.

[12] That is Hungary, Ireland, Poland, and Sweden.

[13] Denmark.

2021 the EPPO communicated that it had initiated its first investigation against four Croatian citizens regarding criminal offences of active and passive corruption and abuse of functions. The investigation started after inquiries were conducted based on a criminal report filed by the Croatian National Police Office for the Suppression of Corruption and Organized Crime.

The European Public Prosecutor's Office (EPPO) has given an account of its operational activity in the annual report published on 24 March 2022.[14] The report contains statistics on EPPO operations in 2021, per participating Member State. The report illustrates the key figures for 2021:

- 2,832 crimes reports processed, followed by 576 investigations opened and 515 ongoing at the end of the year;
- €5.4 billion estimated damages in the active investigations, €147.3 million in seizures;
- non-procurement expenditure fraud was the most frequent type of fraud investigated (31.8%), followed by VAT revenue fraud (17.6%), non-VAT revenue fraud (13.4%), procurement expenditure fraud (11.2%) and corruption (4%).

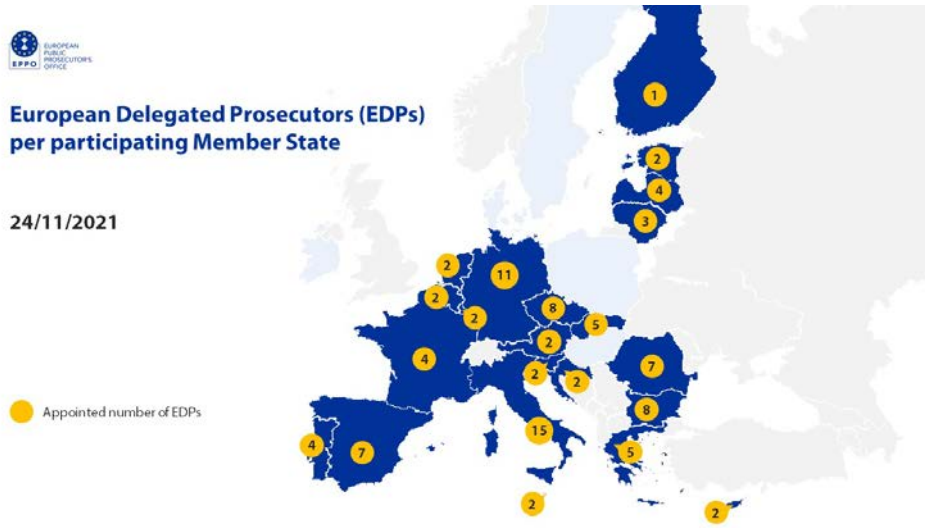

Figure 1: Number of appointed EDPs per participating Member State (*Source: EPPO website*)

As announced by Art 3 of the EPPO Regulation, the EPPO is a body of the EU with legal personality, thus bound by Union law and capable of taking legally binding decisions or entering into legally binding obligations. Art 86 TFEU requires it to be established from Eurojust, therefore the Regulation establishes a close relationship between the two (see Rec. n. 10 EPPO Regulation): the EPPO shall cooperate with Eurojust and rely on its support, in accordance with Art 100 of the EPPO Regulation.

The tasks of the EPPO are defined by Art 4 EPPO Regulation: 'The EPPO shall be responsible for investigating, prosecuting, and bringing to judgment the perpetrators of, and accomplices to, criminal offences affecting the financial interests of the Union which are provided for in Directive (EU) 2017/1371 and determined by this Regulation. In that respect the EPPO shall undertake investigations and carry out acts of prosecution and exercise the functions of prosecutor in the competent courts of the Member States, until the case has been finally disposed of.' According to Art 86(4) TFEU, any extension of this competence to include serious crimes having a cross-border dimension requires a unanimous decision of the European Council.

In this respect, the notion of financial interests of the Union is crucial. Although it may be surprising, the PIF Directive is the first act to provide the legal definition of the category of 'financial interests', and this definition is mirrored by Art 2(3) EPPO Regulation as 'all revenues, expenditures and assets covered by, acquired through, or due to the Union budget and the budgets of the institutions, bodies, offices and agencies established under the Treaties and budgets managed and monitored by them'.

Recalling the general principle enshrined in Art 4(3) TEU, Art 5(6) EPPO Regulation requires national authorities to actively assist and support the investigations and prosecutions of the EPPO, stating, 'Any action, policy or procedure under this Regulation shall be guided by the principle of sincere cooperation.' In other words, the EPPO and the national authorities shall support and inform each other with the aim of efficiently combating the crimes falling under the EPPO's competence.

[14] EPPO Annual Report 2021, published on 24 March 2022.

The interplay between the Regulation and National law is regulated by Art 5(3) EPPO Regulation: 'The investigations and prosecutions on behalf of the EPPO shall be governed by this Regulation. National law shall apply to the extent that a matter is not regulated by this Regulation. Unless otherwise specified in this Regulation, the applicable national law shall be the law of the Member State whose European Delegated Prosecutor is handling the case in accordance with Art 13(1). Where a matter is governed by both national law and this Regulation, the latter shall prevail.' The provision highlights the hybrid nature of the EPPO, and the risks posed by the lack of a harmonized EU criminal procedure code.

Art 106 EPPO Regulation explains that in each of the Member States the EPPO shall have the legal capacity accorded to legal persons under national law. On a more operative level, the provision also states that a Headquarters Agreement – to be concluded between the EPPO and Luxembourg by the date the EPPO assumes its investigative and prosecutorial tasks – will laid down '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'.

As for language arrangements, according to Art 107 EPPO Regulation, Council Regulation (EEC) No 1/58 determining the languages to be used by the European Economic Community shall apply to the acts referred to in Art 21 and 114 of this Regulation. Also, the College has decided by a two-thirds majority of its members on the internal language arrangements of the EPPO: English is the working language for operational and administrative activities, whereas French shall be used (along with English) in the relations with the ECJ.[15] Finally, 'the translation services required for the administrative functioning of the EPPO at the central level shall be provided by the Translation Centre of the bodies of the European Union, unless the urgency of the matter requires another solution. European Delegated Prosecutors shall decide on the modalities of translation for the purpose of investigations in accordance with applicable national law.'

Art 107 EPPO Regulation enshrines the principle of confidentiality and professional secrecy, in accordance with Union law or national law, depending on the sphere in which the professional is operating:

- the members of the College, the Administrative Director, and the staff of the EPPO, seconded national experts and other persons put at the disposal of the EPPO but not employed by it, and EDPs shall be bound by an obligation of confidentiality in accordance with Union legislation with respect to any information held by the EPPO.
- any other person who participates or assists in carrying out the functions of the EPPO at the national level shall be bound by an obligation of confidentiality as provided for under applicable national law.

In both cases, this obligation persists even after the person has left office or employment and after the termination of activities. The object of the obligation of confidentiality shall, in accordance with applicable national or Union law, apply to all information received by the EPPO, unless that information has already lawfully been made public. Investigations carried out under the authority of the EPPO shall be protected by the rules concerning professional secrecy under the applicable Union law. Any person who participates or assists in carrying out the functions of the EPPO shall be bound to respect professional secrecy under the applicable national law.

Lastly, Art 109 EPPO Regulation ensures that the activity of the EPPO is guided by the principle of transparency, as Regulation (EC) No 1049/2001 of the European Parliament and of the Council applies to documents other than case files, including electronic images of those files, that are kept in accordance with Art 45 of Regulation No 1049/2011.

[15] College Decision 002/2020.

CHAPTER II: INSTITUTIONAL AND STRUCTURAL ISSUES

1. Independence and accountability of the EPPO (Arts 6 and 7)

The Union's constitutional framework provides for independent and accountable institutions. Independence and accountability of public institutions are essential prerequisites of a democracy based on the rule of law. Independence and accountability of the EPPO, proclaimed in Art 6 of the EPPO Regulation, are its two essential structural bedrocks that secure its legitimacy and proper execution of tasks (Art 4 EPPO Regulation) in accordance with basic principles of its activities (Art 5 EPPO Regulation).

1.1. Independence of the EPPO (Art 6(1))

The EPPO is a body of the Union responsible for investigation and prosecution of crimes (Art 4 EPPO Regulation) bound by the principles of rule of law and proportionality in all its activities (Art 5 EPPO Regulation). These principles have to be safeguarded from the persisting danger of abuse of power (Sabadell Carnicero, 2021, pp. 57-58) and political influence on the criminal investigation. The danger is higher in cases with political background as is often the case with regard the EPPO offences. The offences against financial interests of the EU as a rule involve corruption and are frequently committed by or with the assistance of the state, local or EU officials (Pajčić, 2020, p. 100). Therefore, the independence of the EPPO from governmental

influence in the individual criminal cases is of the utmost importance and a key feature for its proper functioning.

The prosecution service is a system of hierarchic subordination where prosecutors are bound by the directives, guidelines and instructions issued by their superiors and they do not have, as opposed to judges, internal operational or functional independence.[16] The EPPO, as prosecutorial authority has also hierarchical and subordinated structure, although of a unique complexity. The internal independence is reserved for the Permanent Chambers (PC) that are head authority of the EPPO prosecutions while the European Prosecutors (EP) and the European Delegated Prosecutors (EDP), bodies that are running investigations and prosecutions, do not have internal independence. Therefore, the independence of the EPPO and its prosecutors refers to external independence from the executive and legislative branches of government and not to internal independence of the individual prosecutors within the EPPO.

The following sections on external independence will deal with several major topics related to its establishment, such as institutional, personal, European and national independence and independence safeguards.

1.1.1. Institutional and personal external independence

Art 6 (1) of the EPPO Regulation establishes the institutional external independence of the EPPO as an EU body in the first sentence and the personal external independence of the EP in the second sentence.

External independence is an important feature of the EPPO as international or European law does not guarantee the institutional independence of prosecution office. In some MSs the prosecutors are appointed by the executive branch of power; they implement governmental directives for prosecution policy of combating crime and are even operationally dependent in individual cases in some circumstances. Thus, a hierarchical relationship between the public prosecutor and executive power can be found in Belgium, France and the Netherlands and is based on the political accountability of the Minister for the prosecutorial policy before the Parliament (Ligeti, 2020, pp. 45-46).

1.1.1.1. Institutional external independence

As declared by Art 3(1) of the EPPO Regulation, the EPPO is established as a body of the Union and as such is bound by Union law. It has legal personality (Art 3(2) EPPO Regulation) and can take legally binding decisions or enter into legally binding obligations. It is a separate body from Eurojust and shall cooperate with it and rely on its support in accordance with Art 100 of the EPPO Regulation (Art 3(3) EPPO Regulation).

According to Art 6(1) the EPPO shall be independent. The EPPO is an autonomous body of the Union independent from external influence in the exercise of its tasks and activities. The MSs of the EU and the institutions, bodies, offices and agencies of the Union shall respect the independence of the EPPO and shall not seek to influence it in the exercise of its tasks (Art 6(1), third sentence EPPO Regulation). It is neither a representative of the participating states nor a body of their cooperation and coordination in criminal matters but a supranational European institution with truly European missions and tasks.

Institutional external independence of the EPPO does not relate only to the external undue influence on the EPPO or the ECP but also to the strategic decisions or general instructions. General instructions, for example to prosecute certain types of crimes more severely or speedily, are on the national level regarded as an aspect of policy which may appropriately be decided by parliament or government.[17] For example, the EU regularly requests candidate countries in the accession process to the EU to combat corruption or organized crime. However, the EPPO Regulation has established internal regulatory competences of the EPPO, especially as regards strategic policies and guidelines (Burchard, 2021, p. 32). The EPPO strategic independence deprives the European Parliament, European Council and the European Commission of power to create policy or

[16] Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service - Adopted by the Venice Commission - at its 85th plenary session (Venice, 17-18 December 2010), CDL-AD(2010)040-e (Venice Commission, CDL-AD(2010)040-e).

[17] Ibid.

guidelines for the EPPO outside the legislative procedure. The ECP and the College decide on strategic matters and on general issues (Art 9(2) EPPO Regulation). Upon a proposal by the ECP the College shall determine the priorities and the investigation and prosecution policy of the EPPO.[18] At the operational level, the Permanent Chamber has initiative for discussion of issues related to the implementation policy.[19] In order to ensure legal certainty and to effectively combat offences affecting the Union's financial interests, while deciding about prosecutorial policy the EPPO has to respect that its investigation and prosecution activities should be guided by the legality principle (Rec. 66 EPPO Regulation).

1.1.1.2. Personal external independence

External independence is not only institutional (i.e., guaranteed to the EPPO as a body of the Union) but also personal, guaranteed to all EPPO prosecutors and the staff of the EPPO. That is prescribed by the second sentence of Art 6(1) EPPO Regulation, which juxtaposes the basic decision-making prosecutorial principles of the EPPO – the principle of coherence and the rule of Union law on the one side, and prohibition of the external influence in the exercise of its tasks on the other. The individuals in the criminal proceedings should be protected from arbitrary use of prosecutorial powers of the EPPO. These principles do not serve to protect MSs from arbitrary decisions of the EPPO but suspected or accused persons, as criminal proceedings are dealing with individual criminal responsibility and not with state responsibility. That will be guaranteed if EPs act in the interest of the Union as a whole (the principle of coherence) and as defined by law (rule of law) and if they neither seek nor take instructions from any person external to the EPPO (Rec. 17 EPPO Regulation). The provisions forbid the ECP, the Deputy European Chief Prosecutors, the EPs, the European Delegated Prosecutors, the Administrative Director, as well as the staff of the EPPO to seek nor take instructions from any MS of the EU or any institution, body, office or agency of the Union in the performance of their duties under this Regulation (Art 6(1), second sentence EPPO Regulation). The provision reiterates that the main element of personal external independence of the EPPO is the impermissibility of the executive to give instructions in individual cases to the prosecutors.[20]

1.1.2. European and national external independence

As regards to independence, it is important to recognize that the EPPO is composed of two levels: supranational or central, and national or decentralized. The supranational or central level consists of ECP and 22 EPs from each participating country. The national or decentralized level consists of the EDPs in 22 participating MSs. EDPs are bodies of the EPPO acting at the national level and having the same investigative powers as other national prosecutors. They are the personification of the shared competence between the EPPO and national authorities in combating crimes affecting the financial interests of the Union (Rec. 13 EPPO Regulation). Due to their dual status of European and national prosecutorial authority, they have to be independent from European authorities but also from the national authorities. Taking into account the hierarchical and centralized structure of the national prosecutors' office, additional safeguards have to be put in place in order to establish complete independence of the EDPs from their national authorities.

1.1.2.1. European external independence

Art 6(1) EPPO Regulation stipulates that any EP as well as EDP will be independent from any institution, body, office or agency of the Union in the performance of their duties and vice versa, and that the institutions, bodies, offices and agencies of the Union shall respect the independence of the EPPO.

[18] Internal Rules of Procedure of the EPPO, Art 6.

[19] Each Permanent Chamber, acting through its chair, may submit to the College a written proposal for discussion of specific issues related to the implementation of prosecution policy of the EPPO or other relevant guidelines concerning specific issues arising from the work of the Permanent Chamber. Internal Rules of Procedure of the EPPO, Art 21(2).

[20] See Venice Commission, CDL-AD(2010)040, § 30.

1.1.2.2. National external independence

Art 6(1) EPPO Regulation establishes the independence from any MS and obliges them to respect the independence of the EPPO. As mentioned, the particular emphasis with regard to national independence is related to the EDPs. Under Rec. 32 EPPO Regulation, the EDPs should be an integral part of the EPPO and as such, when investigating and prosecuting offences within the competence of the EPPO, should act exclusively on behalf and in the name of the EPPO on the territory of their respective MS. However, Rec. 43 EPPO Regulation demands that the EDPs are an integral part of the EPPO while also being integrated at the operational level in their national legal systems and judicial and prosecution structures. The requirement to grant the EDPs a functionally and legally independent status which is different from any status under national law under Rec. 43 EPPO Regulation runs counter to the fact that the EDP relies on a double mandate based on two separate appointments, on the national and on the EU level (Mei, 2015, p.111). The loyalty conflicts (Mei, 2015, p. 111) are additionally induced by the fact that national prosecutors are professionally accustomed to be subordinate and have a firm professional affiliation with the national prosecution service.[21] Given the organizational and functional national dependence of EDPs, there is no reason to impose the independence safeguards for the appointment of EPs and non-renewable mandates on them. Therefore, the mandate of the EDPs is renewable and the selection of the EDPs is in the hands of the MSs, as the College may reject an appointment only if the candidate does not fulfil the legal requirements (Art 17(1) EPPO Regulation).[22]

National independence of the EDPs is also critical from the perspective that the EPPO is established owing to the inability or unwillingness of the MSs (Burchard, 2021, p. 35) to effectively prevent, prosecute and adjudicate crimes against the EU budget as well as to frequently the strong political dimension of these crimes.

1.1.3. External independence safeguards

There are institutional, personal and procedural independence safeguards. Rec. 16 of the EPPO Regulation necessitates the establishment of institutional safeguards that should be put in place in order to ensure its independence as well as its accountability towards the institutions of the Union, such as:

A. Appointment of EPPO prosecutors. The procedural rules for the appointment of the ECP and EPs should guarantee their independence (Rec. 40, Arts 14-17 EPPO Regulation). EDPs are nominated by the MS and upon proposal by the ECP appointed by the College (Art 17(1) EPPO Regulation). An important assurance is that the ECP is appointed for a non–renewable term (Art 14(1) EPPO Regulation). However, the appointment of EDPs is renewable (Art 17 EPPO Regulation). Professional independence is guaranteed by the limitation of eligibility of the appointees to active members of public prosecution services and the judiciary (Ligeti, 2020, p. 44). Also, the requirement for appointment of EPPO prosecutors is that their independence is beyond doubt.[23]

B. Dismissal of EPPO prosecutors. The Court of Justice has jurisdiction over the dismissal of the ECP and EPs, in accordance, respectively, with Art 14(5) and Art 16(5) of the EPPO Regulation. The College shall be responsible for dismissing an EDP (Art 17(3) EPPO Regulation). An MS may not dismiss an EDP for reasons connected with his/her responsibilities under this Regulation without the consent of the ECP (Art 17(4) EPPO Regulation).

[21] Thus, Satzger is warning: 'Would the Delegated Prosecutor really act objectively and openly against his superior or also against colleagues within the internal structure? Can he really be independent if he wants to continue a career in the national justice system and needs positive evaluations insofar?' Satzger, 2015, 74.

[22] The College has already exercised the power to reject Member State nominations for the EDP. On 21 April 2021 it rejected a Lithuanian candidate and on 21 May 2021 it rejected two candidates nominated by Bulgaria. COLLEGE DECISION 028/2021 and COLLEGE DECISION 036/2021.

[23] EPPO Regulation, Art 14(2)(b), Art 16(1)(b) and Art 17(2).

C. Disciplinary responsibility. EPPO prosecutors shall be as liable to disciplinary procedures as are other Union servants before the CJEU (Art 270 of the Lisbon Treaty).[24] The removal from office and other professional sanctions envisaged to protect the Office independence can be taken only by a Union-level court.[25] However, this does not apply to the EDPs, as explained in the Rec. 46 EPPO Regulation: 'The College is responsible for disciplinary procedures concerning EDPs acting under the EPPO Regulation. Since EDPs remain active members of the public prosecution or the judiciary of the MSs, and may also exercise functions as national prosecutors, national disciplinary provisions may apply only for reasons not connected with this Regulation. However, in such cases the ECP should be informed of the dismissal or of any disciplinary action, given his/her responsibilities for the management of the EPPO and in order to protect its integrity and independence.' In order to protect the independence of EDPs, the College has specifically regulated the disciplinary offences and sanctions applicable to EDPs (Sabadell Carnicero, 2021, pp. 57-58).

D. Budgetary autonomy. To guarantee the full autonomy and independence of the EPPO, it should be granted an autonomous budget, with revenue coming essentially from a contribution from the budget of the Union (Rec. 111 EPPO Regulation). Allocation of sufficient financial resources in order to fulfil its mandate and the necessary budgetary autonomy to manage them (Sabadell Carnicero, 2021, pp. 57-58) are important guarantors of external independence. The ECP is responsible for preparing decisions on the establishment of the budget and submitting them to the College for adoption, and the Administrative Director is authorizing officer for implementing the budget of the EPPO (Art 90 EPPO Regulation).

E. Internal regulatory competences of the EPPO. The EPPO has competences to prescribe rules related to the prosecution policies, strategic matters, and rules of procedure on organization of work. It has broad and autonomous regulatory powers for the management and administration of its internal work that protect it from any external political interference. The College takes decisions on strategic matters and on general issues arising from individual cases with a view to ensuring coherence, efficiency and consistency in the prosecution policy of the EPPO throughout the MSs (Art 9(2) EPPO Regulation) and adopts Internal Rules of Procedure of the EPPO that governs the organization of the work of the EPPO (Art 21(1 and 2)). The EPPO does not have jurisdiction to prescribe substantive or procedural rules that can be applied to persons in criminal proceedings, as some international organizations do (e.g., international *ad hoc* criminal courts). Internal rules also cannot create any additional obligation or requirement for the MSs (Brodowski, 2021, p. 140).

There are personal independence safeguards of individual EPs that protect their external independence, such as:

F. Appropriate remuneration of EPs. It is recognized that appropriate remuneration of judges is a constitutional guarantee of their independence. The same applies to prosecutors. Financial independence of EPs and the EDP as regards remuneration and operational expenditure are important guarantees for independence of the EDP from European and national influences and pressures. EPPO prosecutors are paid similarly to other European officials by the EU, and are not paid by MSs. In order to establish the financial independence of EDPs from national prosecution service, remuneration of EPs and EDPs as well as operational expenditure of the EPPO including the expenditure incurred by EDPs qualify as EPPO expenditures (Art 91(4 and 5) EPPO Regulation).

G. The Protocol on the Privileges and Immunities of the EU apply to the EPPO and its staff (Art 96(5) EPPO Regulation). Under Art 11 of the Protocol EPPO officials and other staff shall be immune from legal proceedings in respect of acts performed in their official capacity, including their spoken or written words.

[24] Art 270 of the Lisbon Treaty: The Court of Justice of the European Union shall have jurisdiction in any dispute between the Union and its servants within the limits and under the conditions laid down in the Staff Regulations of Officials and the Conditions of Employment of other servants of the Union.

[25] A first instance jurisdiction in disputes between the Union and its servants shall be exercised by the European Union Civil Service Tribunal, which is a specialized tribunal within the Court of Justice.

H. Prevention of conflict of interests of EPs. The EPPO Regulation allows an EP to request, on grounds related to a personal conflict of interest, that the supervision of investigations and prosecutions of individual cases be assigned to another prosecutor (Art 12(2) EPPO Regulation).[26] The prevention and management of conflicts of interest of EDPs, the ECP, the supervising EP and the member of the PC is regulated by Art 69 of the Internal Rules of Procedure of the EPPO.

I. Special rules for protection of the independence of the EDPs when exercising functions as national prosecutors.

J. EDPs' right to assistance and compensation in case of threats, insulting or defamatory acts, or any attack to their person or property.[27]

1.1.4. Internal independence safeguards

There are also procedural guarantees of non-interference in the prosecutor's activities in national criminal proceedings that ensure that he/she is free of external but also internal pressure coming from within the EPPO. Dangers from undue or illegal pressures are not only external but could also come from within the prosecution system.[28] The internal autonomy of individual prosecutors should be secured in order to make possible the objective and impartial performance of the prosecutors' duties in accordance with the principle of legality (Rec. 66 EPPO Regulation). There are checks and balances prescribed by the EPPO Regulation procedural rules that ensure internal independence of EPs and EDPs (Sabadell Carnicero, 2021, pp. 57-58) as well as by the Rules of Procedure and other internal provisions dealing with the management of cases, the decision-making process, workload and workflow.

1.2. Accountability of the EPPO

Accountability in democratic society is the other side of the coin of the EPPO's independence. The EPPO Regulation balances the importance of both, spelling out that institutional safeguards should be put in place to ensure the EPPO's independence as well as its accountability towards the institutions of the Union (Rec. 16 EPPO Regulation). Moreover, independence, autonomy and coercive powers granted to the EPPO are of such an extent that they have to be complemented with its strict accountability (Rec. 28 EPPO Regulation). The EPPO's accountability is particularly important as it is the first EU institution that has repressive powers to restrict fundamental rights and freedoms of EU citizens. In order to ensure its democratic legitimacy and credibility by building public trust in its work, the EPPO has to be held accountable by EU citizens.

However, accountability of prosecutorial services as well as courts is a much less discussed and developed concept than independence, although their importance for the responsible and proper functioning of these institutions is equal. That is also the case with the EPPO, as the Regulation addresses this issue only in a few provisions, scarcely and summarily (Burchard, 2021, p. 36), contrary to the previously outlined complex regulation of the EPPO's independence.

1.2.1. Instruments of democratic accountability: annual reports and hearings

The EPPO Regulation provides for two democratic accountability mechanisms: annual reports and hearings. They are addressed to different institutions and levels: European and national. As proclaimed by Art 6(2) of the EPPO Regulation, the EPPO is accountable to the EU institutions – the European Parliament, the Council and the Commission – for its general activities but also to the national parliaments (Art 7(1) EPPO Regulation). Therefore, under the EPPO Regulation, the monitoring and oversight competences over the EPPO are given to

[26] Internal Rules of Procedure of the EPPO, Art 32(3): When a request is made on the basis of a potential conflict of interest, the European Chief Prosecutor shall grant the request, if he/she concludes that the personal interests of the requesting European Prosecutor actually or potentially impair his/her independence in carrying out the duties of a European Prosecutor in accordance with Art 12 of the Regulation, or may be perceived as such.

[27] Art 7 of the Decision of the college of the European Public Prosecutor's Office of 29 September 2020 laying down rules on conditions of employment of the European Delegated Prosecutors, as amended by decision 017 of 24 March 2021 of the college of the EPPO.

[28] Venice Commission, CDL-AD(2010)040-e, § 32.

EU citizens (the European Parliament), MS governments (the Council), the EU (the Commission) and citizens of the MSs (national parliaments).

Every year the EPPO has to draw up and publicly issue an Annual Report on its general activities and transmit it to the European Parliament, the Council and the Commission as well as to the national parliaments (Art 7(1) EPPO Regulation). A public Annual Report addresses the EPPO's general activities and not individual cases with regard to which the EPPO has an obligation of discretion and confidentiality (Art 7(2) EPPO Regulation). A Report at a minimum should contain statistical data on the work of the EPPO (Rec. 19 EPPO Regulation) and includes the administrative and budgetary parts (Art 19(4)(e) EPPO Regulation).[29] It would be desirable to give a transparent account of how any general instruction given by the College has been implemented.[30] Systemic interpretation would lead to the conclusion that national parliaments are those of the participating states, but inviting non-participating EU states is not excluded. The Report will be written not only in English, the working language of the EPPO,[31] but in all official languages of the institutions of the Union (Brodowski, 2021, p. 40).

In order report the general activities of the EPPO, the ECP has an obligation to appear at the public hearing once a year before the European Parliament and the Council. At his/her request, his/her Deputy will also appear before national parliaments (Art 7(2) EPPO Regulation).

1.2.2. Budgetary and judicial accountability

In addition to the democratic accountability of the EPPO, there is its budgetary accountability and judicial accountability. The EPPO has budgetary autonomy that entails strict accountability for its public expenditure. As regards judicial accountability of the EPPO and its prosecutors, while prosecuting and investigating the perpetrators of PIF criminal offences, the EPPO is considered a national authority and the work of EPs is subject to scrutiny by national courts. The greatest problem of accountability (or rather a lack of accountability) arises when the prosecutors decide not to prosecute. If there is no legal remedy – for instance, by individuals as victims of criminal acts – then there is a high risk of non-accountability.[32] Therefore, in this situation, the Court of Justice is engaged and the decision of the EPPO to dismiss a case are subject to its review.[33]

1.2.3. Lack of personal accountability of the European Chief Prosecutor for the work of the EPPO

There is a systemic problem with the democratic accountability of the EPPO for its work. The structure of the EPPO is organized into two levels: non-operational and operational level. In the first level, the ECP and the College are tasked with strategic, organizational and administrative matters. In the second (lower) level, PCs (three EPs), the supervising EP and EDPs have operational powers in the concrete criminal investigation and trial. All members of the College – that is, the EPs from each participating state as well as the ECP – can make operative decisions when they step down to the lower level and act as members of the PC or as supervising EPs. However, neither the ECP nor the College have powers to take or order any prosecutorial or investigative act in individual cases on behalf of the EPPO. Such a composition, structure and division of functions of the European prosecutorial authority does not correspond either to the internal structure of the national prosecutor's offices in the MSs or to the international prosecutor's office in the international criminal courts. As a rule, the Prosecution's Office is a hierarchical, centralized and subordinated organization when it comes to operative powers and there is a clear chain of command from the Chief Prosecutor to subordinated prosecutors concerning decisions to prosecute, not to prosecute, dismiss the case, accept a guilty plea, the right to evocation and so on in each criminal case. These overall powers make the chief prosecutor personally accountable for the work and efficiency of the prosecutorial office to the parliament.

In the EPPO, nominally the official who bears responsibility for the functioning of the accountability mechanisms is also the ECP. Under Rec. 18 of the EPPO Regulation, as the head of the EPPO, s/he is fully

[29] For more on the contents of the EPPO Annual Report, see Brodowski, 2021, pp. 38-39.

[30] Venice Commission, CDL-AD(2010)040, § 44.

[31] College Decision 002/2020. Decision of the college of the European Public Prosecutor's Office (EPPO) of 30 September 2020 on internal language arrangements.

[32] Venice Commission, CDL-AD(2010)040-e, § 45.

[33] Critical appraisal of this solution see Mitsilegas, 2020, p. 81.

accountable for the performance of his/her duties and bears an overall institutional accountability or its general activities to the European Parliament, the Council and the Commission (Rec. 18 EPPO Regulation).[34] However, the ECP has institutional but not personal accountability for the work of the EPPO.

As the ECP does not have operational powers in individual cases of prosecution or non-prosecution, s/he has no personal responsibility for the work of the EPPO and the European Parliament and the Council may not dismiss him/her due to dissatisfaction with the annual report or the work of the EPPO, as is the case in some national systems. They can apply to the Court of Justice for dismissal only if the ECP is guilty of serious misconduct or not able to perform his/her duties (Art 14(5) EPPO Regulation). It can be concluded that the aim of the report is primarily informative, that is, that it ensures Union institutions 'are kept informed about the work of the EPPO'[35], but is itself of very limited practical relevance (Burchard, 2021, p. 36). Therefore, it is legitimate to address the lack of democratic accountability of the EPPO and its Chief Prosecutor for its work to the European Parliament and European citizens (Đurđević, 2018, 103).

2. Overview of the structure of the EPPO

The EPPO is an indivisible Union body operating as a single Office as established in Art 8(1) of the EPPO Regulation. This proclaimed unity at the supranational level is challenged by its decentralized enforcement in the national criminal justice systems. The EPPO is a supranational body that operates not in a single European legal area but in the national jurisdictions of participating Member States largely on the basis of national law (Mitsilegas, 2021, p. 262). This is reflected in its organization into a central level and a decentralized level (Art 8(2) EPPO Regulation). The central level refers to the Central Office situated in Luxembourg, which consists of the following bodies: the College, the Permanent Chambers, the European Chief Prosecutor, the Deputy European Chief Prosecutors, the EPs and the Administrative Director (Art 8(3) EPPO Regulation). The decentralized level consists of EDPs located in the Member States (Art 8(4) EPPO Regulation) and acting as national prosecutors in the national criminal justice systems.

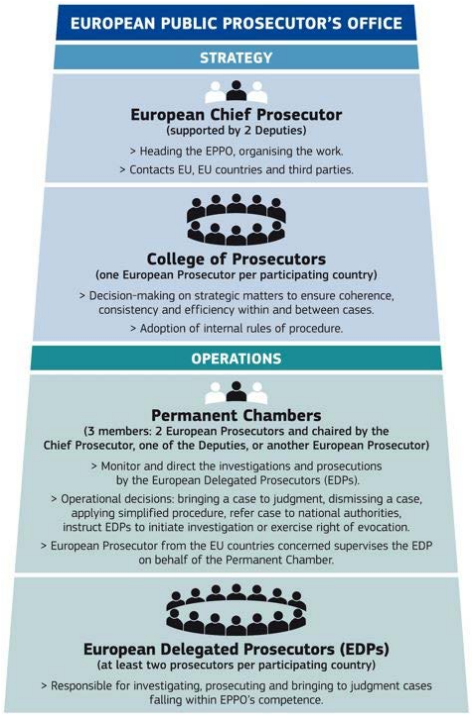

Figure 2: The structure of the EPPO (*Source: EPPO*

The organizational structure and the internal decision-making process of the EPPO enables the Central Office to monitor, direct and supervise all investigations and prosecutions undertaken by EDPs (Rec. 22 EPPO Regulation). However, this task should be further elaborated. The Central Office exercises three different control activities divided between its bodies. These are: a) general oversight; b) monitoring and directing; c) supervision. The upper level of the Central Office, the European Chief Prosecutor and the College, performs general oversight, which is understood as general administration of the activities of the EPPO, in which instructions are only given on issues which have a horizontal importance for the EPPO. They have only management powers, not operational ones.

The operational structure of the EPPO consists of three bodies: the Permanent Chamber, the European Prosecutor and the EDPs. These bodies, when in charge of criminal cases, are united in prosecutorial authority and have hierarchical but also functionally divided competences. A competent Permanent Chamber has the powers to monitor and direct individual investigations and prosecutions. A supervising European

[34] The EU institutions can apply to the Court of Justice of the European Union, with a view to the European Chief Prosecutor and European Prosecutors removal under certain circumstances, including in cases of serious misconduct (Rec. 18 EPPO Regulation).

[35] COM (2013) 532 final, 17.7.2013, 7.

Prosecutor closely oversees and instructs the work of the EDP. The handling EDP is responsible for investigating, prosecuting and bringing to judgment cases falling within EPPO's competence in the Member States. The Permanent Chambers and the European Prosecutors act as headquarters at the central level, and the EDPs operate as field offices in the Member States at the decentralized level (Burchard, 2021, p. 44).

Therefore, from the operational point of view, the EPPO is not a unified prosecutorial authority but is composed of multiple prosecutorial authorities or offices with bodies at central level (Permanent Chambers, a European Prosecutor) and decentralized level (the EDPs) in charge of concrete national prosecutions. Due to functionally divided competences among three bodies, the chain of command is not always centralized and hierarchical in the competent Permanent Chamber. Generally, the Permanent Chamber is at the top, the supervising European Prosecutor is in the middle, and the handling EDP at the bottom (Burchard, 2021, p. 51). As such a decentralized structure of a prosecutorial office is unknown at the national or international levels, it can be rightly designated as *sui generis* (Ligeti, 2020, p. 41).

2.1. European Chief Prosecutor

The European Chief Prosecutor is the head of the EPPO as a whole and the head of the College of European Prosecutors (Rec. 21 EPPO Regulation). S/he is appointed by the European Parliament and the Council by common accord.

A. Powers

The powers of the European Chief Prosecutor are ((Art 11(1)(3) EPPO Regulation):

- organizing the work of the EPPO and directing its activities;
- taking decisions in accordance with this Regulation and the Internal Rules of Procedure of the EPPO;
- representing the EPPO vis-à-vis the institutions of the Union and of the Member States of the European Union, and third parties.

The European Chief Prosecutor does not have competence to take operational decisions in individual cases, except:

- as a chair of the Permanent Chamber;
- when invoking its power to request the Permanent Chamber to review its decision to delegate their decision-making power to the European Prosecutor (Art 10(7) EPPO Regulation);
- when invoking its power to request the lifting of immunities or privileges under national or Union law of persons involved in the investigations.

B. Deputy European Chief Prosecutors

Two Deputy European Chief Prosecutors shall be appointed by the College and their tasks are (Art 11(2) EPPO Regulation):

- to assist the European Chief Prosecutor in the discharge of his/her duties;
- to act as a replacement when he/she is absent or is prevented from attending to those duties.

C. Appointment and dismissal of the European Chief Prosecutor (Art 14 EPPO Regulation)

The European Chief Prosecutor is appointed by common accord of the European Parliament and the Council for a non-renewable term of seven years. The Council acts by simple majority. The candidates for the position should apply to an open call published in the Official Journal of the European Union. Requirements for the position of the European Chief Prosecutor are the same as for the European Prosecutors, but additionally s/he has to have sufficient managerial experience and qualifications for the position.

The European Chief Prosecutor may be dismissed only by the Court of Justice, upon the application of the European Parliament, of the Council or of the Commission if it finds that he/she is no longer able to perform his/her duties, or that he/she is guilty of serious misconduct.

D. Appointment and dismissal of the Deputy European Chief Prosecutors (Art 15 EPPO Regulation)

The College shall appoint two European Prosecutors to serve as Deputy European Chief Prosecutors for a renewable mandate period of three years, which shall not exceed the periods for their mandates as European Prosecutors. The Deputy European Chief Prosecutors shall retain their status as European Prosecutors.

If a European Prosecutor is no longer able to perform his/her duties as Deputy European Chief Prosecutor, the College may decide in accordance with the Internal Rules of Procedure of the EPPO to dismiss the Deputy European Chief Prosecutor from that position.

2.2. College

The College of the EPPO consists of the European Chief Prosecutor and one European Prosecutor per Member State (Art 9(1) EPPO Regulation). It is the principal strategic, organizational and legislative governing body of the EPPO.

The powers of the College are (Rec. 24, Art 9 EPPO Regulation):

- being responsible for the general oversight of the activities of the EPPO; as defined in Rec. 23 of the EPPO Regulation, 'general oversight' should be understood as referring to the general administration of the activities of the EPPO, in which instructions are only given on issues which have a horizontal importance for the EPPO;
- taking decisions on strategic matters, including determining the priorities and the investigation and prosecution policy of the EPPO;
- taking decisions on general issues arising from individual cases and on other matters specified in the Regulation;
- ensuring coherence, efficiency and consistency in the prosecution policy of the EPPO throughout the Member States;
- setting up Permanent Chambers on a proposal by the European Chief Prosecutor and following the Internal Rules of Procedure of the EPPO;
- adopting the Internal Rules of Procedure of the EPPO and further stipulating the responsibilities for the performance of functions of the members of the College and the staff of the EPPO;
- being responsible for disciplinary procedures concerning EDP.

The College does not have competence to take operational decisions in individual cases (Art 9(2) EPPO Regulation). The decisions of the College on general issues should not affect the investigation and prosecution policy of the EPPO (Rec. 24 EPPO Regulation).

The College should make its best efforts to take decisions by consensus (Rec. 24 EPPO Regulation). If such a consensus cannot be reached, decisions should be taken by majority and each member of the College has one vote. As a rule, the College votes by simple majority, but in some cases the College decides by qualified majority. In the event of a tie the European Chief Prosecutor has a vote (Art 9(5) EPPO Regulation). Any member of the College has the right to initiate voting.

2.3. Permanent Chambers

The Permanent Chambers are bodies of the Central Office with powers to monitor and direct individual investigations and prosecutions (Rec. 23 EPPO Regulation). They are the highest bodies of the EPPO and possess its operative powers. There are 15 Permanent Chambers established by the decision of the College.[36] The College sets up a Permanent Chamber that decides on their personal composition, the division of competences among them and the allocation of cases. The Permanent Chambers have been designated by consecutive numbers from one to 15, in order, inter alias, to enable random allocation of cases.

A. Composition

The Permanent Chamber is a collegial body set up by the College and composed of three members: the chair and two permanent Members. The chair is the European Chief Prosecutor or one of the Deputy European Chief Prosecutors, or a European Prosecutor appointed as Chair. The members of the Permanent Chambers are European Prosecutors. A European Prosecutor can be a member of more than one Permanent Chamber where this is appropriate to ensure, to the extent possible, an even workload between individual European Prosecutors (Rec. 25 EPPO Regulation). Contrary to a supervising European Prosecutor and a handling EDP, the

[36] Decision on the Permanent Chambers, College Decision 015/2020, 25 November 2020, Art 2 and 4.

members of the competent Permanent Chamber are not coming from the Member State where criminal proceedings take place. They are the genuine multinational element of the EPPO's proceedings, which guarantees independence from Member states but also creates a number of linguistic, legal and practical challenges (Maschl-Clausen, 2021, pp. 55-56).

B. Working language

Due to its composition, the competent Permanent Chamber has insufficient knowledge of the national rules of criminal procedure as well as the language of the case. As the Permanent Chambers are charged with the crucial prosecutorial powers whose correct use demands knowledge of the evidence, and the proceedings are conducted in the official language of the Member State of the EDP handling the case, it can be expected that the whole criminal case, including all evidence, has to be translated into English, the working language of the EPPO.[37] According to the College Decision on Permanent Chambers, translation is the responsibility of EDPs, who shall ensure that acts of the criminal investigations which are essential to allowing the Central Office to carry out its tasks are made available in the working language of the EPPO, where appropriate in a summary form.[38]

C. Voting

The Permanent Chamber takes decisions by simple majority and at the request of any of its members, and each of them has one vote. In the event of a tie the Chair has a vote (Art 10(6) EPPO Regulation). Any member of the College has the right to initiate voting. The decisions are taken after deliberation in meetings of the Chamber on the basis, where applicable, of the draft decision proposed by the handling EDPs. In addition to the permanent Members, the European Prosecutor who is supervising an investigation or a prosecution shall participate in the deliberation and shall have a right to vote, except in cases referred to in Art 10(9) EPPO Regulation. The handling EDP may also be invited to attend the meetings of the Permanent Chamber without a right to vote (Art 10(9)). The presence of these two operative bodies should enhance the expertise of the Permanent Chamber, whose members are not familiar with the national legal system (Burchard, 2021, p. 47).

D. Powers (Art 10 EPPO Regulation):

There are three general powers of the Permanent Chambers:

- monitoring and directing the investigations and prosecutions conducted by the EDPs;
- ensuring the coordination of investigations and prosecutions in cross-border cases,
- ensuring the implementation of decisions taken by the College in accordance with Art 9(2) EPPO Regulation.

The procedural decision-making powers of the Permanent Chambers are exercised at different stages of the proceedings of the EPPO. At the beginning and during investigations, the role of the Permanent Chambers is mostly subsidiary and supervisory to one of the EDPs and the European Prosecutor, while at the end of the investigation they take the key decisions on the proceedings (Ligeti, 2020, 42). However, in order to effectively combat offences affecting the Union's financial interests, they have power to 'overrule' the EDP's decision not to initiate an investigation (Art 26(3) EPPO Regulation). As a rule, they should adopt decisions on the basis of a draft decision proposed by the handling EDP, but in exceptional cases, they can adopt decisions on the basis of a draft decision presented by the supervising European Prosecutor or autonomously without any proposal (Rec. 36 EPPO Regulation). In order to perform operational decision, they have direct access to information stored electronically in the case management system and on request to the case file (Art 46(2) EPPO Regulation).

Operational decisions of the Permanent Chambers are prescribed by Art 10 EPPO Regulation in three paragraphs:

- to bring a case to judgment, to dismiss a case, to apply a simplified prosecution procedure, on final disposition of the case, to refer a case to the national authorities, to reopen an investigation (Art 10(3) EPPO Regulation);

[37] On the importance of the language in the work of the Permanent Chamber see Đurđević, 2018, 105. The same conclusion: Maschl-Clausen, 2021, pp. 55-56.

[38] Decision on the Permanent Chambers, College Decision 015/2020, 25 November 2020, Art 2(4).

- where necessary, they shall take other operational decisions such as instruction to an EDP to initiate an investigation or to exercise the right of evocation, to refer to the college strategic matters or general issues raising from individual cases, reallocation of cases to different EDPs if she or he does not follow the instruction, approve the decisions of a European Prosecutor to conduct the investigation personally (Art 10(4) EPPO Regulation);
- in a specific case, acting through the supervising European Prosecutor, give instructions (in compliance with national law) to the handling EDP (Art 10(5) EPPO Regulation).

E. Delegation of powers

A Permanent Chamber may decide to delegate its decision-making power to prosecute or dismiss the case to the supervising European Prosecutor in specific cases where an offence is not serious or the proceedings are not complex (Rec. 37 EPPO Regulation). The limitations to delegation are:

- the power to dismiss the case on the ground of the lack of relevant evidence cannot be delegated;
- delegation is permissible only if the likely damage to the financial interests of the Union is less than €100,000;
- when assessing the degree of seriousness of an offence, account should be taken of its repercussions at Union level.
-

The European Chief prosecutor who has to be informed about the delegation may request to review it and withdraw the decision on delegation at any time (Art 10(7) EPPO Regulation).

2.4. European Prosecutors

There is one European Prosecutor per participating Member State. They are members of the College, members of the Permanent Chamber and act as supervising European Prosecutors.

A. As supervising European prosecutor

As supervising prosecutors their main task is to supervise the prosecutorial and investigative work of EDPs. The rule is that the European Prosecutors supervise the cases from their Member State of origin save in exceptional cases such as temporary absence, excessive workload, conflict of interest or inability to carry out his/her function (Art 12(1) EPPO Regulation). Since the national criminal justice systems 'still vary to considerable degree, [. . .] it is clear that only a prosecutor with his or her background in a given legal system will be able to know exactly what actions are most appropriate and efficient in that given state.'[39]

'Supervision' should be understood as referring to closer and continuous oversight of investigations and prosecutions, including, whenever necessary, intervention and instruction-giving on investigations and prosecution matters (Rec. 23 EPPO Regulation).

B. Powers of supervising European Prosecutors are (Rec. 28, Art 12 EPPO Regulation):

- supervising the investigations and prosecutions for which the EDPs handling the case in their Member State of origin are responsible; they do so on behalf of the Permanent Chamber and in compliance with any instructions it has given in accordance with Art 10(3), (4) and (5) (Art 12(1) EPPO Regulation);
- in a specific case and in compliance with applicable national law and with the instructions given by the competent Permanent Chamber, giving instructions to the handling EDP, whenever necessary for the efficient handling of the investigation or prosecution or in the interest of justice, or to ensure the coherent functioning of the EPPO (Art 12(3) EPPO Regulation);
- performing prosecutorial review, where the national law of a Member State provides for the internal review of certain acts within the structure of a national prosecutor's office (Art 12(4) EPPO Regulation);
- in exceptional cases with approval of the competent Permanent Chambers, conducting the investigation personally, personally undertaking the investigation measures or other measures or instructing the competent national authorities (Art 28(4) EPPO Regulation);

[39] Intervention of Ivan Korčok, President-in-Office of the Council, see Sellier and Weyembergh, 2018, p. 32.

- functioning as liaisons and information channels between the Permanent Chambers and the EDPs; monitoring the implementation of the tasks of the EPPO in their respective Member States of origin, in close consultation with the EDPs and ensure that all relevant information from the Central Office is provided to EDPs and vice versa (Art 12(5) EPPO Regulation); checking any instruction's compliance with national law and inform the Permanent Chamber if the instructions do not do so (Rec. 28 EPPO Regulation);
- presenting summaries of the cases under their supervision to the Chamber and, where applicable, proposals for decisions to be taken by the said Chamber, on the basis of draft decisions prepared by the EDPs (Art 12(1) EPPO Regulation);
- participating in the deliberation of a competent Permanent Chamber and having a right to vote, except in cases referred to in Art 10(9) EPPO Regulation;
- having direct access to information stored electronically in the case management system and to the case file (Art 46(2) EPPO Regulation).

C. As substitute European Prosecutor

There are two mechanisms for the substitution of a European Prosecutor. One is a substitution mechanism between European Prosecutors provided for in the Internal Rules of Procedure of the EPPO (Rec. 38 EPPO Regulation). A substitute European Prosecutor replaces the supervising European Prosecutor where she or he is temporarily absent from her or his duties or is for other reasons not available to carry out the functions of the European Prosecutor. She or he may fulfil any function of a European Prosecutor, except that of conducting an investigation personally (Art 28(4) EPPO Regulation).

Additionally, the College for each European Prosecutor designates one of the EDPs of the same Member State to substitute the European Prosecutor in case she or he is unable to carry out her or his functions or left her or his position. The EDP is an interim European prosecutor whose position is limited to a period of up to three months (Rec. 39, Art 16(7) EPPO Regulation).

D. Appointment and dismissal of the European Prosecutors (Art 16 EPPO Regulation)

European Prosecutors are appointed by the Council, based on a list of three candidates nominated by each Member State and the reasoned opinion of the selection panel. The high-level expertise of the European Prosecutors is secured by binding effect of the selection panel opinion that a candidate does not fulfil the conditions required for the performance of the duties of a European Prosecutor. The Council, acting by simple majority, selects and appoints European Prosecutors for a non-renewable term of six years. The Council may decide to extend the mandate for a maximum of three years at the end of the six-year period. Every three years there shall be a partial replacement of one third of the European Prosecutors.

The requirements for the position are: being an active member of the public prosecution service or judiciary of the Member States or active European Prosecutors whose independence is beyond doubt; possessing the qualifications required for appointment to the highest prosecutorial or judicial offices in their respective Member States; relevant practical experience of national legal systems, financial investigations and of international judicial cooperation in criminal matters, or previous service as a European Prosecutor.

The Court of Justice may, upon application of the European Parliament, of the Council or of the Commission, dismiss a European Prosecutor if it finds that he/she is no longer able to perform his/her duties or that he/she is guilty of serious misconduct.

2.5. European Delegated Prosecutors

The investigations of the EPPO as a rule are carried out by one of the EDPs in Member States. They carry out their tasks under the supervision of the supervising European Prosecutor and under the direction and instruction of the competent Permanent Chamber and are bound to follow the instructions of these two hierarchically upper bodies (Art 13(1) EPPO Regulation).

A. Functional position of the EDPs

The EDPs are decentralized bodies of the EPPO that act on the national level and are integrated in the national criminal justice systems. The EDPs are an integral part of the EPPO and as such, when investigating and prosecuting offences within the competence of the EPPO, act exclusively on behalf and in the name of the

EPPO on the territory of their respective Member State (Rec. 32 EPPO Regulation). However, from the time of their appointment as EDPs until dismissal they are active members of the public prosecution service or judiciary of the respective Member States which nominated them (Art 17 (2) EPPO Regulation), they have a functionally and legally independent status which is different from any status under national law (Rec. 32 EPPO Regulation). The powers and status of the EDPs enable prosecutors with knowledge of the individual legal systems in principle to handle investigations and prosecutions in their respective Member States (Rec. 20 EPPO Regulation).

There are two or more EDPs in each Member State, to ensure the proper handling of the caseload of the EPPO (Rec. 44 EPPO Regulation). The European Chief Prosecutor shall, after consulting and reaching an agreement with the relevant authorities of the Member States, approve the number of EDPs, as well as the functional and territorial division of competences between the EDPs within each Member State (Rec. 44 EPPO Regulation). There are a handling EDP and an assisting EDP.

B. Handling and assisting EDPs

A handling EDP is an EDP responsible for the investigations and prosecutions, which she or he has initiated, which have been allocated[40] or reallocated[41] to him/her by a competent Permanent Chamber or which he/she has taken over, using the right of evocation[42] (Art 2(5) EPPO Regulation).

An assisting EDP and an EDP located in a Member State, other than the Member State of the handling EDP, where an investigation or other measure assigned to him/her is to be carried out (Art 2(6) EPPO Regulation). The handling EDP decides on the adoption of the necessary measure, assigns it to an assisting EDP and informs his/her supervising European Prosecutor about it (Art 31(1)(2) EPPO Regulation).

C. Competences of the handling European Delegated Prosecutors

The handling EDPs have powers conferred on them by the Regulation and powers conferred on them by national law as active members of the national public prosecution service (Burchard, 2021, p. 103). The EPPO Regulation provides for the following powers of the EDPs:

- responsible for investigating, prosecuting and bringing to judgment cases failing within EPPO's competence;
- initiating an investigation and noting this in the EPPO case management system (Art 26(1) EPPO Regulation);
- may either undertake the investigation measures and other measures on his/her own or instruct the competent authorities in his/her Member State (Art 28 (1) EPPO Regulation);
- can assign an investigation measure to EDPs from another Member State in cross-border investigation (Art 31(1) EPPO Regulation);
- exercising the right of evocation (Art 27(6) EPPO Regulation);
- may order or request the arrest or pre-trial detention of the suspect or accused person, or if s/he is not present in the Member State of the handling EDP, issue or request the competent authority to issue a European Arrest Warrant (Art 33 EPPO Regulation);
- when considering the investigation to be completed, submitting 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 in accordance with Art 34, 39 or 40 (Art 35 EPPO Regulation);
- in respect to bringing a case to judgment, presenting trial pleas, participating in taking evidence and exercising the available remedies in accordance with national law (Art 13 (1) EPPO Regulation);
- as an interim European Prosecutor, may substitute a European Prosecutor (Rec. 39, Art 16(7) EPPO Regulation).

[40] EPPO Regulation, Art 26(3)

[41] A Permanent Chamber may reallocate a case to a EDP of another Member State (Art 26(5)(a)) and to another in the same Member State (Art 28(3)).

[42] EPPO Regulation, Art 27(6).

D. Double status of EDPs: European and national prosecution authorities (Art 13(3) EPPO Regulation)

The EDPs can have a so called 'double hat' status (Burchard, 2021, p. 99) and outside the EPPO competence exercise functions as national prosecutors. That is allowed only to the extent that this does not prevent them from fulfilling their obligations under this Regulation. The supervising European Prosecutor has to be informed of such functions.

In the event that an EDP at any given moment is unable to fulfil her or his functions because of the exercise of such functions as national prosecutor, she or 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 the EPPO Regulation. When deciding about the priority, a supervising European Prosecutor should be guided by the basic provision that 'double hat' status is allowed only to the extent that this does not prevent the EDP from fulfilling obligations under the EPPO Regulation (Art 13(3) EPPO Regulation). If the European Prosecutor gives priority to the national prosecution, she or he may propose to the Permanent Chamber to reallocate the case to another EDP in the same Member State or to conduct the investigations personally (Art 28(3) and (4) EPPO Regulation).

E. Appointment and dismissal of the European Delegated Prosecutors (Art 17 EPPO Regulation)

The EDPs are appointed by the College, upon a proposal by the European Chief Prosecutor and nomination by the Member States for a renewable term of five years. The substantive requirements for their appointment are prescribed by national law, as they have to be active members of the public prosecution service or judiciary of the respective Member State which nominated them and possess the necessary qualifications and relevant practical experience of their national legal system. Their independence shall be beyond doubt. If a nominated person does not fulfil these criteria, the College may reject her or him.

The College shall dismiss an EDP if it finds that he or she no longer fulfils the requirements, is unable to perform her or duties, or is guilty of serious misconduct.

2.6. Administrative Director

The Administrative Director is a temporary agent of the EPPO appointed by the College from a list of candidates proposed by the European Chief Prosecutor for a period of four years that may be extended once for a period of no more than four years. S/he is accountable to the European Chief Prosecutor and the College (Art 18 EPPO Regulation). She or he has no responsibility for criminal EPPO investigations and prosecutions.

Responsibilities of the Administrative Director are (Art 19 EPPO Regulation):

- managing and legally representing the EPPO for administrative and budgetary purposes;
- as authorizing officer, implementing the budget of the EPPO;
- being in charge of human resources, concluding employment contracts (Rec. 114 EPPO Regulation);
- when consulting with the Permanent Chamber regarding exceptionally costly investigation measures, deciding on the amount of the grant to be awarded, based on the available financial resources and in accordance with the criteria set out in the Internal Rules of Procedure of the EPPO;
- implementing the administrative tasks assigned to the EPPO listed in Art 19(4) EPPO Regulation.

2.7. Staff

'EPPO staff' are the personnel at the central level who support the College, the Permanent Chambers, the European Chief Prosecutor, the European Prosecutors, the EDPs and the Administrative Director in the day-to-day activities and the performance of the tasks of this Office under this Regulation (Art 2 (4) EPPO Regulation).

The EPPO may make use, in addition to its own staff, seconded national experts or other persons put at its disposal but not employed by it (Art 98(1) EPPO Regulation).

On the national level there is no EPPO staff, but in line with the principle of sincere cooperation national authorities should actively support EPPO investigations and prosecutions (Rec. 69 EPPO Regulation). Contrary to the operational expenditures that are covered from the EPPO budget, the costs of the EDPs' office and secretarial support are covered by the Member States (Rec. 113 EPPO Regulation).

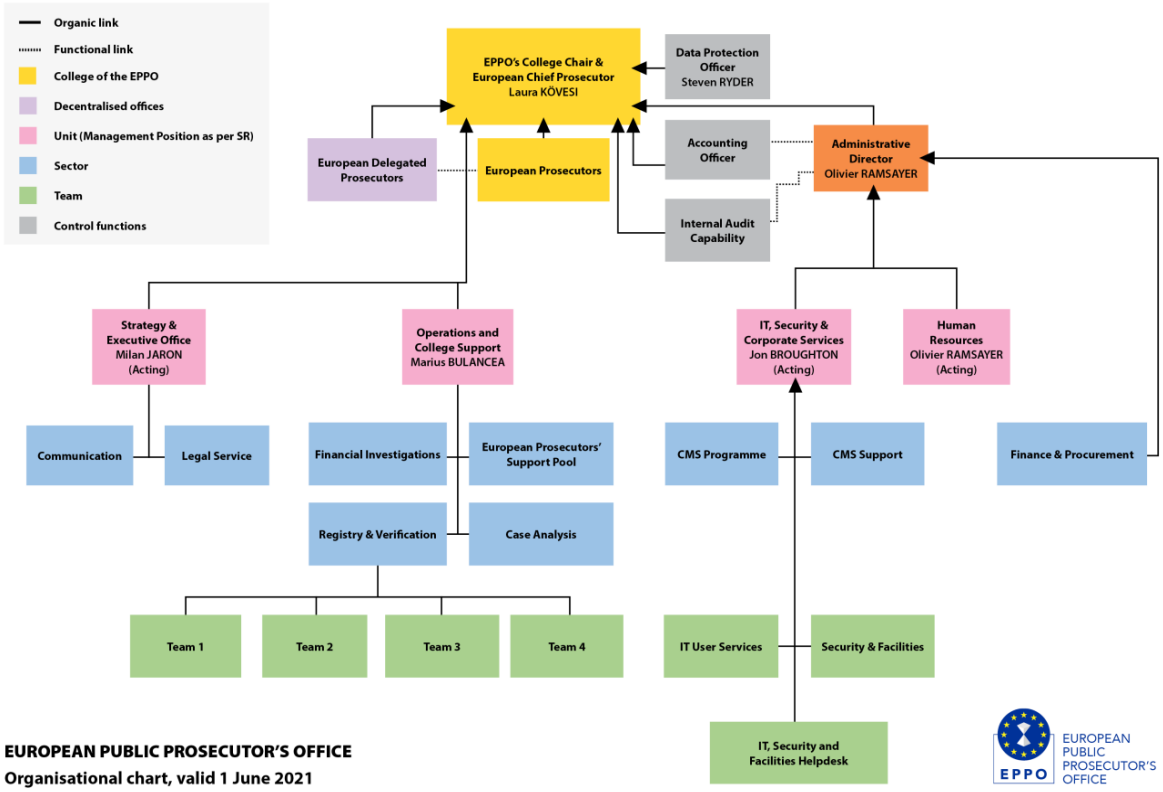

Figure 3: European Public Prosecutor's Office (*Source: EPPO website*)

3. Processing of information and data protection

3.1. Different regimes of personal data protection

The data protection landscape in the European union is shaped by three major legal acts: Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data ('GDPR'), Police and Criminal Justice Data Protection Directive ('The Directive') and Regulation (EU) 2018/1725 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, which replaces Regulation (EC) No 45/2001 and Decision No 1247/2002/EC ('Regulation 2018/1725').

The GDPR is the main European act stating the rules relating to the protection of natural persons with regard to the processing of personal data and rules relating to the free movement of personal data. The Directive 95/46/EC sets the rules relating to the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security. The last legal act, namely Regulation 2018/1725, lays down rules relating to the protection of natural persons with regard to the processing of personal data by the Union institutions and bodies and rules relating to the free movement of personal data between them or to other recipients established in the Union.[43]

At the same time as the creation of EPPO the personal data protection regime become more complicated. The EPPO constitutes an exception to all of the above-described regimes and is explicitly excluded from the scope of Regulation 2018/1725. The main legal act regulating the existence and work of the EPPO is

[43] Art 1 (1) of Regulation (EU) 2018/1725 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, which replaces Regulation (EC) No 45/2001 and Decision No 1247/2002/EC.

Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the EPPO ('EPPO Regulation'). This Regulation also includes a self-sufficient system of data protection rules of a hybrid nature regarding the EPPO. While the general principles of the Police and Criminal Justice Data Protection Directive[44] and the GDPR[45] are reaffirmed, the EPPO data protection legal framework regulation differs in many aspects. The specifications can be found in Art 2 of the EPPO Regulation as well as in its chapter VIII, Arts 47-89. The main structure of the GDPR and the Directive are still provisions on the principles of processing, individual rights, supervision and data transfers, provisions on privacy by design and by default,[46] provisions on impact assessments,[47] or provisions on data breach notifications.[48] However, differences are found there as well.

3.2. Differences in the principles

While analyzing the principles relating to processing of personal data under the GDPR, we find deviations in between Regulation 2018/1725 and the EPPO Regulation. This difference comes from the fact that in principle that Regulation 2018/1725 has a horizontal effect on all personal data processing by EU agencies and bodies unlike the GDPR. The supervision tasks are to be carried out by the European Data Protection Supervisor. However, this regulatory model is not universally applicable. Some EU agencies or bodies have specific rules regarding the data processing in their constituting documents. There are also third type of EU EU organizations like Europol followed now by the EPPO which have their own, ad hoc data protection regime. The last two do not contribute to coherence of the regulation of the EU structures.[49]

Although Art 2 states that Europol and the EPPO shall be exempt from the general regime only until the Regulation concerning Europol[50] and EPPO Regulation are adapted in accordance with Regulation 2018/1725,[51] for the moment the situation is as complex as it can get. With regard to supervision, while it is by now universally awarded to the EDPS, it should be noted that the EDPS has to exercise its obligations by applying not the Regulation 45/2001 rules, but rather the rules applicable to each agency and body under the above distinctions.

Another difference related to the principles relating to processing of personal data between the GDPR and EPPO Regulation, however small, should be mentioned. According to Art 5(1)(a) of the GDPR the main principles are 'lawfulness, fairness and transparency'. The corresponding article in the EPPO Regulation, Art 47 p. 1 (a), stipulates 'lawfulness and fairness', but 'transparency' has been intentionally omitted.

The accountability of the controller is also settled in different ways. According to the EPPO Regulation, the EPPO's accountability is more precisely defined. It shall be responsible for, and be able to demonstrate compliance with, the principles of GDPR especially when processing personal data wholly or partly by automated means and when processing other than by automated means personal data which form part of a filing system or are intended to form part of a filing system.

[44] Directive (European Union) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, OJ L 119, 4 May 2016, pp. 89-131.

[45] Regulation (European Union) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4 May 2016, pp. 1-88.

[46] Art 67 of the EPPO Regulation.

[47] Art 71 of the EPPO Regulation.

[48] Arts 74 and 75 of the EPPO Regulation.

[49] Data protection and the EPPO, Paul De Hert, Vrije University Brussel, Belgium and Vagelis Papakonstantinou, Vrije University Brussel, Belgium; New Journal of European Criminal Law, 2019, Vol. 10 (1)34-43.

[50] Regulation (EU) 2016/794 of the European Parliament and of the Council.

[51] Art 98 of Regulation 2018/1725.

3.3. Data protection by design and by default. Impact assessment. Notification of a personal data breach

The analysis of the three major legal acts[52] in the field of data protection by design and by default show that the GDPR and the Regulation 2018/1725 have almost identical provisions regarding those issues. The EPPO Regulation, however, defines in Art 67 that the appropriate technical and organizational measures should apply only for operational personal data. In addition, the EPPO does not have to apply the approved certification mechanism, which is envisaged in both GDPR and Regulation 2018/1725. Similar to this, when looking at the impact assessment the EPPO Regulation does not stipulate that a single assessment may address a set of similar processing operations that present similar high risks. The EPPO as a controller also does not have the obligation, as do all the other controllers according to the GDPR and other EU bodies, to seek the advice of the data protection officer, where designated, when carrying out a data protection impact assessment. In the same regard, the EPPO Regulation does not detail specific cases in which impact assessment shall be required.

Regarding the notification of a personal data breach to the EDPS, the difference between the three regulations is that where the personal data breach involves personal data that have been transmitted by or to another controller, the EPPO shall communicate the information referred to in paragraph 3 of the regulation to that controller without undue delay.[53]

3.4. Case Management System (CMS)

The EPPO uses a specific case management system through which most of the personal data is managed. Therefore, special attention is to be paid to this system. The EDPS made comments on the draft Commission Delegated Regulation amending Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office as regards to setting out categories of operational personal data and categories of data subjects for the purpose of data processing in the index. The draft Commission Delegated Regulation lays down four categories of data subjects whose operational personal data may be processed in the CMS index:

a. suspected or accused persons in the criminal proceedings of the EPPO;
b. convicted persons following the criminal proceedings of the EPPO;
c. natural persons who reported or are victims of offences that fall within the competence of the EPPO;
d. contacts or associates of one of the persons referred to in points (a) and (b).[54]

It can be noted that the categories of operational personal data that may be processed in the index with regard to the data subjects referred to in points (c) and (d) are more limited than the personal data on suspected, accused or convicted persons. The EDSP approves such an approach, which it found to be in line with Art 51 of Council Regulation (EU) 2017/1939, with the specific obligation that the EPPO distinguishes between different categories of data subjects.

However, the EDPS points out that the category 'contacts or associates' in point (d) could be potentially very broad and lead to the processing of the personal data of a large number of natural persons, who have had only occasional association with or are entirely unrelated to the criminal activity contacts with the suspected, accused or convicted perpetrator. This remark is based on in Art 27 (2) of Regulation (EU) 2018/1727 (Eurojust Regulation), which states that the processing of personal data of victims, contacts and associates 'may only take place if it is necessary for the fulfilment of the tasks of [Eurojust], within the framework of its competence and in order to carry out its operational functions.' Therefore, the EDPS concludes that this safeguard is not provided for in Council Regulation (EU) 2017/1939.

[52] GDPR, Regulation 2018/1725 and the Regulation (EU) 2017/1939of 12 October 2017implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO').

[53] Art 74 (5) of Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO').

[54] Brussels, 14.10.2020, C(2020) 6797 final ANNEX to the Commission Delegated Regulation (EU) .../... amending Council Regulation (EU) 2017/1939 as regards the categories of operational personal data and the categories of data subjects whose operational personal data may be processed in the index of case files by the European Public Prosecutor's Office, Categories of data subjects and categories of operational personal data referred to in Art 49(3).

In conclusion, the EPPO is to have an independent system from the Eurojust and OLAF systems.[55] Consequently, its exact relationship with neighbouring case management systems (in essence, those of Eurojust and OLAF) needs to be clearly delineated.[56] It should not be forgotten that the EPPO communicates with other EU authorities in order to exercise its duties, which is done through CMSs. From a data protection point of view, the relationship between the case management systems of the EPPO, Eurojust and OLAF inevitably means the sharing of personal data among them. One of the most important questions is the way this sharing is regulated. The EPPO may 'share information, including personal data' in operational matters, whereby it may 'associate Eurojust with its activities concerning cross-border cases'.[57]

4. Concise overview of the requirements for implementation in Member States

4.1. Luxembourg

4.1.1. Legal framework in Luxembourg

The Law of 31 March 2021 establishes the *Office des procureurs européens délégués* ('Office of European Delegated Prosecutors') within Luxembourg's judicial organization,[58] by adding, amongst others, a new Art 75-8*bis* to the Law of 7 March 1980 on judicial organization.[59] Thus, it now provides that Luxembourg's *procureur général d'État* ('Chief Public Prosecutor') selects two EDPs from amongst the magistrates of Luxembourg's judicial organization who otherwise satisfy the criteria laid down in Art 17(2) of the EPPO Regulation. In addition, an ongoing *projet de loi* ('Draft Law') prepared by the Ministry of Justice and concerning the core procedural framework through which Luxembourg's Office of European Delegated Prosecutors will exercise its powers is, at the time of writing, being discussed by the Justice Commission of Luxembourg's Chamber of Deputies.[60] Essentially, the Draft Law seeks to amend the Code of Criminal Procedure (CCP) by introducing a new *Titre IV - Du Parquet européen* ('Title IV – of the EPPO'), subdivided into three chapters dealing with, respectively: (i) the competences and powers of the EDPs; (ii) the procedural framework for their activities; and (iii) the delineation of competences between the EPPO and national judicial authorities.

4.1.2. Status of the EDPs

The aforementioned new Art 75-8*bis* provides that Luxembourg's EDPs have the status of *substitut principal*,[61] and retain the rights and obligations attached to their status as Luxembourg magistrates. This suggests that, in accordance with Art 17(2) EPPO Regulation, Luxembourg's EDPs will wear a 'double hat' by continuing to be

[55] See para. 47 of the Preamble, Art 44, as well as Art 45(1)of the EPPO Regulation.

[56] Data protection and the EPPO, Paul De Hert, Vrije University Brussel, Belgium and Vagelis Papakonstantinou, Vrije University Brussel, Belgium; New Journal of European Criminal Law, 2019, Vol. 10 (1)34-43.

[57] Ibid.

[58] Loi du 31 mars 2021 portant modification de la loi modifiée du 7 mars 1980 sur l'organisation judiciaire en vue de l'organisation de l'Office des procureurs européens délégués, Mémorial A n° 282 de 2021, https://legilux.public.lu/eli/etat/leg/loi/2021/03/31/a282/jo (the 'Law of 31 March 2021').

[59] Texte coordonné du 12 septembre 1997 de la loi du 7 mars 1980 sur l'organisation judiciaire, Mémorial A n° 69 de 1997, as amended, http://legilux.public.lu/eli/etat/leg/tc/1997/09/12/n1/jo (the 'Law of 7 March 1980').

[60] Projet de loi modifiant le Code de procédure pénale aux fins de la mise en œuvre du règlement (UE) 2017/1939 du Conseil du 12 octobre 2017 mettant en oeuvre une coopération renforcée concernant la création du Parquet européen, Chambre des Députés, N° doc. parl. 7759/07, available at: https://www.chd.lu/wps/PA_RoleDesAffaires/FTSByteServingServletImpl?path=4E9CB89F9D6B04B67D323342277C03318764D785B557589F5AB7246792CDDD6BCB113DFECC30FA60C9AC4FE6A659DBB0$54DB4C10145C8E611D32C9B9FB56DFB8 (the 'Draft Law'); For an overview of the progress of the Draft Law, see https://www.chd.lu/wps/portal/public/Accueil/TravailALaChambre/Recherche/RoleDesAffaires?action=doDocpaDetails&backto=/wps/portal/public/Accueil/Actualite&id=7759.

[61] A *substitut principal* is a magistrate who is a member of the public prosecutor's office before one of Luxembourg's two *tribunaux d'arrondissement* (each a 'District Court') and is obliged to assist the State Prosecutor. See French definition here: https://justice.public.lu/fr/support/glossaire/s/substitut.html.

'active members of the public prosecution service or judiciary'.[62] However, because Art 75-8*bis* also provides that EDPs are released from their national functions for the duration of their EDP mandate, it seems that Luxembourg chose not to adopt the possibility, otherwise permitted by Art 13(3) EPPO Regulation, for its EDPs to wear a 'double hat' (Herrnfeld, 2018), that is, to 'exercise functions as national prosecutors'.[63] The Draft Law ensures the EDPs' independence and autonomy by providing that certain provisions of the CCP do not apply to them. For example, neither the Chief Public Prosecutor nor the Minister of Justice can issue orders and/or instructions to the EDPs, because Arts 16-2, 19 and 20 CCP are inapplicable.[64]

4.1.3. Material competence

a. PIF crimes

Luxembourg's Law of 12 March 2020 transposed the PIF Directive by amending the Criminal Code, the CCP, and the Law of 12 February 1979 concerning VAT, as amended.[65] It should be noted that all the offences covered by the PIF Directive were already covered within Luxembourg's criminal law as follows:

PIF DIRECTIVE	LUXEMBOURG LEGISLATION
- **Art 3** (Fraud affecting the Union's financial interests)	- **Arts 496, 496-1, 496-2, 496-3 and 496-4** of the Criminal Code - Law of 12 February 1979 concerning the VAT, as amended
- **Art 4** (Other criminal offences affecting the Union's financial interests)	- **Arts 506-1 to 506-8**, and **Arts 240 to 253** of the Criminal Code
- **Art 5** (Incitement, aiding and abetting, and attempt)	- **Arts 66 et seq**. of the Criminal Code (incitement and complicity) - **Art 506-1** of the Criminal Code (attempted money laundering)
- **Arts 6 and 9** (Liability and Sanctions of Legal Persons)	- **Arts 34 to 40** of the Criminal Code

The Law of 12 March 2020 simply amended the existing provisions of the Criminal Code but in a few rare cases introduced new ones to comply with the provisions of the PIF Directive. For example, it inserted a new Art 496-6 in the Criminal Code criminalizing attempts to commit the offences set out in Arts 496-1 through 496-4 of the Criminal Code.

b. Offences relating to participation in a criminal organization

The offences defined in Framework Decision 2008/841/JHA[66] correspond to Arts 324*bis* and 324*ter* of the Criminal Code, and were introduced by the Law of 11 August 1998.[67] As the offences introduced thereby were largely inspired by the then Community definition of 'criminal organization', the aforementioned Framework Decision did not require any particular transposition measures (Nies, 2019, p. 12).

[62] EPPO Regulation, Art 17(2).

[63] EPPO Regulation, Art 13(3).

[64] Draft Law, draft Art 136-2 CCP.

[65] Loi du 12 mars 2020 portant modification du Code pénal ; du Code de procédure pénale ; de la loi modifiée du 12 février 1979 concernant la taxe sur la valeur ajoutée ; aux fins de transposition de la directive (UE) 2017/1371 du Parlement européen et du Conseil du 5 juillet 2017 relative à la lutte contre la fraude portant atteinte aux intérêts financiers de l'Union au moyen du droit pénal, Mémorial A n° 153 de 2020, https://legilux.public.lu/eli/etat/leg/loi/2020/03/12/a153/jo.

[66] Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime [2008] OJ L 300/42.

[67] Loi du 11 août 1998 portant introduction de l'incrimination des organisations criminelles et de l'infraction de blanchiment au code pénal et modifiant: 1° la loi modifiée du 19 février 1973 concernant la vente de substances médicamenteuses et la lutte contre la toxicomanie; 2° la loi modifiée du 5 avril 1993 relative au secteur financier; 3° la loi modifiée du 6 décembre 1991 sur le secteur des assurances; 4° la loi modifiée du 9 décembre 1976 relative à l'organisation du notariat; 5° la loi du 20 avril 1977 relative à l'exploitation des jeux de hasard et des paris relatifs aux épreuves sportives; 6° la loi du 28 juin 1984 portant organisation de la profession de réviseur d'entreprises; 7° le code d'instruction criminelle, Mémorial A n° 73 de 1998, https://legilux.public.lu/eli/etat/leg/loi/1998/08/11/n1/jo.

c. Attribution of material competence

With regard to material competence, several implementation challenges arise from the division of labour between the EPPO and the national prosecution authorities (Nies, 2019). One such challenge relates to the concept of 'inextricably linked' offences, found in Art 22(3) EPPO Regulation. As noted by a commentator, the ambiguity of this concept could lead to a situation in which a national prosecutor might try to minimize a case file's European dimension in order to retain national competence or, conversely, a European Prosecutor could try to minimize the case file's national dimension to direct it to the EPPO (Nies, 2019, p. 12). In this regard, Art 25(6) EPPO Regulation provides that 'Member States shall specify the national authority which will decide on the attribution of competence' in the case of a disagreement between the EPPO and the national prosecution authorities.

The Draft Law, at the time of this writing, provides that if the *procureur d'État* ('State Prosecutor') in charge of the investigation refuses to relinquish jurisdiction in favour of the EPPO, the Chief Public Prosecutor, motivated by the EDP's reasoned request, designates the competent magistrate to continue the procedure.[68] If it is the investigating judge who refuses to relinquish jurisdiction in favour of the EPPO, he/she invites the parties, the State Prosecutor and the EDPs to submit their observations within five days.[69] After this time period, if the investigating judge persists, he/she issues an order refusing relinquishment, which is notified to the State Prosecutor, the EDP and the parties.[70] Within five days of its notification, this order may be referred, at the request of the EDP, the State Prosecutor or the parties, to the *chambre du conseil* ('pre-trial chamber') of Luxembourg's *cour d'appel* ('Court of Appeal').[71] Within eight days following receipt of the request, the Court of Appeal's pre-trial chamber designates the competent authority to continue the investigations.[72]

4.1.4. Procedural framework

The Draft Law introduces an autonomous procedural framework that provides both the specific investigative powers of the EDPs but also regulates the EDPs' relationship with the investigating judge in the event that the latter's intervention is required. Rather than referring to the existing CCP provisions relating to the investigating judge, the Draft Law essentially adapts the provisions on the *instruction judiciaire* ('judicial investigation') to the EPPO. In this way, proceedings are clearly organized without the risk of having to interpret the provisions designed for the investigating judge.

a. Competent authorities and national courts

The Draft Law provides that, by way of derogation from Art 26(1) CCP,[73] and without prejudice to the competence attributed to the EDPs, Luxembourg's State Prosecutor and the courts of the Luxembourg judicial district (as opposed to the Diekirch judicial district) will have sole jurisdiction over cases concerning criminal offences affecting EU financial interests, referred to in the EPPO Regulation, which are committed after 20 November 2017.[74] When it comes to first instance courts, the EDPs shall represent the EPPO before the *tribunal d'arrondissement* ('District Court') and the *tribunaux de police* ('Police Courts').[75] When it comes to second instance courts, the EDPs represent the EPPO before the Court of Appeal and the *cour de cassation* ('Court of Cassation').[76]

[68] Draft Law, draft Art 136-74(1) CCP.
[69] Draft Law, draft Art 136-74(2) CCP.
[70] Ibid.
[71] Ibid.
[72] Ibid.
[73] CCP, Art 26(1) : 'Sont compétents le procureur d'État du lieu de l'infraction, celui de la résidence, au moment de la poursuite, de l'une des personnes physiques soupçonnées d'avoir participé à l'infraction, celui du lieu d'arrestation d'une de ces personnes, même lorsque cette arrestation a été opérée pour une autre cause, celui du siège de la personne morale.'
[74] Draft Law, draft Art 26(4*bis*) CCP.
[75] Draft Law, draft Art 22(2) CCP.
[76] Draft Law, draft Art 17(2) CCP.

b. Competence and powers of the EDPs

At the time of writing, the Draft Law provides that the EDPs are competent throughout the national territory to investigate, prosecute and bring to judgment the perpetrators and accomplices of the criminal offences referred to in the EPPO Regulation.[77] For all offences falling within their competence, EDPs will exercise the powers of the State Prosecutor and the Chief Public Prosecutor, with the exception of certain CCP provisions.[78] When the EPPO has decided to exercise its jurisdiction, the EDPs shall, in accordance with the law, carry out all investigative acts they deem useful for establishing the truth.[79]

A key implementation challenge for Luxembourg, and other Member States with similar judicial systems,[80] stems from the articulation of competences between the EDPs and the investigating judge. In this regard, the Draft Law provides that certain investigative acts can be ordered by the EDPs themselves, and others by the investigating judge upon the EDPs' request, without the opening of an *instruction préparatoire* ('preparatory investigation').[81] Amongst other measures, the EDPs can – by themselves – visit places to make findings,[82] summon witnesses,[83] interrogate and charge an individual,[84] and hear experts.[85] Upon an EDP's written and reasoned request, the investigating judge can order certain measures such as the issuance of arrest warrants (including European or international),[86] searches and seizures, special surveillance measures, and provisional measures against legal persons.[87] Upon receipt of the EDP's written and reasoned request, the investigating judge verifies the legality of the requested measure, orders the requested investigative measure and returns the file to the EDP for the purposes of execution.[88] The investigating judge does not examine the advisability of the requested measure.[89] The investigating judge's decision ordering or refusing to order the requested measure is subject to appeal by the EDP as well as any concerned person with a legitimate interest.[90]

c. Rights of the parties to the proceedings

Again at the time of this writing, the Draft Law provides that the person who is the subject of the investigative acts, the *partie civile* ('civil party'), the *partie civilement responsable* ('party incurring third party civil liability'), as well as any third party having a legitimate personal interest, shall be able to exercise the entirety of their rights recognized by the CCP as in the context of a usual investigation by the investigating judge.[91] Such rights include, but are not limited to, access to a lawyer,[92] access to the case file before and after the first *interrogatoire* ('interrogation') – except for what relates to *devoirs en cours d'exécution* ('duties in progress'),[93] requests for an expert,[94] hearing of witnesses,[95] and requests for a specific investigative act to be carried out.[96] Furthermore, the EDP, as well as any person concerned who can prove a legitimate personal interest, may

[77] Draft Law, draft Art 136-1 CCP.

[78] Draft Law, draft Art 136-2 CCP; Arts 15-2, 16-2, 17, 18(1)-(2), 19, 20, 21, 22, and 23(5) CCP are not applicable.

[79] Draft law, draft Art 136-7(1) CCP.

[80] For instance, see the report on the French implementing legislation: Assemblée Nationale, 'Rapport fait au nom de la Commission des lois constitutionnelles, de la législation et de l'administration générale de la République sur le projet de loi, adopté par le Sénat après engagement de la procédure accélérée, relatif au Parquet européen et à la justice pénale spécialisée (no 2731)', No 3592, 25 novembre 2020, https://www.assemblee-nationale.fr/dyn/15/rapports/cion_lois/l15b3592_rapport-fond.pdf.

[81] Draft law, draft Art 136-7(2) CCP.

[82] Draft law, draft Art 136-8(1) CCP.

[83] Draft law, draft Art 136-9(1) CCP.

[84] Draft law, draft Arts 136-22(1) and 136-22(7) CCP.

[85] Draft law, draft Art 136-31 CCP.

[86] Draft law, draft Art 136-54 CCP.

[87] Draft law, draft Art 136-48(1) CCP.

[88] Draft law, draft Art 136-48(3) CCP.

[89] Ibid.

[90] Ibid.

[91] Draft Law, draft Art 136-68(1) CCP.

[92] CCP, Art 3-6; Draft Law, draft Art 136-25(1) CCP.

[93] Draft Law, draft Art 136-27(1)-(2) CCP.

[94] Draft Law, draft Art 136-32(1) CCP.

[95] Draft Law, draft Art 136-9(3) CCP.

[96] Draft Law, draft Art 136-68(2) CCP.

request the annulment of the investigation procedure carried out by the EDP or of any act whatsoever thereof.[97] The request must be presented before the pre-trial chamber of the District Court.[98]

4.2. Bulgaria

4.2.1. Implementation of the structure of the EPPO

In Bulgaria the status and the powers of the European Prosecutor and European Delegated prosecutors (EDPs) are regulated by the Art 136, para. 8-10 of the Judiciary Act and by the Code of Criminal Procedure (CCP). The European Prosecutor and the EDPs are members of the Prosecutor's Office of the Republic of Bulgaria and consequently have all prosecutorial powers under Bulgarian legislation. But unlike other national prosecutors, and in accordance with Art 6 of EPPO Regulation,[99] when European Prosecutors or EDPs perform their functions under the EPPO Regulation, they are not under the direct supervision of higher prosecutors and the Prosecutor General of the Republic of Bulgaria does not supervise their activities.

Criminal cases within the competence of the EPPO are under the jurisdiction of the specialized criminal court, which exercises judicial control over the EPPO's acts.

4.2.2. Implementation of the material competence of the EPPO

Criminal offences against the financial interests of the EU are not systemized in a separate chapter or section of Special Part of Bulgarian Criminal Code. One of the reasons for the lack of systematization is the diversity of the criminal activity that concerns the financial interests of the EU. Under the Bulgarian Criminal Code all of these crimes are described in their *corpus delicti* as crimes where the funds appropriated come from funds, which are the property of the European Union or which have been granted by the European Union to the Bulgarian State. This legal construction of crimes meets the criteria of definitions of the financial interests of the EU provided for in Art 2, para. 1 of the PIF Directive and of Art 2, para. 3 of the EPPO Regulation.

According to the Bulgarian Criminal Code, all crimes against the financial interests of the EU are intentional crimes, and, consequently, the attempt and implication in their participation are always punishable.[100] Some of these crimes are defined as acts against the property/means from funds belonging to the European Union or provided by the European Union, but some of them include an additional element: the property or means may have a mixed character – some belong to the EU and some to the Bulgarian state. It could lead to a competence dispute between national authority and the EPPO.

Criminal offences against the financial interests of the EU can be presented in two groups. The first one includes crimes that directly affect the financial interests of the EU in accordance with Art 3 (2) of PIF Directive. These criminal offences under the Bulgarian Criminal Code are as follows:

- Documentary fraud under Art 212 (3) of Bulgarian Criminal Code: obtaining funds belonging to the European Union or submitted by them to the Bulgarian state without legal grounds by using a document of false contents or inauthentic or forged documents. The penalty for this crime is imprisonment of three to ten years.

[97] Draft law, draft Art 136-62(1) CCP.

[98] Draft Law, draft Art 136-62(2) CCP.

[99] Art 6(1): The EPPO shall be independent. The European Chief Prosecutor, the Deputy European Chief Prosecutors, the European Prosecutors, the European Delegated Prosecutors, the Administrative Director, as well as the staff of the EPPO shall act in the interest of the Union as a whole, as defined by law, and neither seek nor take instructions from any person external to the EPPO, any Member State of the European Union or any institution, body, office or agency of the Union in the performance of their duties under this Regulation. The Member States of the European Union and the institutions, bodies, offices and agencies of the Union shall respect the independence of the EPPO and shall not seek to influence it in the exercise of its tasks.

[100] According to Art 18 (2) of Bulgarian Criminal Code for an attempt the perpetrator shall be punished by the penalty stipulated for the committed crime, taking into consideration the degree of fulfilment of the intention and the reasons for which the crime has remained unfinished. The implication is punishable under Art 21 (1) of Bulgarian Criminal Code according to that all accomplices shall be punished by the penalty stipulated for the committed crime, taking into consideration the nature and the degree of their participation.

- Criminal offence under Art 248a (2) of Bulgarian Criminal Code: 'Whosoever concedes untrue data or conceals data in violation of obligation to present such in order to receive resources from funds belonging to the European Union, or granted by the EU to the Bulgarian state, as well as means, belonging to the Bulgarian state by which projects have been co-finances, funded by means of these funds.' The penalty provided for this crime is imprisonment of up to three years and a fine of Лв1,500. Severer penalties from one to six years and a fine of Лв2,000-10,000 are provided for if the criminal offence under Art 248a (2) is committed by a person who manages and represents a legal person or a civil company, or by an entrepreneur (Art 248a, para. 3), and if the official who has permitted the credit or granted the resources of para. 2 should he have known that the presented information was untrue (Art 248a, para. 3). According to Art 248a (5), if as a result of the act under para. 2 means have been received from funds belonging to the EU or granted by EU to the Bulgarian state, as well as means belonging to the Bulgarian state by which projects are co-financed by means of these funds, the penalty shall be imprisonment from two to eight years.
- Art 254b. para. 1 of the Criminal Code provides for: whosoever uses financial resources from funds belonging to the European Union or granted by the European Union to the Bulgarian state and that are not intended for him/her shall be punished with imprisonment from one to six years. According to para. 2, if an official orders the action of the previous para., the penalty shall be imprisonment from two to eight years, the court being able to deprive the guilty person from rights under Art 37, para. 1, items 6 and 7 of Criminal Code.

The second group of criminal offences includes the criminal activity in accordance with Art 4 of the PIF Directive and Art 22(2) of EPPO Regulation. These crimes are money laundering under Art 253 (1-8); active corruption under Art 304, the passive corruption under Art 301; qualified misappropriation under Art 202 (2), (p. 3); and participation in a criminal organization under Art 321 (1-6) of Bulgarian Criminal Code. These crimes fall within the competence of the EPPO only if they are related to PIF offences.

In accordance with Art 2 (2) of PIF Directive, the EPPO shall be the competent authority if the criminal activity is qualified under Art 255 or Art 256 of Bulgarian Criminal Code and if the act or omission meets the criteria of Art 3 (2)(d) of the Directive. The legal entities' liability is administrative, not criminal, and it is provided for in Art 83a of the Administrative Violations and Penalties Act. In accordance with Art 6 (3) of the PIF Directive: 'Liability of legal persons under paragraphs 1 and 2 of this Art shall not exclude the possibility of criminal proceedings against natural persons who are perpetrators of the criminal offences referred to in Arts 3 and 4 or who are criminally liable under Art 5.'

4.2.3. Implementation of procedural competence

The provisions of the Bulgarian Code of Criminal Procedure (CCP) establish powers, procedural acts and control over the acts of the European Prosecutor and EDPs based on their status as national prosecutors and on their special status as bodies of the EPPO. With regard to the powers of the European prosecutor and EDPs, all provisions related to investigation, admissibility of evidence and judicial review that are applicable to national prosecutors shall apply.[101] But in accordance with the special status of the European Prosecutor and EDPs provided by the EPPO Regulation, the Bulgarian CCP establishes that the superior national authorities cannot exercise control over the European Prosecutor and EDPs when they perform functions under Regulation (EU) 2017/1939. For example, under Art 46, para. 6 of CCP, a prosecutor from a higher-level prosecution cannot cancel or amend acts of the European Prosecutor or EDPs; the same article states that the prosecutor from a higher-level prosecution does not have the power to give written instructions to the European Prosecutor and EDPs.

Another special rule is provided for by Art 46 (7) according to which the General Prosecutor of the Republic of Bulgaria shall perform supervision of lawfulness and methodical ruling of the activity of all the

[101] Art 46 (3) of Bulgarian CCP states that the functions of the prosecutor provided for in this Code shall also be performed by the European Prosecutor and the European Delegated Prosecutors in accordance with their competence under Regulation (EU) 2017/1939.

prosecutors, except for the activities of the European Prosecutor and the EDPs when they perform functions under Regulation (EU) 2017/1939.

Some limitations are provided for the appealing and cancelling of prosecutor's acts. The decrees of the European Prosecutor and EDPs, which are not subject to judicial review, cannot be appealed before a higher-level prosecutor (arg. of Art 200 CCP). And according to Art 213 (1) the decree of the European Prosecutor and the EDP when he/she refuses to initiate a pre-trial procedure shall not be subject to appeal before the higher-level prosecution office. A similar exception is provided for the decree for the termination of a case. The rules for termination of the criminal proceedings, which may be ex officio revoked by a higher-level prosecutor (Art 243, para. 12), are not applicable regarding the European Prosecutor and EDPs.

Although the EPPO Regulation is directly applicable, it would be appropriate for the Bulgarian CCP to establish explicitly that the rules of Regulation apply in cases within the competence of the EPPO. And the proceedings in the cases within EPPO competence should be regulated in more detail.[102] It would address different practical issues, including the conflicts of jurisdiction between the EPPO and national authorities.

4.3. Croatia

4.3.1. Implementation of structure of the EPPO

In Croatia the EPPO Regulation is implemented by the Act on the Implementation of Council Regulation (EU) 2017/1939 of 12 October 2017 on the Implementation of Enhanced Cooperation in Connection with the Establishment of the European Public Prosecutor's Office ('EPPO').[103] Due to the fact that many EPPO Regulations are directly applicable, the Implementing Act has provisions only when it is necessary to supplement the directly applicable provision or the provision is not directly applicable, including where it refers to the application of the national legislation (for details on implementation in Croatia see Bonačić 2020).

According to Art 3 of the Implementing Act, the Department of Delegated European Prosecutors operates within the Office for the Suppression of Corruption and Organized Crime (USKOK). The tasks in the Department are performed by EDPs and officials under their supervision. For the cases within the EPPO's jurisdiction the County Court in Zagreb has a subject-matter and territorial jurisdiction, and trial panels are composed of three judges assigned to work in the USKOK Department according to the annual work schedule. The only exception are the cases against juvenile and young adults, where the provisions of Juvenile Courts Law apply to the competence and the composition of the court (Art 4 of the Implementing Law).

The EP candidates are nominated on the basis of the Ordinance regarding the conditions and procedure of nominating candidates for the appointment of the European Prosecutor,[104] pursuant to Art 107(5) of the State Attorney's Office Act,[105] and pursuant to Art 88 of the Courts Act.[106] Croatia has decided to have two EDPs and they are nominated on the basis of the Ordinance regarding the conditions and procedure of nominating candidates for the appointment of the European Delegated Prosecutors.[107] The 'double hat' option was used with the provision that in such cases the Republic of Croatia will reimburse the EPPO for the amount of work the EDP performed as national prosecutor (Art 7 of the Implementing Act).

---

[102] Тонева, Г. Европейската прокуратура и необходимите промени в българското законодателство. Налагат ли се конституционни промени?, сп. 'De Jure', том 10, бр. 2, 2019 г. Available at: https://static1.squarespace.com/static/5502d30ee4b0f063546540ec/t/5ee87ffc43b4df3c53985a97/1592295421928/ERRO_KRB.pdf.

[103] Zakon o provedbiUredbeVijeća (EU) 2017/1939 od 12. listopada 2017. o provedbipojačanesuradnje u vezi s osnivanjemuredaEuropskogjavnogtužitelja (»EPPO«), Narodnenovine no 146/2020. Hereinafter: Implementing Act.

[104] Pravilnik o uvjetima i postupkupredlaganjakandidata za imenovanjeeuropskogtužitelja, Narodnenovineno 23/2019.

[105] Zakon o državnomodvjetništvu, Narodnenovine no 67/2018.

[106] Zakon o sudovima, Narodnenovinenos 28/2013, 33/2015, 82/2015, 82/2016, 67/2018, 126/2019, 130/2020.

[107] Pravilnik o uvjetima i postupkupredlaganjakandidata za imenovanjedelegiraniheuropskihtužitelja, Narodnenovine no 139/2020.

4.3.2. Implementation of the material competence of the EPPO

The material competence of the EPPO is not defined in the implementing law, but Art 22 of the EPPO Regulation applies directly. The criminal offences envisaged by the PIF Directed are covered by the Criminal Code (CC).[108] Fraud affecting the Union's financial interests is covered by Tax or Customs Evasion (Art 256 CC), Subsidy Fraud (Art 258 CC) and Fraud in Business Operations (Art 247 CC). Other criminal offences affecting the financial interests of the Union are covered by Money Laundering (Art 265 CC), Taking and Giving a Bribe (Art 293 and 294 CC) and Embezzlement at Work (Art 233 CC) and offences regarding participation in a criminal organization are covered by Criminal Association (Art 328 CC) (for details see Sokanović, 2018.).

4.3.3. Implementation of the investigative and prosecutorial powers

Art 5 of the Implementing Act provides that the EDPs and EP, when acting in accordance with the EPPO Regulation, are authorized prosecutors for criminal offences under the competence of the EPPO. In these cases, the EDPs and EP have state attorney powers under the Criminal Procedure Act[109] and other regulation, as well as under the Act on the Anti-Corruption and Organized Crime Office[110] for criminal offences set out in Art 21 of the Act, unless otherwise determined by the Implementing Act. EDPs and the EP are also authorized to take all actions which competent State Attorney's Offices undertake based on Judicial Cooperation in Criminal Matters with the Member States of the European Union Act[111] and International Legal Assistance in Criminal Matters Act.[112]

To ensure the independence of EDPs in EPPO cases, the Implementing Act empowered the EPPO to exercise the authority or duty of senior state attorney when it is prescribed in the CPA, as well as State Attorney General in some cases (Art 6 of the Implementing Act). In addition to that the EPPO is allowed to lodge a protection of legality request (extraordinary legal remedy) in criminal proceedings under its competence. In case of disagreement between the EPPO and the national prosecution authorities over competence, Art 8 of the Implementing Act specify that the State Attorney General as the national authority to decide on the attribution of competence.

Regarding investigation and other measures, in addition to the minimum list, all other evidentiary and special evidentiary actions apply under the conditions referred to in the CPA. These are: search (of a person, a dwelling and other premises, search of movable property and a bank safe) (Arts 240-260), temporary seizure of objects (Arts 261-270), interrogation of the defendant (Arts 272-282), examination of witnesses (Arts 283-300), identification (Arts 301-303), inspection (crime reconstruction or experiment) (Arts 304-306), taking fingerprints or prints of other body parts (Art 307), expert witness testimony (Art 308-328), documentary evidence (Art 329), recording evidence (Art 330), electronic (digital) evidence (Art 331). Under the special evidentiary actions, the CPA provides for: surveillance and interception of telephone conversations and other means of remote technical communication, interception, gathering and recording of electronic data, entry on the premises for the purpose of conducting surveillance and technical recording at the premises, covert following and technical recording of individuals and objects, use of undercover investigators and informants, simulated sales and purchase of certain objects, simulated bribe-offering and bribe-receiving, offering simulated business services or closing simulated legal businesses, controlled transport and delivery of objects from criminal offences (Arts 332-338). However, Tax and Customs Evasion (Art 256 BB) and Fraud in Business Operations (Art 247 CC) are not on the list of crimes for which special evidentiary actions can be ordered. In addition, the Act also provides for retaining and opening shipments (Art 339), checking the establishment of a telecommunication contact (Art 339(a)) and comparing personal data of citizens kept in a database and other registers with police data records, registers, and automatic data processing base (Art 340).

---

[108] Kazneni zakon, Narodne novine no 125/2011, 144/2012, 56/2015, 61/2015, 101/2017, 118/2018, 126/2019, 84/2021.

[109] Zakon o kaznenom postupku, Narodne novine no 152/2008, 76/2009, 80/2011, 121/2011, 91/2012, 143/2012, 56/2013, 145/2013, 152/2014, 70/2017, 126/2019, 126/2019.

[110] Zakon o Uredu za suzbijanjekorupcije i organiziranogkriminaliteta, Narodnenovine no 76/2009, 116/2010, 145/2010, 57/2011, 136/2012, 148/2013, 70/2017.

[111] Zakon o pravosudnojsuradnji u kaznenimstvarima s državamačlanicamaEuropskeunije, Narodnenovine no 91/2010, 81/2013, 124/2013, 26/2015, 102/2017, 68/2018, 70/2019, 141/2020.

[112] Zakon o međunarodnojpravnojpomoći u kaznenimstvarima, Narodnenovineno 178/2004.

4.4. Italy

4.4.1. Implementation of structure of the EPPO

In Italy the status and the powers of the European Prosecutor and European Delegated Prosecutors (EDPs) are regulated by the Legislative Decree n. 9 of 2 February 2021. The European Prosecutor and the EDPs are members of the Italian Judicial Order. They have all of the prosecutorial powers provided under the Italian legislation, but unlike other national prosecutors, and in accordance with Art 6 of EPPO Regulation, when the European Prosecutor or EDPs perform their functions under the EPPO Regulation, they are independent and subject to the special discipline provided by the Regulation and by Legislative Decree 9/2021 including for what concerns hierarchical and disciplinary issues.

Criminal cases within the competence of the EPPO are under the jurisdiction of the national Tribunals and Courts according to the principle of the natural judge and in application of the provisions of the Italian criminal procedure code.

4.4.2. Implementation of the material competence of the EPPO

Criminal offences against the financial interests of the EU are not systemized in a separate chapter or section of the Italian Criminal Code. Some of the crimes are also disciplined by special legislation as it happens for tax crimes related to VAT. One of the reasons for the lack of systematization is the diversity of the criminal activity that concerns the financial interests of the EU.

Under the Italian Criminal Code all these crimes are described in their corpus delicti as crimes against the means from funds belonging to the European Union or provided by the European Union. This legal construction of crimes meets the criteria of definitions of financial interests of the EU provided for in Art 2, para. 1 of the PIF Directive and of Art 2, para. 3 of the EPPO Regulation.

According to Italian Criminal Code, all crimes against the financial interests of the EU are intentional crimes, and consequently, the attempt and implication in their participation are always punishable.

Some of these crimes are defined as acts against the property/means from funds belonging to the European Union or provided by the European Union, but some of them include an additional element – the property or means may have a mixed character – some of them belong to the EU and some to other public bodies. Many of them can possibly leave open the door to a competence dispute between the national authority and the EPPO.

Criminal offences against the financial interests of the EU can be at least presented in two groups. The first one includes crimes that directly affect the financial interests of the EU in accordance with Art 3 (2) of the PIF Directive.

The second group of criminal offences includes criminal activity in accordance with Art 4 of the PIF Directive and Art 22 (2) of the EPPO Regulation that falls within the competence of the EPPO only if they are related to PIF offences.

Art 117 of the EPPO Regulation refers to a national list of crimes that fall within the competence of the EPPO when conditions are met. The list of offences provided by the Italian legislation that may be covered by the European Public Prosecutor's Office according to the criteria set out in Directive (EU) 2017/1371 include:

- any offence, committed or attempted, resulting in the misappropriation or diversion of funds or property from the budget of the Union or budgets managed by it, or on its behalf (Arts 316-bis, 316-ter, 356, 640, second para. 1), 640-bis, 640-ter, second paragraph of the Criminal code, Art 2 of Law no. 898 of 23 December 1986, Arts 282 et seq. of the decree no. 43 of the President of the Republic of 23 January 1973, n. 43);
- any offence, committed or attempted, affecting VAT revenue and resulting in a reduction in the resources of the Union budget or budgets managed by it or on its behalf, provided that the act or omission is committed in cross-border fraudulent schemes (hence, also in part on the territory of another Member State of the European Union) and the overall damage caused to the financial interests of the Member States concerned and the Union, excluding interests and penalties, amounting to at least €10 million (Arts 2, 3, 4, 5, 8, 10, 10-quater, 11 of the Legislative Decree no. 74 of 10 March 2000);

- any offence, committed or attempted, by a public official or a person entrusted with a public service who, directly or indirectly, requests or receives advantages of any kind, or accepts the promise thereof, with a view to performing or refraining from performing an official act or service which has the effect of prejudicing or endangering the European Union's financial interests (Arts 317, 318, 319, 319-ter, 319-quarter, 320, 322, 322-bis of the Criminal Code);
- any offence, committed or attempted, by a person promising, offering or procuring for a public official or a person in charge of a public service, any advantage whatsoever to perform or refrain from performing the acts mentioned in the previous paragraph (Arts 319 quater, paragraph 2, 321, 322 and 322-bis of the Criminal Code);
- any offence, committed or attempted, by a public official or a person entrusted with a public service who, directly or indirectly tasked with the management of funds or assets, appropriates or allocates them for purposes other than those intended, where this causes damage to the Union's financial interests (Arts 314, 316, 323 of the Criminal Code; Arts 379, 12-bis, 648, 648-bis, 648-ter and 648-ter.1 of the Criminal Code in cases where the conduct referred therein is detrimental to the financial interests of the European Union or is related to money and properties that are the proceeds of the offences referred to above);
- association offences aimed at the commission of offences mentioned in the previous paragraphs.

In accordance with Art 2 (2) of the PIF Directive, the EPPO shall be competent authority if the criminal activity meets the criteria of Art 3 (2)(d) of the Directive.

The legal entities' liability is administrative, not criminal, and it is provided for in Legislative Decree n. 231 of 2001. In accordance with Art 6 (3) of the PIF Directive: 'Liability of legal persons under paragraphs 1 and 2 of this Art shall not exclude the possibility of criminal proceedings against natural persons who are perpetrators of the criminal offences referred to in Arts 3 and 4 or who are criminally liable under Art 5.'

4.4.3. Implementation of procedural competence

The Legislative Decree n. 9 of February 2021 establishes powers, procedural acts and control over the acts of the European Prosecutor and EDPs, considering both their status as national prosecutors and as bodies of the EPPO. The Italian legislator limited intervention to what is strictly necessary to define the procedure for the designation of the European Prosecutor and the EDPs, to regulate the flow of communication of the offence notices and solve the conflicts of competence. Consequently, the discipline relating to investigations is minimal due to the choice not to merely reproduce the European regulation.

Art 9 of the above-mentioned Legislative Decree establishes, in accordance with the special status of European Prosecutor and EDPs, provided by the EPPO Regulation, that the superior national authorities cannot exercise control over the European Prosecutor and EDPs when they perform functions under Regulation (EU) 2017/1939. Therefore, the EDPs do not operate under the direction of the heads of the national public prosecutor's offices and are not subject to the supervision of the General Prosecutor at the Court of Appeal. Therefore, a series of particular provisions of the criminal procedure code are inapplicable, such as Art 53, concerning the autonomy of the public prosecutor at the hearing, Art 371 *bis*, concerning the coordination activity of the national anti-mafia and anti-terrorism prosecutor, and Arts 372, 412, 413, 421 *bis* in the matter of avocation of the investigations by the General Prosecutor at the Court of Appeal. In the proceedings for which the EPPO starts an investigation or exercises the right of evocation, EDPs operate, exclusively and until the end of the proceeding, in the interest of the EPPO but with the functions and the powers of the national prosecutors. This means that all provisions related to investigation, admissibility of evidence and judicial review that are applicable to national prosecutors apply.

Some special rules are provided by Art 14 of the Legislative Decree for the offence notices for crimes that fall under the competence of the EPPO. The choice of the Italian legislator was oriented in the sense of double communication, with a copy addressed to the competent national prosecutor at the same time as the communication for the EPPO. Therefore, the offence notices should be transmitted not only to the national prosecutor but also to the EDP. The national prosecutor provides for the registration of the offence notices in the register indicated by the Art 335, first paragraph of the Italian Criminal Procedure Code if the EPPO has not already communicated the exercise of its competence and it is necessary to proceed with urgent acts or there

is in any reason to believe that a delay in initiating investigations could compromise their results. Apart from this case, the national prosecutor provides for the registration in a specific register for the EPPO crimes offence notices. If the EPPO communicates that it intends to not exercise its competence and, in any case, once 30 days have passed from the registration in the register for the EPPO crimes offence notices, the national prosecutor should provide immediately for the registration in the register indicated by Art 335 of the Italian Criminal Procedure Code.

Concerning investigative measures, it should be remembered that Regulation 2017/1939 provides that the EDPs should always have a selected number of investigative measures ensured to them by the Member States in cases where the offence subject to the investigation is punishable by a maximum penalty of at least four years of imprisonment. In this perspective, Art 17 of Legislative Decree n. 9/2021 establishes, according to Art 30 (1) (3) of the EPPO Regulation, that EDPs are authorized to order or request the wiretapping of conversations and the controlled deliveries of goods, within the limits and conditions of the current legislation. Consequently, the Legislative Decree establishes the notification to the European Public Prosecutor's Office of a list of crimes for which the current Italian regulations allow the use, for criminal investigation purposes, of the interception of conversations and controlled deliveries of goods. In the matter of personal freedom, the powers of the EDPs are disciplined by the European Regulation through a substantial reference to the powers available to the prosecutors in accordance with the national law of each Member State applicable in similar cases. This means that they are able to directly request the issue of arrest or pre-trial detention orders, and issue or request a European arrest warrant if the requested person is in another Member State. To this end, the Legislative Decree, in Art 15, provides only that the delivery procedures relating to European arrest warrants issued by EDPs are regulated by the current Italian legislation on the matter.

Art 25 (6) of the EPPO Regulation provides that, in the event of a disagreement between the EPPO and the national prosecutors concerning competence, the conflict must be resolved by the competent national authorities. In this perspective, Art 16 of Legislative Decree n. 9/2021 establishes that the general prosecutor at the Supreme Court is competent for the resolution of the dispute. The proceeding concerning the conflict of competence is regulated by the Italian Criminal Procedure Code. The same Authority is competent to give the authorization to the EPPO in the cases provided for by Art 25 (4) of the EPPO Regulation (offences falling under the material competence of the EPPO that would be excluded because the damage caused or likely to be caused to the Union's financial interests does not exceed the damage caused or likely to be caused to another victim, but for which it appears that the EPPO is better placed to investigate or prosecute). The General Prosecutor at the Supreme Court is also the authority to which the Permanent Chambers refer when the competent national authorities do not accept to take over the case and the specific conditions for the exercise of the competence of the EPPO are no longer met. To the General Prosecutor the Permanent Chambers shall refer also when the EPPO considers a dismissal, and the national authority so requires (Art 34 (5) (6) of the EPPO Regulation). Art 42 of the Regulation provides that in the event of failure to settle the conflict, the Court of Justice may give a preliminary ruling on the interpretation of Arts 22 and 25 of the Regulation. According to Art 19 of Legislative Decree n. 9/2021 when, because of the decisions of the General Prosecutor at the Supreme Court, the proceedings characterized by investigations made by EDPs of other member States is transferred to Italy, rules of the Italian Criminal Code concerning the assumption of proceedings from abroad apply (Art 746-ter, paras. 3, 4, 5, 6, 7). This disposition applies also when the transferring of the proceeding to Italy is due to the decisions of the Permanent Chambers of the EPPO.

4.5. Spain

4.5.1. Implementation of the structure

Spanish Organic Law 9/2021 on the implementation of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the EPPO ('the Law') was passed on 1 July 2021. The Law introduces the figure of the European Delegated Prosecutor ('EDP') in the Spanish criminal procedure system in accordance with the rules laid down in Council Regulation 2017/1939. However, this is not the only modification made by the Law. Indeed, the Law changes the foundations of the Spanish criminal justice system by giving the EDP the power to monitor and direct the investigation, which until now was a competence of the

judge. In addition, the Law establishes the figure of the Judge of Guarantees, whose primary mission is to review all investigative and procedural acts of the EDP.

Regarding the EDP, Art 14 of the Law provides that the appointment of candidates for the post of EDP shall be made by a Selection Committee regulated by Royal Decree 37/2019 of 1 February 2019 creating the Selection Committee and regulating the procedure for the appointment of the shortlist of candidates for European Public Prosecutor and candidates for EDP in Spain. The candidates shall be active members of the public prosecution office or the judiciary. The selection process must be based on the principles of equality, merit, capacity and publicity. The EDP will be on special service status for the duration of its duties.

Regarding the Judge of Guarantees, a new element in the Spanish criminal justice system, the law provides that their functions are assumed by the Investigative Central Courts of the National High Court, except for the persons protected by a privilege or immunity under national law. In these cases, the Judge of Guarantees will be appointed among the members of the Supreme Court or the High Court of Justice.

4.5.2. Implementation of the material competence

Art 4 of the Law provides that the EDP has material competence throughout Spain to direct the investigation regarding criminal offences against the Union's financial interests under Directive (EU) 2017/1371 and offences which are inextricably linked to them. The EDP has also competence to bring to judgment the perpetrators of the criminal offences that it investigates and their accomplices, and to appeal Court decisions.

According to Paragraph 2 of Art 4 of the Law, the EDP has material competence to investigate and prosecute the following criminal offences defined in the Spanish Criminal Code:

a. Offences against the Union's budget not relating to national direct taxation, as referred to in Arts 305, 305a and 306. Regarding VAT taxation, the EDP has jurisdiction only where the acts are connected to the territory of two or more Member States and involve total damage of at least €10 million.
b. Fraud against European subsidies and aids provided for in Art 308.
c. Money laundering involving property derived from the criminal offences against the Union's financial interests; bribery, where it harms or is likely to harm the Union's financial interests and misappropriation when it damages in any way the Union's financial interests.
d. Participation in a criminal organization as defined in Art 570a, the principal activity of which is the commission of any of the offences referred to in the previous paragraphs.

The EDP also has competence regarding smuggling when it affects the Union's financial interests. The different smuggling offences are set out in Organic Law 12/1995 of 12 December 1995 on the Suppression of Smuggling. The EDP's jurisdiction shall be extended to the offences indissociably listed in points (i) to (iii).

4.5.3. Implementation of the investigative and prosecutorial powers

Pursuant to Art 42 of the Law, the EDP directs the investigation by ordering all the investigation acts laid down in the Spanish Criminal Procedure Law, except those reserved for the judicial authority, which have to be ordered by the Judge of Guarantees.

According to Art 17 of the Law, the EDP is responsible for initiating and directing the investigation of the offences under the competence of the EPPO. After verifying its competence, the EDP must initiate proceedings by means of a Decree. The EDP responsible for the investigation must communicate the Decree to the Court Secretary so that the latter may determine the judge competent to act as Judge of Guarantees.

In addition, the EDPs may:

a. call to testify as witnesses as many persons as may be aware of facts or circumstances relevant to the successful completion of the investigation;
b. appoint the experts they deem appropriate to issue opinions on the matters submitted to their consideration;
c. order the search of any premises, always with the authorization of the Judge of Guarantees;
d. order the interception of communications and technological investigation measures, always with the authorization of the Judge of Guarantees;

e. when it is essential to guarantee the efficiency of the investigation, order the total or partial secrecy of proceedings, provided that this decision must be confirmed or rejected by the Judge of Guarantees within 48 hours;
f. request the Judge of Guarantees to order any of the personal precautionary measures provided for in the Spanish Criminal Procedure Law.

According to Art 8 of the Law, the functions of the Judge for Guarantees are as follows:

a. authorize investigative measures that may restrict fundamental rights, in accordance with the provisions of the Spanish Criminal Procedure Law;
b. order personal precautionary measures whose adoption is reserved for the judicial authority;
c. secure personal evidence sources which may be at risk of loss;
d. authorize the secrecy of the investigation and any extension thereof;
e. order the opening of the trial or the dismissal of the case in accordance with the provisions of the Law;
f. rule on appeals against the Decrees of the EDP;
g. adopt measures for the protection of witnesses and experts at the request of the Deputy European Public Prosecutor.

The EDP's Decrees can be appealed before the Judge of Guarantees. In turn, the Criminal Division of the National High Court will be competent to hear appeals lodged against decisions of the Judge of Guarantees. Once all criminal investigations have been carried out, the EDP will issue a Decree either closing the proceedings or bringing them to judgment.

The Judge of Guarantees must decide on the evidence proposed by the parties. This decision must be adopted in a preliminary hearing that the Law has added to the criminal procedure in Spain. In this hearing, evidence is heard in the same way as it is during the trial under the Spanish Criminal Procedure Law. The Judge of Guarantees will then order the opening of oral proceedings, establishing both the competent Court and the facts subject to prosecution. In relation to the competent Court, Art 65 of the Judiciary Act establishes that it will be the Criminal Chamber of the National Criminal Court.

4.5.4. Examples of the different national systems

The implementation of the EPPO in the Spanish procedural system has required a series of particularly complex adjustments, since the investigation phase in Spain is attributed to the judicial authority. Similarly, it is also traditionally up to the judge to decide on the termination of the proceedings and whether to continue with the oral proceedings. The Law, in line with the Regulation, articulates a new procedural system as an alternative to the judicial investigation that allows the EDP to assume the functions of investigation and promotion of the criminal action, while at the same time creating the figure of the Judge of Guarantees, in charge of controlling the function of the EDP and safeguarding fundamental rights.

In addition to the above, a number of other issues are envisaged:

- Jury trials are excluded for offences for which the EDP has assumed jurisdiction.
- The time limits for the duration of criminal investigations generally laid down in Art 324 of the Spanish Criminal Procedure Law do not apply to the investigation and prosecution of the criminal offences for which the EDP has assumed jurisdiction.

There is no open standing (*action popularis*) in procedures related to criminal offences for which the EDP has assumed jurisdiction.

CHAPTER III: SUBSTANTIVE CRIMINAL LAW ISSUES

by Costa. M, Sicurella R. (co-authors)

1. The material scope of competence of the EPPO: general framework

Executive Summary

The EPPO's material competence is the result of the combination and cross-reference of several provisions and sources of law, the most relevant being Art 86 TFUE, the EPPO Regulation, the PIF Directive and national substantial criminal law. Put simply: the new European Prosecutor will be able to investigate and prosecute crimes affecting EU financial interests ('PIF offences') and some other crimes related to them (organized crime and other offences when 'inextricably' linked to PIF ones), as implemented by national law and somehow in contrast with the idea of a supranational office. The definition of it was indeed one of the most contentious issues during the negotiation and ultimately led to failure of a unanimous agreement and the launch of an enhanced cooperation (Vilas Alvarez, 2018). The EPPO's scope of competence is not defined directly by either its Regulation or the PIF directive, but rather indirectly: the EPPO is competent for those offences that fall within the minimum definition contained in the PIF Directive (Arts 3 et. seq PIF Directive), as 'implemented by national law'. In fact, the very same EPPO Regulation creates issues, such as the exact definition of the concept of 'inextricably linked offence' and the general exclusion of offences related to direct national taxes, as these are often linked to VAT fraud crimes. In addition to that, even in case of conduct theoretically falling under the scope of Art 22 of the EPPO Regulation, the EPPO's reach is conditioned by the territorial and personal link criteria and, most important, by the conditions under which the competence could be exercised. In sum, it seems from the reading of the text that the EU legislator was concerned with restraining the EPPO's reach so to preserve Member States' sovereignty, as they were not ready for a full supranational European Prosecutor. The fragmentation deriving from the system that will be described in this Chapter could have not only serious consequence in terms of efficiency and effectiveness, but also with regards to equal treatment of EU citizens and the respect of the principle of legality, namely when it comes to the foreseeability of the penalty.

Key provisions:

- Art 86(2) TFUE establishes the area of EPPO's competence: 'investigating, prosecuting and bringing to judgment . . . the perpetrators of, and accomplices in, offences against the Union's financial interests, as determined by the regulation . . . '
- Art 4 EPPO Regulation specifies that the offences for which the Office is competent are those 'provided for in Directive (EU) 2017/1371 and determined by this Regulation.'
- Art 22 EPPO Regulation uses a dynamic reference to the PIF Directive to determine the offences subject to the EPPO's competence. Next, it adds to two categories of connected crimes: organized crime if focused on the commission of PIF offences and crimes 'inextricably linked' to PIF offences. The Art excludes criminal offences in respect of national direct taxes from the Office's competence.
- Arts 23-25 EPPO Regulation deal with the criteria triggering the EPPO's competence and its exercise. Once the territorial and personal criteria set out in Art 23 EPPO Regulation are verified, the EPPO will exercise its competence if the conditions listed in Art 25 EPPO Regulation are fulfilled. Even when all these requirements are satisfied, however, the EPPO's competence is not exclusive: as a matter of fact, the Regulation opts for a system of shared competence with the Member States (cfr. Rec. 13 EPPO Regulation),

allowing the EPPO to focus on the gravest cases. If applicable, it is activated by the initiation of the investigations (Art 26 EPPO Regulation) or through the right of evocation (Art 27 EPPO Regulation).

Art 86 TFUE establishes the constitutional framework and foundation of the EPPO, including with respect to its material competence:

- The constitutional nature of this provision explains its lack of a list of offences for which the competence of the EPPO can be established, even if some have suggested that it would even have allowed the European legislator to determine offences directly applicable to individuals (Picotti, 2005; Vervaele, 2017). The text of its paragraph (1) – referring to 'crimes affecting the financial interests of the Union'' leaves open the question of whether an actual or potential harm is required ('restrictive interpretation') or not ('extensive interpretation'). However, the PIF Directive opted for the former.
- According to Paragraph (2) the European Office shall be responsible for the investigation and prosecution of the offences against the Union's financial interests 'as determined by the regulation provided for in paragraph 1'. However, the EU legislature has refrained from introducing through the EPPO regulation the criminal offences of the competence of the EPPO – which would have meant to establish a direct competence in criminal matters of the EU. Indeed, article 22 of the EPPO regulation establishes the EPPO competence by reference to the PIF directive
- Paragraph (4) concerns the possibility of extending the EPPO's competence to include serious crime having a cross-border dimension by a simplified Treaty-amending procedure. This means that, since the proposed amendments relate to the EU's policies and its internal actions, the European Council unanimously adopts a decision on the amendments, having obtained the consent of the European Parliament and after consulting the Commission. The amendment, aimed at extending the powers of the European Public Prosecutor's Office, could also modify accordingly paragraph 2 as regards the perpetrators of, and accomplices in, serious crimes affecting more than one Member State. In 2018 the European Commission issued a Communication on the initiative to subject cross-border terrorist crimes to the EPPO's reach; notwithstanding this, at the moment of writing, the amendment is not likely to occur in the near term.

Art 2(3) EPPO Regulation: recalling the definition provided at a general level by Arts 86 and 325 TFUE, it describes the notion of EU financial interests for its purposes:

> 'All revenues, expenditures and assets covered by, acquired through, or due to the Union budget and the budgets of the institutions, bodies, offices and agencies established under the Treaties and budgets managed and monitored by them'.

Art 4 EPPO Regulation: it specifies that the criminal offences affecting the financial interests of the Union are those provided for in the PIF Directive and determined by the EPPO Regulation, which the latter does in its Art 22.

- Art 22 (1)-(3) EPPO Regulation: three types of offences subject to the EPPO's authority which share a common requirement: they must constitute a criminal offence according to the national law of the participating Member State.
- Art 22 (4) EPPO Regulation contains a 'protective clause' which excludes offences relating to national direct taxes (and offences inextricably linked) from the EPPO's competence; and states that the structure and functioning of the Member States' tax administration shall not be affected by the Regulation.

The EPPO's material competence exists if:

- the conduct is criminalized by the national law;
- this criminal offence is subsumed in one of the three categories enlisted by Art 22 EPPO Regulation, i.e.:
  - PIF Offence as defined by Directive (EU) 2017/1371, and respecting a threshold for VAT-related offences;
  - criminal organization as defined by Framework Decision 2008/841/JHA, focused on PIF offences;
  - offence inextricably linked to a PIF crime, considering the limits to the exercising of the EPPO's competence established by Art 23 EPPO Regulation;
  - the criminal offence does not concern offences relating to national direct taxes.

Observations:

- Art 22 EPPO Regulation does not set the criminal offence on its own but refers to other instruments (i.e., PIF Directive, Framework Decision 2008/841/JHA) which, in turn, set out minimum rules concerning the definition of criminal offences and sanctions for the purpose of harmonization (Art 83(1) and 2 TFEU). Member States should adopt the necessary provision so to be compliant with the Directive.

- Consequently, the Office will have to deal with 22 different substantive criminal law legislations implementing the relevant EU law instruments. The dependence on domestic interpretation and implementation leads to a potential fragmentation of substantive law related to the PIF area at the national level and ultimately to a violation of the legality principle.
- The ECJ may play a decisive role if it is asked to provide an interpretation of the PIF Directive, in particular in cases where the EPPO is involved.

2. Art 22 of the EPPO Regulation

2.1. PIF offences

The EPPO shall be competent for offences that, at the same time:

- are criminalized under national law; and
- fall within the minimum definition contained in the PIF Directive (Arts 3 et. seq PIF Directive).

By stating that the EPPO 'shall be competent in respect of the criminal offences affecting the financial interests of the Union that are provided for in Directive (EU) 2017/1371', Art 22(1) EPPO Regulation determines the EPPO's scope of competence through a dynamic reference to the PIF Directive's criminal offences affecting the financial interests of the Union. Therefore, amendments to the PIF Directive might indirectly impact the competence of the EPPO as well, except for VAT frauds and any change in the Directive which is not related to the protection of the Union's financial interests

The Directive does not contain self-standing criminal provisions (cfr. Art 83 (1) and (2) TFUE); instead, it describes the minimum common elements of the conducts that the Member States are obliged to criminalize through their national laws. Next, each Member State is responsible for incorporating them into its legal system, even by adopting more stringent rules.

The PIF Directive requires the criminalization of four offences, all requiring an intentional behaviour (thus excluding recklessness and gross negligence). A common definition of intent is not available, so it will be up to national courts to provide it (Hernnfeld, 2021). The four offences at stake are:

- **EU fraud (including VAT fraud over the threshold);**
- **money laundering involving property derived from the (other) criminal offences covered by the PIF Directive;**
- **active and passive corruption;**
- **misappropriation of funds.**

2.1.1. General relevant provision

The notion of public official [Art 4(4) PIF Directive]

Corruption and misappropriation share the notion of public official, which is defined by Art 4(4) PIF Directive as a person belonging to the following three categories:

- **Union official**, that is, an official or other servant engaged under contract by the Union or seconded to the Union by a Member State or by any public or private body, who carries out functions equivalent to those performed by Union officials or other servants.
- **National official**, which should be interpreted by reference to the definition of 'official' or 'public official' in the national law of the Member State or third country in which the person in question carries out his or her functions. The term 'national official' shall refer to any person holding an executive, administrative or judicial office at national, regional or local level. Also, any person holding a legislative office at national, regional or local level shall be assimilated to a national official.
- Any other person assigned and exercising a public service function involving the management of or decisions concerning the Union's financial interests in Member States or third countries. The inclusion of this third category implies the need to include the growing number of persons who do not cover formally a public office, but are assigned and exercise, in a similar manner, a public service function in relation to Union funds.

Incitement, aiding and abetting, and attempt (Art 5 PIF Directive)

The directive does not contain a definition of these expressions but requires Member States to criminalize the modalities of inciting and aiding and abetting for any of the criminal offences referred to in Arts 3 and 4 PIF Directive.

Even if the criminalization of attempt is not required expressly for corruption and money laundering, this could be anyway the case, in line with the 'Explanatory Memorandum' of the PIF Directive Proposal which stated: 'criminal responsibility for attempt is excluded for most of the offences, since the basic crime

definitions in question already cover elements of attempt'. As a matter of fact, regarding corruption, the PIF Directive requires to criminalize the mere acceptance of a promise of an unlawful advantage; as far as money laundering is concerned, the AML Directive's notion includes 'attempts to commit' money laundering (Grasso, Sicurella, Giuffrida, 2020).

Liability of legal persons (Art 6 PIF Directive) and sanctions (Art 9 PIF Directive)

Art 2(1)(b) of the PIF Directive defines legal persons: entities having legal personality under the applicable law (except for States or public bodies in the exercise of State authority and for public international organisations). Art 6 of the PIF Directive requires Member States to implement the necessary measures to ensure their liability for any of the criminal offences referred to in Arts 3, 4 and 5 PIF Directive:

- committed for their benefit;
- committed by any person, acting either individually or as part of an organ of the legal person, and having a leading position within the legal person, based on: (a) a power of representation of the legal person; (b) an authority to take decisions on behalf of the legal person; or (c) an authority to exercise control within the legal person;
- and even when the lack of supervision or control by a person in a leading position has made possible the commission by a person under its authority.

In any case, the liability of the legal persons does not exclude the possibility of criminal proceedings against natural persons who committed the offence or who are criminally liable under Art 5 PIF Directive. However, corporate liability should not be made dependent on a final conviction of a natural person;[113] therefore, the legal entity can be held responsible even if the natural person's criminal responsibility has not been established.

Lastly, according to Art 9 PIF Directive, Member States have to ensure that legal persons are subject to effective, proportionate and dissuasive sanctions, which can be criminal or non-criminal fines. Also, national law can foresee other sanctions and the provision offers a non-exhaustive ('such as…') list of examples (i.e., exclusion from entitlement to public benefits or aid, temporary or permanent exclusion from public tender procedures, temporary or permanent disqualification from the practice of commercial activities, placing under judicial supervision, judicial winding-up, temporary or permanent closure of establishments which have been used for committing the criminal offence.)

Sanctions of natural persons (Art 7 PIF Directive)

As far as sanctions of natural persons are concerned, Member States should ensure that all the criminal offences referred to in Arts 3, 4 and 5 PIF Directive are punishable by effective, proportionate and dissuasive criminal sanctions.

While the requirement is not mandatory for the case of incitement, aiding and abetting, and attempt (Art 5 PIF Directive), the Directive requires that for the offences referred to in its Arts 3 and 4, Member States ensure a maximum penalty which provides for imprisonment. In addition to that, the provision:

- imposes at least four years of imprisonment when they involve considerable damage or advantage:
  - the damage or advantage resulting from all the offences (except for VAT-related fraud) shall be presumed to be considerable where the damage or advantage involves more than €100,000;
  - the damage or advantage resulting from VAT fraud (provided it is over the threshold foreseen in Art 2(2) PIF Directive) shall always be presumed to be considerable;
- allows for a maximum sanction of at least four years of imprisonment in other serious circumstances defined in their national law.

Other provisions (Arts 8–14 PIF Directive)

In its Art 8, the Directive includes an aggravating circumstance where a criminal offence referred to in Arts 3, 4 or 5 PIF Directive is committed within a criminal organization in the sense of Framework Decision 2008/841/JHA. Furthermore, it establishes specific rules concerning freezing and confiscation (Art 10 PIF Directive), jurisdiction (Art 11 PIF Directive), recovery (Art 14 PIF Directive) and limitation periods (Art 12 PIF Directive). With regard to the last, it has been noted that while their harmonization is a positive innovation, the

[113] Commission, 'Report from the Commission to the European Parliament and the Council on the implementation of 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' COM(2021) 536 final, p. 7.

risk that the Office – even in the framework of a single case – will apply different statutes of limitation still exists (e.g., in case of a crime committed by two or more nationals) (Grasso, Sicurella, Giuffrida, 2020).

2.1.2. EU fraud (Art 3 PIF Directive)

Art 3 PIF Directive defines the notion of EU fraud. Such an offence is characterized by intentionality, which must 'apply to all the elements constituting those criminal offences' (Rec. 11 PIF Directive). The variants of the fraud are distinguished as follows:

Expenditure

- **Art 3(2)(a) PIF Directive: non-procurement related fraud** as any act or omission relating to:
  - the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds or assets from the Union budget or budgets managed by the Union, or on its behalf;
  - non-disclosure of information in violation of a specific obligation, with the same effect; or
  - the misapplication of such funds or assets for purposes other than those for which they were originally granted.
- **Art 3(2)(b) PIF Directive: procurement related fraud**, at least when committed in order to make an unlawful gain for the perpetrator or another by causing a loss to the Union's financial interests, any act or omission relating to:
  - the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds or assets from the Union budget or budgets managed by the Union, or on its behalf;
  - non-disclosure of information in violation of a specific obligation, with the same effect; or
  - the misapplication of such funds or assets for purposes other than those for which they were originally granted, which damages the Union's financial interests.

Revenue

- **Art 3(2)(c) PIF Directive: 'General'**, any act or omission relating to:
  - the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the Union budget or budgets managed by the Union, or on its behalf;
  - non-disclosure of information in violation of a specific obligation, with the same effect; or
  - misapplication of a legally obtained benefit, with the same effect;
- **Art 3(2)(d) PIF Directive: VAT related**, any act or omission committed in cross-border fraudulent schemes in relation to:
  - the use or presentation of false, incorrect or incomplete VAT-related statements or documents, which has as an effect the diminution of the resources of the Union budget;
  - non-disclosure of VAT-related information in violation of a specific obligation, with the same effect; or
  - the presentation of correct VAT-related statements for the purposes of fraudulently disguising the non-payment or wrongful creation of rights to VAT refunds.

➔ VAT fraud offences are the only ones explicitly mentioned by Art 22(1) of EPPO Regulation, which establishes a precise threshold so that that the Office's competence exists only when the intentional acts or omissions defined in point (d) of Art 3(2) of Directive (EU) 2017/1371:

- ♦ are connected with the territory of two or more Member States; and
- ♦ involve a total damage of at least €10 million.

  The explicit definition of this threshold in Art 22 EPPO Regulation implies that a revision of the PIF Directive on this point (e.g., lowering the damage threshold) will not affect the material competence of the EPPO. The latter will stay limited to cases with a damage of €10 million or more until this article of the Regulation is amended.

2.1.3. Money laundering (Art 4(1) PIF Directive)

Art 4(1) PIF Directive requires Member States to take the necessary measures to ensure that money laundering – as described in Art 1(3) of Directive (EU) 2015/849 – involving property derived from the criminal offences covered by the PIF Directive constitutes a criminal offence.

Apart from the reference made to the AML Directive, the relationship between it and the PIF Directive should read in the light of Rec. 10 of the AML Directive itself, which states that it does not apply to money laundering involving property derived from criminal offences affecting the Union's financial interests, which is subject to specific rules as laid down in Directive (EU) 2017/1371 of the European Parliament and of the

Council. In other words, the PIF Directive contains specific rules which prevail on the generic AML Directive. Art 1(3) AML Directive enlists the following conducts:

- the conversion or transfer of property,
  - knowing that such property is derived from criminal activity or from an act of participation in such activity;
  - for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an activity to evade the legal consequences of that person's action.
- the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property,
  - knowing that such property is derived from criminal activity or from an act of participation in such an activity.
- the acquisition, possession or use of property,
  - knowing, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such an activity.
- participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the actions referred to the previous (respectively, in the provision: points (a), (b) and (c)).

2.1.4. Passive and active bribery (Art 4(2) PIF Directive)

Art 4(2) requires Member States to take the necessary measures to ensure that passive and active corruption, when committed intentionally, constitute criminal offences. The provision further elaborates the two hypotheses:

- 'passive corruption' means
  - the action of a public official who, directly or through an intermediary;
  - requests or receives advantages of any kind, for himself or for a third party, or accepts a promise of such an advantage;
  - to act or to refrain from acting in accordance with his duty or in the exercise of his functions in a way which damages or is likely to damage the Union's financial interests.
- 'active corruption' means
  - the action of a person who;
  - promises, offers or gives, directly or through an intermediary, an advantage of any kind to a public official for himself or for a third party for him;
  - to act or to refrain from acting in accordance with his duty or in the exercise of his functions;
  - in a way which damages or is likely to damage the Union's financial interests.

2.1.5. Misappropriation [Art 4(3) PIF Directive]

Art 4(3) PIF Directive requires Member States to take the necessary measures to ensure that misappropriation, when committed intentionally, constitutes a criminal offence. 'Misappropriation' should be regarded as:

- the action of a public official;
- who is directly or indirectly entrusted with the management of funds or assets;
- to commit or disburse funds or appropriate or use assets contrary to the purpose for which they were intended.

Based on a literal meaning of Art 4(3) PIF Directive, it would seem that, money laundering apart – where it is the predicate offence that directly damages the financial interests of the EU – this offence is the only one for which a damage or risk for the EU budget is not required.

2.2. Participation in a criminal organization if focused on PIF offences

The EPPO shall be competent in relation to the participation in a criminal organization if the conduct:

- is criminalized under national law;
- falls within the minimum definition contained in Framework Decision 2008/841/JHA;
- is focused on the committed PIF offences.

A dynamic reference is made to Framework Decision 2008/841/JHA so that any amendment of it would impact also on EPPO's material competence of the EPPO:

- Art 1 of the Framework Decision describes the notions of:
  - 'criminal organization', which means 'a structured association, established over a period of time, of more than two persons acting in concert with a view to committing offences which are punishable by

deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit';
  - 'structured association', which means an association that is not randomly formed for the immediate commission of an offence, nor does it need to have formally defined roles for its members, continuity of its membership or a developed structure. This notion could be interpreted narrowly, thus having less practical impact, or too widely, leading to problems of legal certainty (Calderoni, 2008).
- The EPPO would be competent for the conduct criminalized by the Member State that, according to Art 2 of the Framework Decision, can decide to regard as a criminal offence one or both of the following cases:
  - conduct by any person who, with intent and knowledge of either the aim and general activity of the criminal organization or its intention to commit the offences in question, actively takes part in the organization's criminal activities, including the provision of information or material means, the recruitment of new members and all forms of financing of its activities, knowing that such participation will contribute to the achievement of the organization's criminal activities;
  - conduct by any person consisting in an agreement with one or more persons that an activity should be pursued, which if carried out, would amount to the commission of offences referred to in Art 1 of the Framework Decision, even if that person does not take part in the actual execution of the activity.
- 'Focus of the criminal activity': the Regulation does not define this ambiguous expression, leading to the possibility of divergent interpretation of it by each national system and even interventions of the ECJ (Grasso, Sicurella, Giuffrida, 2020). It has been argued that the norm requires that the commission of PIF offences should constitute the main area of interest and activity of the organization in order to establish the EPPO's competence (Brodowski, 2021, p. 168, where the author offers additional interpretation of this notion).

2.3. Any other criminal offence that is inextricably linked to a PIF offence

The EPPO shall be competent also in relation to any other criminal offence if:

- it is criminalized under national law;
- it is inextricably linked to a PIF Offence.

And can exercise this competence if:

- the requirements set out in Art 25(3) EPPO Regulation are fulfilled.

Art 22(3) EPPO Regulation establishes that the EPPO is also competent for criminal offences which are 'inextricably linked' to PIF offences. Competence regarding these crimes exists in conformity with Art 25(3) EPPO Regulation, whose rationale seems to be that the EPPO's competence covers crimes that would normally be excluded only insofar they are connected with PIF offences that are the **most relevant and serious offences** in a given case. In other words, inextricably linked offences are subject to the EPPO's authority if their penalties are lower than those provided for PIF offences (Grasso, Sicurella, Giuffrida, 2020).

According to **Rec. 54 EPPO Regulation** these offences have been included to ensure efficiency and comply with the ***ne bis in idem* principle**. Rec. 54 also provides some clarification of the key concept: 'the notion of "inextricably linked offences" should be considered in light of the relevant case-law which, for the application of the *ne bis in idem* principle, retains as a relevant criterion the identity of the material facts (or facts which are substantially the same), understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together in time and space.'

Accordingly, other interpretations of the *ne bis in idem* principle not embraced by the ECJ would not serve as a tool for understanding the meaning of inextricability under the EPPO Regulation (Brodowski, 2021). It has been argued that more than a fundamental guarantee for the defendant, the *ne bis in idem* in this case represents: 'an operational and procedural rule in order to establish which prosecutor's office is competent . . . [and] ensure the consistency of the prosecutorial action' (Ceccarelli, 2021, p. 47).

In the light of the relevant provisions, it seems that the only offences that could be covered by the EPPO's mandate thanks to the extension of Art 22(3) EPPO Regulation are those inextricably linked to Art 22(1) EPPO Regulation crimes (i.e., to PIF Offences). Therefore, the EPPO's mandate would not include offences inextricably linked to:

- Art 22(2) EPPO Regulation offences (participation in a criminal organization if focused on PIF offences), since Art 22(3) EPPO Regulation only refers to connection with offences enlisted in paragraph 1, without mentioning paragraph 2 (Brodowski, 2021);
- offences excluded by the protective clause of Art 22(4) EPPO Regulation (offences in respect of national direct taxes) as the provision explicitly refers to offences inextricably linked thereto (Ceccarelli, 2021).

2.4. Protective clause

The EPPO's competence does not cover criminal offences in respect of national direct taxes including offences inextricably linked thereto. The structure and functioning of the tax administration of the Member States shall not be affected by the Regulation. Some authors have observed that not only the implications of this paragraph are not fully clear, but, most important, it excludes the possibility for the EPPO to investigate direct tax criminal offences related to VAT fraud (Alvarez, 2018; Ceccarelli, 2021).

3. Territorial and personal competence

According to Art 23 EPPO Regulation, the EPPO shall be competent if the offence was committed:

- on the Member States' territory;
- by a national of a Member State;
- by EU officials and other public servants.

It is sufficient that one of these criteria applies, even in respect of a single participating Member State. This implies that 'for a PIF-crime committed by a national citizen of a participating Member State, even if the offence was committed on the territory of a non-participating Member State, provided that the participating Member State has jurisdiction for such offences when committed outside its territory' (Hernnfeld, 2021, p. 193).

On a general note, it must be underlined that the EPPO's competence exists within the national jurisdiction's boundaries. Art 23 EPPO Regulation is not intended to extend or limit the jurisdiction of the Member States (cfr. Art 11 PIF Directive: Member States must reach a minimum level of harmonization in terms of jurisdiction over PIF offences.) To some extent, this provision is reflected by Art 23 EPPO Regulation, still leaving room for the following scenarios:

- **National jurisdiction is narrower than the EPPO's:**
  Even if the conduct would fall within the scope of Art 22 EPPO Regulation, the EPPO has no competence if the Member State has no jurisdiction. Example: Art 11(2) PIF Directive, which is reflected by Art 23(3) EPPO Regulation, allows Member States to refrain from implementing or limit the jurisdictional connection contained in it (i.e., for EU officials and other servants).
- **National jurisdiction is broader than the EPPO's:**
  Member States may have jurisdiction in respect of cases falling within Art 22 EPPO Regulation but the EPPO is not competent because of Art 23 EPPO Regulation.
  Example: Art 11(3) PIF Directive allows Member States to add further jurisdictional links ('(a) the offender is a habitual resident in its territory; (b) the criminal offence is committed for the benefit of a legal person established in its territory; or (c) the offender is one of its officials who acts in his or her official duty'). Also, national law might envisage a 'protective principle': 'giving their courts jurisdiction for offences committed by foreign nationals outside of that Member State's territory on the basis of the fact that the criminal offence is directed against the financial interests of the Union' (Hernnfeld, 2021, p. 192).
  Art 23(1) EPPO Regulation attributes competence to the EPPO when the offence is committed in whole or in part within the territory of one or several participating Member States. The provision leaves open for interpretation of the exact meaning of the term 'committed'. For sure, this can be read as the place where the criminal activity was undertaken. It could also be argued whether the provision refers to:
- the place where the effects/result of the criminal act occurred;
- the place where the main financial damage occurred.

Art 23 (2) and (3) EPPO Regulation attribute competence to the EPPO based on a criterion linked to the quality of the person who has committed the offence, establishing the Office's reach for offences outside of the combined territories of the participating Member States, that is, on the territory of NPMS and third countries. These paragraphs provide, respectively, that the EPPO shall be competent when:

- The offence is committed **by a national of a Member State**, provided that a Member State has jurisdiction for such offences when committed outside its territory. This rule applies to any national of any participating Member State, even if the investigation is opened in a different participating Member State, if he/she is a habitual resident and provided that this Member State has jurisdiction over habitual residents. However, it could be questioned whether the relevant conduct needs to constitute a criminal offence at the place where the offence was committed (Hernnfeld, 2021).
- The offence is committed outside the territories referred to in point (a) by **a person who was subject to the Staff Regulations or to the Conditions of Employment**, provided that a Member State has jurisdiction for such offences when committed outside its territory.

The norm refers to Regulation (EC) 31/196213, which applies to permanent staff of the EU institutions, agencies, etc. ('officials'), as well as temporary agents and contract staff ('other servants'), but not the members of the EU institutions such as the members of the European Parliament and the Commission (Herrnfeld, 2021). Also, the expression 'a person' should be interpreted as irrespective of whether the staff member is a national citizen of one of the participating Member States, including also national citizens of a NPM 'provided that a participating Member State has established jurisdiction in accordance with Art 11(2) of the PIF-Directive, the EPPO would also be competent for offences committed within the territory of a non-participating Member State or in a third country by an EU official or other servant, who is a national of a non-participating Member State' (Herrnfeld, 2021, p. 197). The complex interplay between EU law and national law, not only with respect to substantive law, but also to relevant jurisdiction rules, might render the EPPO's material competence variable and difficult to delimit it on a practical level.

4. Exercise of competence

Once established a territorial or personal link with an offence enlisted in Art 22 EPPO Regulation, the EPPO can exercise its competence (according to two different modalities) if the conditions foreseen by Art 25 are fulfilled. As for the **modalities**, paragraph (1) of Art 25 EPPO Regulation states that the EPPO can either:

- decide to initiate an investigation (Art 26 EPPO Regulation); or
- make use of its right of evocation, if national authorities have already started an investigation (Art 27 EPPO Regulation).

Regarding the **conditions**, paragraph (2) prescribes that if the offence caused or is likely to cause a damage of less than €10,000 to the Union's financial interests of, the EPPO may only exercise its competence if:

- The case has 'repercussions at Union level'. Rec. 59 EPPO Regulation provides some examples of this circumstance: transnational nature and scale of the criminal offence, the involvement of a criminal organization or where the specific type of offence could pose a serious threat to the Union's financial interests or the Union institutions' credit and Union citizens' confidence. The notion, however, could be further elaborated by national laws.
- EU Officials/servants or members of the institutions could be suspected of having committed the offence.

In both cases, the EPPO shall consult the competent national or EU authorities to establish whether these criteria are met.

Paragraph (3) introduces **limits** to the exercise of competence, requesting the EPPO to refrain from exercising its competence if:

1) The maximum penalty provided by national law for the PIF offence equals or is less severe than the inextricably linked offence's one (i.e., PIF offence is not preponderant). This rule does not apply where the inextricably linked offence has been instrumental, a notion that will need interpretation (Kuhl, 2017). Rec. 56 EPPO Regulation explains this provision and the notion of instrumentality: 'such other offence has been committed for the main purpose of creating the conditions to commit the offence affecting the financial interests of the Union, such as an offence strictly aimed at ensuring the material or legal means to commit the offence affecting the financial interests of the Union, or to ensure the profit or product thereof'.
2) There is a reason to assume that the damage caused or likely to be caused to the Union's financial interests by an offence as referred to in Art 22 EPPO Regulation does not exceed the damage caused or likely to be caused to another victim. This rule does not apply to the offences referred to in Art 3(2)(a), (b) and (d) of Directive (EU) 2017/1371 as implemented by national law. Therefore, it only applies to VAT fraud, money laundering, corruption and misappropriation. Moreover, paragraph (4) adds that in this case the EPPO may, with the consent of the competent national authorities, exercise its competence if it appears that the EPPO is better placed to investigate or prosecute.

Art 25(5) EPPO Regulation then imposes a **duty of information**. The EPPO must inform the competent national authorities without undue delay of any decision to exercise or to refrain from exercising its competence.

Lastly, in case of **conflict of competence between the EPPO and the national prosecution authorities** – over the question of whether the criminal conduct falls within the scope of Art 22(2) or (3), or Art 25(2) or (3) of the EPPO Regulation – the national authorities shall decide who is to be competent for the investigation of the case (Art 25(6) EPPO Regulation).

Summing up	
Offences Art 22 EPPO Regulation	Does the offence fall within one of the three categories enlisted in Art 22 EPPO Regulation?
	Is the offence criminalized under national law?
	Is the threshold set for EU VAT fraud reached?
Territorial and personal link Art 23 EPPO Regulation	Is the offence committed: - on the Member States' territory? - by a national of a Member State? - by EU officials and other public servants?
Exercise of competence Art 24 EPPO Regulation	Are the conditions for the exercise of competence respected in case of an offence that caused or likely to cause a damage of less than €10,000 euros?
	Is the PIF offence 'preponderant' with respect to the inextricably linked offence?
	In case of VAT fraud, money laundering, corruption and misappropriation, does the damage caused or likely to be caused to the EU financial interest exceed the damage caused or likely to be caused to another victim? If YES -> Is the EPPO better placed to investigate or prosecute?

CHAPTER IV: PROCEDURAL CRIMINAL LAW ISSUES

1. Basic principles for the EPPO's activities

The EPPO has to ensure that its activities respect the rights enshrined in the Charter (Art 5(1) of the EPPO Regulation). The basic principles for the EPPO's activities are: the principle of rule of law and proportionality, the principle of objectivity (impartiality), the principle of fairness, the principle of legality and the principle of sincere cooperation.

The Art 5(2) of the EPPO Regulation stipulates that the EPPO is bound by the principles of rule of law and proportionality in all its activities (Art 5(1) and (2) of the EPPO Regulation). The EPPO has to be impartial on its investigations and 'seek all relevant evidence whether inculpatory or exculpatory' (Art 5(4) of the EPPO Regulation), and it has to open and conduct investigations without undue delay (Art 5(5) of the EPPO Regulation). The investigations and prosecutions of the EPPO should also be guided by the principle of fairness towards the suspect or accused person (Rec. 67 EPPO Regulation). In order to best safeguard the rights of the defendant, in principle a suspect or accused person should face one investigation or the prosecution by the EPPO or one joint investigation in case of several offenders (Rec. 67 EPPO Regulation).

In order to ensure legal certainty and to effectively combat offences in its competence, the EPPO is guided by the legality principle (Rec. 66 EPPO Regulation).

Cooperation with national authorities is guided by the principle of sincere cooperation in regard to any action, policy or procedure. National authorities have to actively assist and support the investigations and prosecutions of the EPPO (Art 5(6) of the EPPO Regulation).

The primary source regulating the EPPO's investigations and prosecutions is the Regulation. The national law applies to the extent that a matter is not regulated by the Regulation or where the Regulation refers to the application of national law. In case of conflict of norms, the norms of the Regulation prevail. The Regulation also defines national law as the law of the MS whose EDP is handling a case, but leaves open the possibility of prescribing the application of other national law (Art 5(3) of the EPPO Regulation).

2. Investigation

2.1. Initiation of investigations and allocation within the EPPO

The investigation can be initiated in an MS which has jurisdiction over the offence according to its national law. The EDP has to, in accordance with the principle of legality, initiate an investigation 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. The exceptions to the rule are cases where the EPPO does not exercise it competence due to damage limitation (less than €10,000), as foreseen in Art 25(2) of the EPPO Regulation, or can refrain from exercising its competence and refer it to the national authorities, as foreseen in Art 25(3) of the EPPO Regulation.[114] As a form of prosecutorial review, the PC to which a case has been allocated can also instruct an EDP to initiate an investigation (Art 26(3) of the EPPO Regulation). The initiation of the investigation has to be noted in the CMS (Art 26(1) of the EPPO Regulation).

The Regulation contains rules on the **allocation of cases** within the EPPO in its Art 26(4). The rule is that a case is to be initiated and handled by an EDP from the MS:

1. where the focus of the criminal activity is; or
2. in case of several connected EPPO offences, where the bulk of the offences has been committed.

As an exception, an EDP of a different MS with jurisdiction may initiate or be instructed to initiate an investigation when it is duly justified by taking into account, in order of priority:

(a) the place of the suspect's or accused person's habitual residence;
(b) the nationality of the suspect or accused person;
(c) the place where the main financial damage has occurred.

In addition to the rules on the allocation of cases, the EPPO Regulation provides for the **rules on reallocation** of cases and the rules on their merging and separating. In a case concerning the jurisdiction of more than one MS the competent PC may, until the decision to prosecute and after consultation with the EPs or EDPs concerned, decide to:

(a) reallocate the case to an EDP in another MS;
(b) merge or split cases and, for each case choose the EDP handling it.

The prerequisites are that it is in the general interest of justice and in accordance with the criteria for the choice of the handling EDP (Art 26(5) of the EPPO Regulation). In taking a decision, the PC has also to take due account of the current state of the investigations (Art 26(6) of the EPPO Regulation).

The EPPO has to without undue delay inform the authority that reported the criminal conduct of the decision to initiate an investigation upon verification (Art 26(2) of the EPPO Regulation), as well as competent national authorities without undue delay of any decision to initiate an investigation (Art 26(7) of the EPPO Regulation).

2.2. Exercising the right of evocation

The EPPO can exercise its right of evocation in two situations: a) where it has received the relevant information from the national authorities that they initiated an investigation in respect of a criminal offence that falls within the competence of the EPPO, or b) it has become aware of it by other means. In both situations the EPPO will, where appropriate, consult the competent authorities of the MS concerned before the decision (Art 27(4) of the EPPO Regulation). The right can be exercised by the EDP from any MS whose competent authorities have initiated an investigation in respect of an offence that falls within the competence of the EPPO. On the other hand, if an EDP considers to not exercise the right of evocation, he/she has to inform the competent PC through the EP of his/her MS, who will take a decision on the matter (Art 27(6) of the EPPO Regulation).

The EPPO has to take its decision whether to evocate as soon as possible, but no later than five days after receiving all of the relevant information from the national authorities and shall inform the national authorities of that decision. The ECP may in a specific case take a reasoned decision to extend the time limit by a maximum period of five days and shall inform the national authorities accordingly (Art 27(1) of the EPPO

[114] See Ch. III para. 4 above.

Regulation). During that time the national authorities must refrain from taking any decision under national law that may have the effect of precluding the EPPO from exercising its right of evocation, but they must take any urgent measures necessary to ensure effective investigation and prosecution (Art 27(2) of the EPPO Regulation).

In the second situation, where the EPPO becomes aware by other means that an investigation has already been undertaken by competent authorities in MS, the EPPO will inform these authorities about it without delay. The competent authorities have to duly inform the EPPO and then it shall take a decision within time limit of five or ten days (Art 27(3) of the EPPO Regulation).

In both situations, if the EPPO decides to exercise the right of evocation, the competent authorities have to transfer the file to the EPPO and refrain from carrying out further acts of investigation in respect of the same offence (Art 27(5) of the EPPO Regulation). If, however, the EPPO refrained from exercising its competence, it has to inform competent national authorities without undue delay. National authorities have to inform the EPPO of any new facts which could give the EPPO reasons to reconsider its decision not to exercise competence. In this case the EPPO can exercise its right of evocation if the national investigation has not already been finalized and an indictment submitted to a court. The same time limits of five or ten days for the decision apply (Art 27(5) of the EPPO Regulation).

With regard to offences which caused or are likely to cause damage to the financial interests of the Union of less than €100,000, where the College considers that, with reference to the degree of seriousness of the offence or the complexity of the proceedings in the individual case, there is no need to investigate or to prosecute a case at Union level, the College is empowered to issue general guidelines allowing the EDPs to decide, independently and without undue delay, to not evoke the case. Art 27(8) of the EPPO Regulation requests that the guidelines specify, with all necessary details, the circumstances to which they apply, by establishing clear criteria, taking specifically into account the nature of the offence, the urgency of the situation and the commitment of the competent national authorities to take all necessary measures in order to fully recover the damage to the Union's financial interests. The College adopted guidelines on criteria for non-evocation of cases by the EDPs on 21 April 2021.[115] According to the guidelines, the EDPs have to evoke such cases if:

(a) public officials, as defined in Art 4(4) of the PIF Directive, are suspected of having committed, in any capacity, the offence;
(b) the investigation concerns a criminal organization pursuant to Art 22(2) of the EPPO Regulation;
(c) the investigation might have repercussions at Union level or could harm the Union's reputation, including cases where the Union's reputation might be compromised at national or local level;
(d) the investigation has a cross-border dimension involving at least two MSs participating in the establishment of the EPPO, putting the EPPO, as a single office, in a more effective position to investigate and prosecute;
(e) the investigation has a cross-border dimension, involving both participating MSs and MSs which do not take part in the establishment of the EPPO, and/or third countries, and the national authorities did not undertake any relevant action or the investigation is considerably delayed;
(f) the national authority did not undertake, and it is unlikely or unable to undertake, pertinent actions in order to fully recover the damage to the Union's financial interests; or
(g) there is an urgent need to deal with one or more of the following situations and the national authority in charge did not undertake pertinent actions, and is unlikely or unable to undertake actions, to tackle it:
    1. the concrete danger that the proceeds of crime are dissipated, sold, transferred or are made unavailable for confiscation;
    2. the concrete danger that the suspect(s) might try to escape or are actually trying to escape prosecution and justice;

[115] Decision of the College of the European Public Prosecutor's Office of 21 April 2021 Adopting Operational Guidelines on Investigation, Evocation Policy and Referral of Cases 029/2021.

3. the concrete danger that one or more key witnesses are intimidated, harmed or approached to modify their statement;
4. the concrete danger that important evidence is destroyed, concealed or made unavailable;
5. a risk that the damage to the financial interests of the Union would increase.

In order to ensure the coherent application of the guidelines, an EDP has to inform the competent PC of each such decision and the PC has to report annually to the College on the application of the guidelines (Art 27(9) of the EPPO Regulation).

2.3. Rules on conducting the investigation

There are a few basic rules on conducting the investigation. The first rule is that the handling EDP is authorized to undertake the investigation measures and other measures on his/her own or instruct the competent authorities in his/her MS. This is done in accordance with the Regulation and with the national law.

The second rule is that the MS's authorities have to ensure that all instructions are followed and undertake the measures assigned to them (Art 28(1) of the EPPO Regulation). The competent authorities should also, in accordance with national law, take any urgent measure necessary to ensure the principle of effective investigations even where not specifically acting under an instruction given by the handling EDP, and inform the EDP of measures taken without undue delay (Art 28(2) of the EPPO Regulation).

The third rule is that the handling EDP has to report through the CMS to the competent EP and to the PC any significant developments in the case, in accordance with the rules laid down in the Internal Rules of Procedure of the EPPO (Art 28(1) of the EPPO Regulation).

2.3.1. Reallocation to another EDP

Pursuant to Art 28(3) of the EPPO Regulation, it is possible to reallocate a case to another EDP in the same MS when the handling EDP:

(a) cannot perform the investigation or prosecution; or

(b) fails to follow the instructions of the competent Permanent Chamber or the European Prosecutor.

The decision is taken by the competent PC on the proposal of the supervising EP.

2.3.2. Investigation by the EP

Pursuant to Art 28(4) of the EPPO Regulation, in exceptional cases the supervising EP may conduct the investigation personally, either by personally undertaking the investigation measures and other measures or by instructing the competent authorities in his/her MS. This can happen where it appears to be indispensable in the interest of the efficiency of the investigation or prosecution on the grounds of one or more of the following criteria:

(a) the seriousness of the offence, in particular in view of its possible repercussions at Union level;

(b) when the investigation concerns officials or other public servants of the Union or members of the institutions of the Union;

(c) in the event of failure of the reallocation mechanism to reallocate to another EDP in the same MS.

The MSs have to ensure that the EP is entitled to order or request investigative measures and other measures and that he/she has all the powers, responsibilities and obligations of an EDP in accordance with this Regulation and national law.

The supervising EP can take this decision after having obtained the approval of the competent Permanent Chamber, and he/she has to inform the competent national authorities and the EDPs concerned without undue delay of the decision taken.

2.3.3. Lifting privileges or immunities

There is a possibility that the EPPO investigation involves a person protected by a privilege or immunity under national or EU law and such privilege or immunity presents an obstacle to a specific investigation being conducted. Under Art 29 of the EPPO regulation the ECP is authorized to make a reasoned written request for lifting a privilege or immunity in accordance with the procedures laid down by national or EU law.

3. Investigation measures and other measures

3.1. Investigation measures and other measures in national legal system

For the EPPO to conduct an effective investigation and prosecution, the EPPO Regulation lists a minimum set of investigation measures that have to be provided to the EPPO, while respecting the proportionality principle, and entitling EDPs (or EPs) to request or order other measures available to prosecutors under national law in similar national cases. In both cases the investigative measures can be subject to limitations in accordance with national law (Recs 70 and 71 EPPO Regulation). The preconditions for the use of investigative measures are: a) there are reasonable grounds to believe that the specific measure in question might provide information or evidence useful to the investigation, and b) there is no less intrusive measure available which could achieve the same objective. The procedures and the modalities for taking the measures are also governed by the applicable national law (Art 30(5) of the EPPO Regulation).

The minimum investigation measures listed in Art 30(1) of the EPPO Regulation, which in accordance with the proportionality principle have to be provided for the offences punishable by a maximum penalty of at least four years of imprisonment, are:

a) search of any premises, land, means of transport, private home, clothes and any other personal property or computer system, and taking of any conservatory measures necessary to preserve their integrity or to avoid the loss or contamination of evidence;
b) obtaining the production of any relevant object or document either in its original form or in some other specified form;
c) obtaining the production of stored computer data, encrypted or decrypted, either in their original form or in some other specified form, including bank account data and traffic data with the exception of data specifically retained in accordance with national law pursuant to the second sentence of Art 15(1) of the Directive on privacy and electronic communications;
d) freezing instrumentalities or proceeds of crimes, including assets, that are expected to be subject to confiscation by the trial court, where there is reason to believe that the owner, possessor or controller of those instrumentalities or proceeds will seek to frustrate the judgment ordering confiscation;
e) intercepting electronic communications to and from the suspect or accused person, over any electronic communication means that the suspect or accused person is using;
f) tracking and tracing an object by technical means, including controlled deliveries of goods.

These investigation measures may be subject to conditions in accordance with the applicable national law if it contains specific restrictions with regard to certain categories of persons or professionals who are legally bound by an obligation of confidentiality (Art 30(2) of the EPPO Regulation).[116] The investigation measures may be subject to further conditions, including limitations, provided for in the applicable national law. In this regard, intercepting electronic communications to and from the suspect or accused person, and tracking and tracing an object by technical means in particular can be limited to individual serious crimes (Art 30(3) of the EPPO Regulation).

In addition to minimum investigative measures, EDPs can use any other measures in their MS that are available to prosecutors under national law in similar national cases (Art 30(4) of the EPPO Regulation).

The result of such regulation is different preconditions for undertaking minimum investigative measures as well as different additional investigation measures and the preconditions for their application in different MSs.

The EDP is authorized to order or request the arrest or pre-trial detention of the suspect or accused person in accordance with the national law applicable in similar domestic cases (Art 33(1) of the EPPO Regulation).

[116] Without prejudice to lifting privileges or immunities in Art 29 of the EPPO Regulation.

3.2. Investigation measures and other measures in cross-border investigations

3.2.1. Undertaking of measures by the assisting EDPs

The Regulation provides for special rules for cross-border investigations regulating cooperation between the 'handling' and the 'assisting' EDPs, regulating that the investigation and other measures in other MSs where the measure is to be carried out are undertaken by the assisting EDPs located there (Art 2(6) of the EPPO Regulation). These special rules have primacy over legal instruments on mutual recognition or cross-border cooperation, but these instruments can supplement the special rules 'where a measure is necessary in a cross-border investigation but is not available in national law for a purely domestic situation', but it can be used in accordance with national law implementing the relevant instrument (Rec. 73 EPPO Regulation). However, it is without prejudice to legal instruments that facilitate other forms of cross-border cooperation than prosecution or judicial authorities, as well as administrative cooperation (Rec. 74 EPPO Regulation).

In cross-border cases the EDPs have to act in close cooperation by assisting and regularly consulting each other. Where needed, the handling EDP can decide on the adoption of the necessary measure and assign it to an EDP located in the MS where the measure needs to be carried out (Art 31(1) of the EPPO Regulation), and at the same time has to inform his/her supervising EP. The handling EDP can assign any measure available to him (both minimum and additional measures under national law), and their justification and adoption is governed by the law of his/her MS (Art 31(2) of the EPPO Regulation).

As a rule, the assisting EDP has to undertake or instruct the competent national authority to undertake the assigned measure (Art 31(4) of the EPPO Regulation). The assisting EDP carries out the assigned measures in accordance with the Regulation and the law of his/her MS. If the handling EDP has expressly indicated the formalities and procedures, the assisting EDP shall comply with them unless they are contrary to the fundamental principles of the law of his/her MS (Art 32 of the EPPO Regulation). Rec. 72 EPPO Regulation deals with the situation where the laws of both MSs require authorization, and stipulates that there should be only one authorization.

Where the law of the assisting EDP's MS requires the authorization for the measure, he/she shall obtain it in accordance with the law. If the authorization is refused, the handling EDP has to withdraw the assignment. Rec. 72 EPPO Regulation specifies that it means the final refusal, after all legal remedies have been exhausted. On the other hand, if only the law of the handling EDP's MS requires the authorization, he/she shall obtain it and submit it together with the assignment (Art 31(3) of the EPPO Regulation).

In particular cases, instead of the undertaking of the assigned measure, a consultation procedure is foreseen. The procedure will be triggered if the assisting EDP considers that:

(a) the assignment is incomplete or contains a manifest relevant error;
(b) the measure cannot be undertaken within the time limit set out in the assignment for justified and objective reasons;
(c) an alternative but less intrusive measure would achieve the same results as the measure assigned; or
(d) the assigned measure does not exist or would not be available in a similar domestic case under the law of his/her MS.

The consultations take place between the handling and assisting EDPs in order to resolve the matter bilaterally. The latter also informs the supervising EP (Art 31(5) of the EPPO Regulation).

The situation can be resolved, in agreement with the supervising EP, by recourse to legal instruments on mutual recognition or cross-border cooperation, which allow the assigned measure which does not exist in a purely domestic situation (Art 31(6) of the EPPO Regulation). On the other hand, if the matter is not resolved within seven working days and the assignment is maintained, or the measure is not undertaken within the time limit set in the assignment or within a reasonable time, the matter is referred to the competent PC (Art 31(7) of the EPPO Regulation). After hearing the EDPs to the extent necessary the PC decides without undue delay whether and by when the assigned or a substitute measure shall be undertaken and communicate its decision to the EDPs through the competent EP. The decision is taken in accordance with applicable national law and the Regulation (Art 31(8) of the EPPO Regulation).

3.3.2. Pre-trial arrest and surrender in cross-border cases

Regarding the arrest and surrender of a person who is in another MS, the handling EDP is authorized to issue or request the competent authority of his/her MS to issue an EAW in accordance with Council Framework Decision 2002/584/JHA[117] (Art 33(2) of the EPPO Regulation). The Regulation, however, entitles the EDP to issue or request an EAW only within the area of competence of the EPPO (Rec. 76 EPPO Regulation). Rec. 75 EPPO Regulation additionally stipulates that it is without prejudice to the specific procedures in MSs where judicial authorization is not required for the initial arrest of a suspect or accused person.

4. Prosecutorial decisions

The prosecutorial decisions of the EPPO after the initiation of the investigation phase of the proceedings are divided into two groups: the decisions during and the decisions after the termination of the investigation. As a rule, the prosecutorial decisions are made after the termination of the investigation, i.e., when the handling EDP considers the investigation to be completed. According to Art 35(1) and (3) of the EPPO Regulation, the handling EDP has to submit a report to the supervising EP, with a summary of the case and a draft decision. Where applicable, the EDP has to provide sufficient reasoning for bringing the case to judgment either at a court of the MS where he/she is located, or at a court of a different MS which has jurisdiction over the case. The supervising EP shall forward those documents to the competent PC for the decision. If he/she considers it necessary, the EP can accompany the documents with his/her own assessment and propose the following decisions: a) to prosecute before a national court (Art 36 of the EPPO Regulation); b) to dismiss the case (Art 39 of the EPPO Regulation); c) to consider a referral of the case (Art 34 of the EPPO Regulation); or d) to apply a simplified prosecution procedure (Art 40 of the EPPO Regulation). The competent PC is not required to take a decision as proposed by the EDP. The fact that a decision in each case is not made by the acting prosecutor (EDP) or even the prosecutor who oversees his/her work (handling EP), but rather by the third body (PC), differs from many MSs' legal systems. The reason for such a solution is to ensure a common prosecution policy (Rec. 78 EPPO Regulation). This will be further explained in a section dealing with the prosecutorial review of EPPO decisions (see 4.5 Prosecutorial review of the EPPO decisions below).

The only exception from the rule that the decisions are made after the termination of the investigation is the situations where the PC can decide to refer the case to the competent national authorities during investigation (see 4.3 Referrals and transfers of proceedings below).

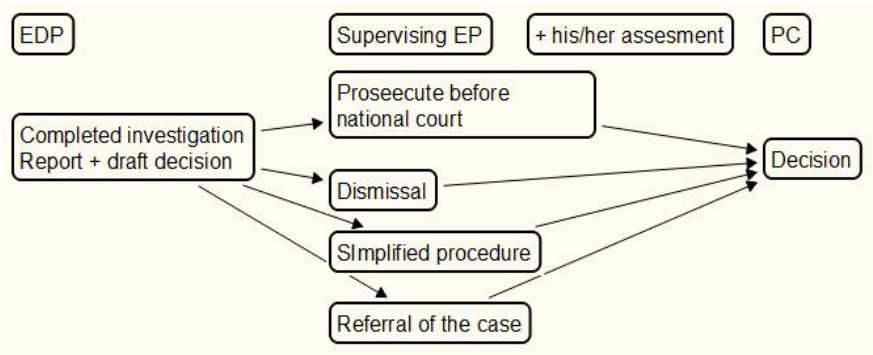

Figure 4: Prosecutorial decisions during or after the termination of the investigation

[117] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States [2002] OJ L 190/1.

4.1. Prosecution before national courts

The first possible decision after the termination of the investigation is to initiate prosecution before national courts. According to Art 36(1) and (2) of the EPPO Regulation, there are three possible outcomes of the EDPs' proposal to bring a case to judgment:

(a) the PC agrees with the proposal;

(b) the PC does not agree with the proposal;

(c) the PC does not take the decision within 21-day time limit.

The PC can always request further evidence before deciding to bring a case to judgment (Rec. 78 EPPO Regulation), but the peculiarity of this decision-making of the PC is that in all three cases the EDP continues with the prosecution before national courts. If the PC does not agree, it cannot dismiss the case contrary to the draft proposal to bring a case to judgment, and if the PC does not take the decision within the time limits, the proposal is deemed to be accepted. The Central Office will notify the competent national authorities, interested persons and the relevant institutions, bodies, offices and agencies of the Union of the decision to prosecute whenever it is necessary for the purposes of recovery, administrative follow-up or monitoring (Art 36(6) of the EPPO Regulation).

The specific case of bringing a case to prosecution is the situation where the PC decides to bring it to prosecution in a different MS. It is an exception from the principle that a case is brought to prosecution in the MS of the handling EDP. The prosecution in a different MS can take place if, taking into account the report of the handling EDP, there are sufficiently justified grounds for doing so (the criteria are set out in Art 26(4) and (5) of the EPPO Regulation). In this case, the PC will instruct the EDP of the concerned MS to bring a case to the prosecution (Art 36(3) of the EPPO Regulation). There is also a possibility of joining several cases against the same person(s) in order to prosecute these cases in the courts of a single MS with jurisdiction for each of the cases (Art 36(4) of the EPPO Regulation).

The competent national court is determined under the rules of national law (Art 36(5) of the EPPO Regulation). The procedure at the trial is governed by the rules of national criminal procedure. The EPPO Regulation deals only with two situations at this stage: the decision to lodge an appeal against the judgment of the court, and the position of the EDP that would lead to the dismissal of the case. In both cases the handling EDP has to submit a report including a draft decision to the competent PC and wait for its instructions. If it is impossible, due to the deadlines in national law, to await those instructions, the EDP is entitled to lodge an appeal without prior instructions and submit the report without delay. In this case the PC instructs him/her afterwards whether to maintain or withdraw the appeal. The same procedure applies in the situation when the handling EDP would take the position that would lead to the dismissal of the case (Art 36(7) of the EPPO Regulation).

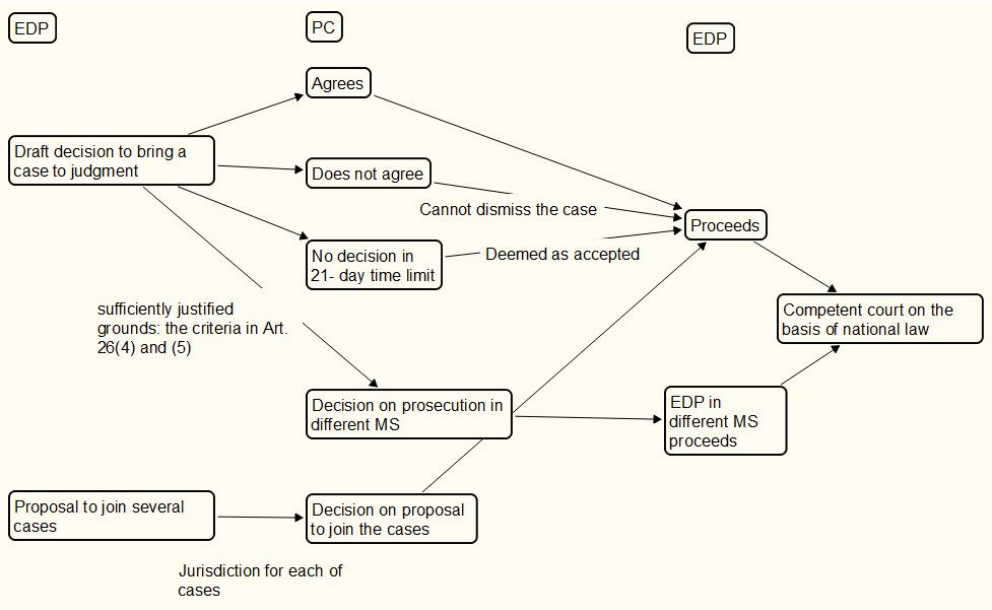

Figure 5: The prosecution before national courts

4.2. Dismissal of the case

4.2.1. Grounds for the dismissal

The dismissal of the case is regulated in Art 39 of the EPPO Regulation, and Rec. 81 EPPO Regulation emphasizes that the grounds for dismissal are exhaustively laid down in the Regulation. The decision is made by the PC, based on the already mentioned report of the EDP upon the termination of the investigation. The dismissal will take place where, pursuant to the law of the MS of the handling EDP, the prosecution has become impossible. The grounds for the dismissal in Art 39(1) are:

(a) the death of the suspect or accused person or winding up of a suspect or accused legal person;
(b) the insanity of the suspect or accused person;
(c) amnesty granted to the suspect or accused person;
(d) immunity granted to the suspect or accused person, unless it has been lifted;
(e) expiry of the national statutory limitation to prosecute;
(f) the suspect's or accused person's case has already been disposed of in relation to the same acts;
(g) the lack of relevant evidence.

Commentators point out that there are some grounds for dismissal that are not listed in Art 39. For instance, the age of the suspect, the lack of authority to prosecute when required, or the violation of the fair trial principle (Brodowski 'Art 39', 2021, p. 359).

Since it deals with the whole case, Art 39 'does not cover the situations where the "case" proceeds but where the legal basis of the investigation and prosecution changes' (Brodowski 'Art 39', 2021, 358): when conduct is prosecuted under a different offence or the prosecution is limited to specific actions or offences (ibid.).

In two cases the EPPO cannot dismiss a case without the previous consultations with the national authorities of the MS. The first case is inextricably linked to criminal offences. The second case relates to some offences regarded as fraud affecting the Union's financial interests where the damage caused or likely to be caused to the Union's financial interests does not exceed the damage caused or likely to be caused to another victim. The offences referred to in Art 3(2) (a) and (b) of the PIF Directive are any acts or omissions in respect of: a) non-procurement-related expenditure or b) procurement related expenditure (at least when committed in order to make an unlawful gain for the perpetrator or another by causing a loss to the Union's financial interests), relating to:

- the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds or assets from the Union budget or budgets managed by the Union, or on its behalf;
- non-disclosure of information in violation of a specific obligation, with the same effect; or
- the misapplication of such funds or assets for purposes other than those for which they were originally granted (which in the latter case damages the Union's financial interests).

In these cases the PC has to, if applicable, refer the case to the competent national authorities (see 4.2 Referrals and transfers of proceedings to the national authorities below).

After the dismissal, the EPPO has the duty to officially notify and inform various stakeholders of its decision (Art 39(4) of the EPPO Regulation). The EPPO has to notify competent national authorities and inform the relevant institutions, bodies, offices and agencies of the Union. Where it is appropriate under national law, the EPPO has to inform the suspects or accused persons and the crime victims. The case may also be referred to OLAF or to the competent national administrative or judicial authorities for recovery or other administrative follow-up.

4.2.2. Reopening of the investigation

The dismissal is not a bar for further investigation if there are new facts which were not known to the EPPO at the time of the decision and became known after the decision. The investigation can be reopened, and the decision is made by the competent PC (Art 39(2) of the EPPO Regulation).

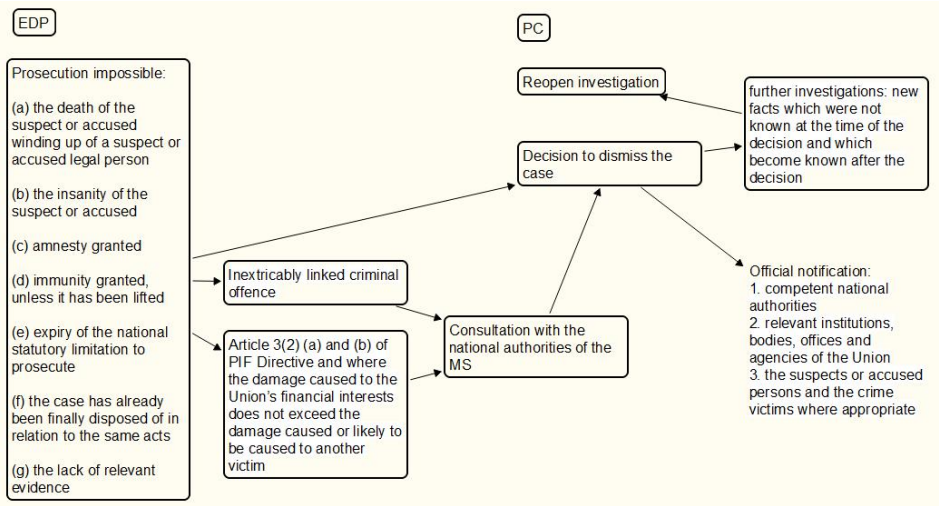

Figure 6: Dismissal of the case

4.3. Referrals and transfers of proceedings to the national authorities

Art 34(1) to (3) of the EPPO Regulation foresees two mandatory grounds and one optional ground for referral and transfer of the proceedings to the national authorities:

a) where an investigation conducted by the EPPO reveals that the facts subject to investigation do not constitute a criminal offence for which it is competent under Arts 22 and 23;
b) where an investigation conducted by the EPPO reveals that the specific conditions for the exercise of its competence set out in Art 25(2) and (3) are no longer met;
   In both cases the competent PC has to decide on the referral to the competent national authorities without undue delay, and in the latter case before initiating prosecution at national courts.
c) where, with regard to offences which caused or are likely to cause damage to the financial interests of the Union of less than €100,000, the College considers that, with reference to the degree of seriousness of the offence or the complexity of the proceedings in the individual case, there is no need to investigate or to prosecute a case at Union level and that it would be in the interest of the efficiency of investigation or prosecution. In this regard, the College is empowered to issue general guidelines allowing the PC to refer a case. In order to ensure the coherent application of the guidelines, each PC has to report annually to the College on the application of the guidelines (Art 34(4) of the EPPO Regulation). In addition to that, the PC has to communicate any such decision to the ECP, who performs a prosecutorial review (see 5.3 Review by the European Chief Prosecutor or his/her Deputy below).

The College adopted the operational guidelines on referral of cases in April 2021.[118] In regard to offences which caused or are likely to cause damage to the financial interests of the Union of less than €100,000, the guidelines list the exceptions from the rule that such cases should be referred:

a) where public officials, as defined in Art 4(4) of the PIF Directive, are suspected of having committed, in any capacity, the offence;
b) where the investigation concerns a criminal organization pursuant to Art 22(2) of the EPP0 Regulation;
c) where the investigation might have repercussions at Union level or could harm the Union's reputation, including cases where the Union's reputation might be compromised at national or local level only;
d) where the investigation has a cross-border dimension involving at least two MSs participating in the establishment of the EPP0, and/or involving both participating and non-participating MSs and MSs,

[118] Decision of the College of the European Public Prosecutor's Office of 21 April 2021 Adopting Operational Guidelines on Investigation, Evocation Policy and Referral of Cases 029/2021.

and/or third countries, putting the EPP0, as a single office, in a better position to investigate and prosecute;

e) where there are reasons to believe that the national authority would not undertake pertinent actions in order to fully recover the damage to the Union's financial interests;

f) where there is an urgent need to deal with one or more of the following situations and there is reason to believe that the national authority in charge would not undertake pertinent actions to tackle it:

1. the concrete danger that the proceeds of crime are dissipated, sold, transferred or made unavailable for confiscation;
2. the concrete danger that the suspect(s) might try to escape or are actually trying to escape prosecution and justice;
3. the concrete danger that one or more key witnesses are intimidated, harmed or approached to modify their statement;
4. the concrete danger that important evidence is destroyed, concealed or made unavailable;
5. a risk that the damage to the financial interests of the Union would increase.

The guidelines also apply to the offences referred to in points (a) and (b) of Art 3(2) of Directive (EU) 2017/1371 where the damage caused or likely to be caused to the Union's financial interests does not exceed the damage caused or likely to be caused to another victim, and the referrals include any inextricably linked offences within the competence of the EPPO. In this regard, the guidelines stipulate that upon request of the other victim the PC has to refer the case if this victim is a public institution or body of an MS, and the competent national authority is better placed to investigate or prosecute.

After the PC decides to refer a case, the competent national authorities decide whether they will take over the case. If they decide to open an investigation, the EPPO has to transfer the file to that national authority, refrain from taking further investigative or prosecutorial measures and close the case (Art 34(7) of the EPPO Regulation). In addition to that, the EPPO has to inform the relevant institutions, bodies, offices and agencies of the Union, as well as, where appropriate under national law, suspects or accused persons and the crime victims of the transfer (Art 34(8) of the EPPO Regulation).

The special case is the situation where the EPPO considers a dismissal of a case for an inextricably linked criminal offence. In that situation the EPPO can dismiss the case only after consultation with the competent national authorities. Instead of dismissal, the PC has to refer the case to the national authority without delay if it so requires (Art 34(9) of the EPPO Regulation).

On the other hand, if the national authorities do not accept to take over the case within a maximum timeframe of 30 days, the EPPO remains competent to prosecute or dismiss the case (Art 34(5) of the EPPO Regulation).

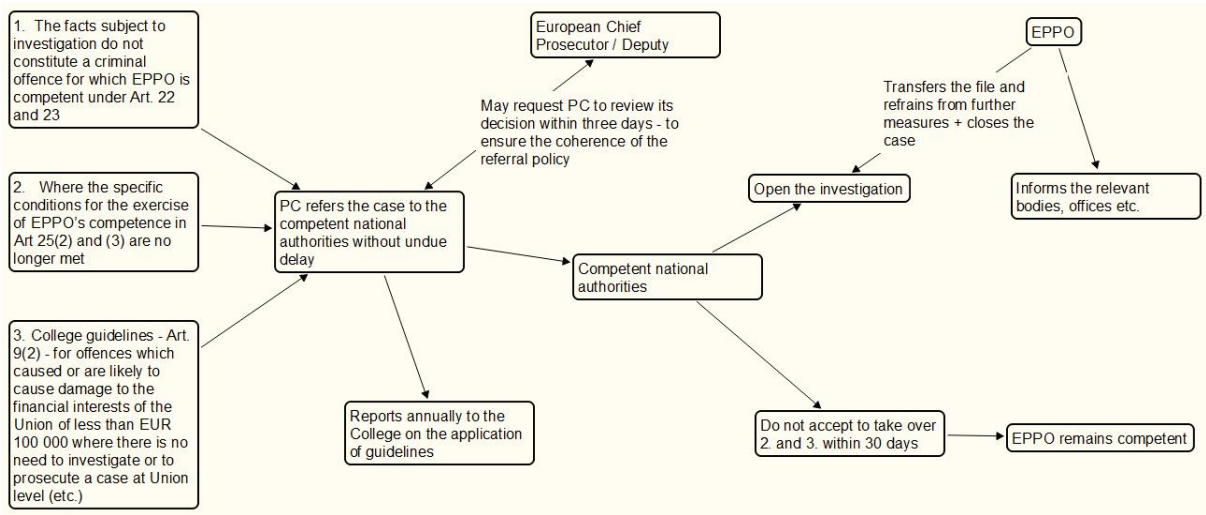

Figure 7: Referrals and transfers of proceedings

4.4. Simplified prosecution procedures

If the case is not dismissed or referred to the competent national authorities, in accordance with Art40(1) of the EPPO Regulation the EPPO can decide to use simplified prosecution procedures if they are provided under applicable national law. These procedures aim at the final disposal of a case on the basis of terms agreed with the suspect. The procedure has to follow the conditions provided for in the national law. These procedures may or may not include involvement of the court and they could be an exception from the legality principle (Rec. 81 and 82 EPPO Regulation). Such situations include cases where the final damage of the offence, after possible recovery of an amount corresponding to such damage, is not significant (Rec. 82 EPPO Regulation).

In case of offences referred to in Art 3(2) (a) and (b) of the PIF Directive (see 4.1.1 above) and where the damage caused or likely to be caused to the Union's financial interest does not exceed the damage caused or likely to be caused to another victim, the handling EDP has to consult national prosecution authorities before proposing to apply a simplified prosecution procedure.

Art 40(2) of the EPPO Regulation sets the criteria for the decision. The PC has to take into account the following grounds:

(a) the seriousness of the offence, based on, in particular, the damage caused;

(b) the willingness of the suspected offender to repair the damage caused by the illegal conduct;

(c) the use of the procedure would be in accordance with the general objectives and basic principles of the EPPO as set out in the Regulation.

The College was empowered to adopt guidelines on the application of those grounds, and it adopted them on 2 December 2020.[119] The guidelines set guiding principles: legality, proportionality and opportunity. In order to allow the PC to make a decision, the handling EDP has to explain the motives for using a simplified procedure and has to specify at least the following elements: a) information on the legal qualification and minimum and maximum penalty according to the respective national law; b) evaluation of the seriousness of the offence(s); c) estimation of the damage caused or likely to be caused and of the overall gain sought by the perpetrator; d) assessment of the complexity of the case; e) information on the transnational character of the criminal activity; f) information on the nature and background of the defendant(s), namely if they are natural or legal persons and if they have a criminal record; g) assessment on the suspect's willingness and his/her possibility to repair the damage caused or to compensate it in any other manner; h) relevant information on the existing victims other than the EU; i) where applicable, the outcome of the consultation with the national prosecution authorities, carried out in application of the second subparagraph of Art 40(1) of the EPPO Regulation; j) a reasoned opinion on the proposed penalty.

If PC agrees, the handling EDP applies the simplified procedure and registers it in the CMS. Upon fulfilment of the terms agreed with the suspect, the PC instructs the EDP to finally dispose of the case (Art 40(3) of the EPPO Regulation).

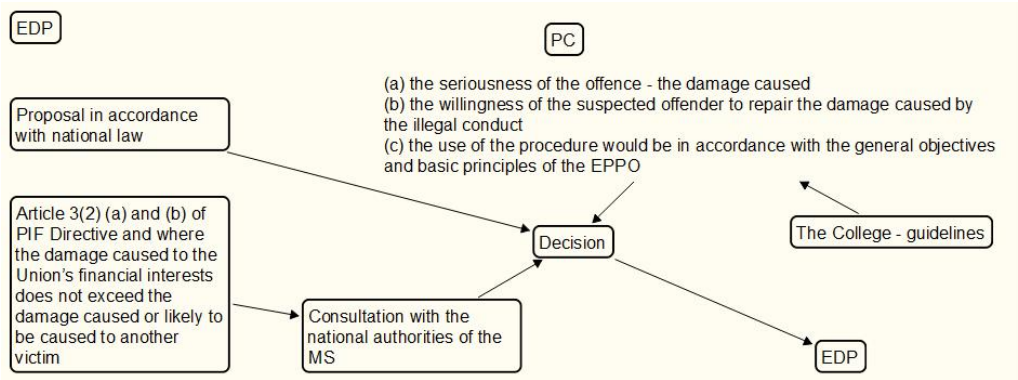

Figure 8: The simplified prosecution procedures

[119] Decision of the College of the European Public Prosecutor's Office of 2 December 2020 Laying Down Guidelines on Simplified Procedures and on the Delegation of Powers of the Permanent Chambers Respectively, College Decision 023/2020.

5. Prosecutorial review of the EPPO decisions

The EPPO Regulation provides for three types of prosecutorial review of EPPO decisions: a) review by the supervising EP; b) review by the PCs; and c) review by the ECP. The prosecutorial review is, as a rule, provided during and after the termination of the investigation, where the Regulation provides for the review of the handling EDP's draft decisions. In these situations, both the supervising EP and the competent PC have a role in reviewing the handling EDP's decision (see 4 Prosecutorial decisions above). In addition to that, the decision of the EDP not to initiate the investigation can also be reviewed (Art 26(3) of the EPPO Regulation).

On the other hand, the EPPO Regulation does not have rules on prosecutorial review of the other decisions and actions, but it relies on applicable national law. The absence of provisions on the prosecutorial reviews was criticized by Đurđević, since it leads to the fragmentation of the functioning of the EPPO, i.e., there is no common internal supervision of the work of the EPs and EDPs (Đurđević, 2018, 106). In this section, the review powers of the supervising EPs, competent PCs, and ECP will be considered.

5.1. Review by the supervising European prosecutor

Art 12(4) of the EPPO Regulation empowers the supervising EP to review certain acts whenever the national law of the MS provides for the internal review of such acts within the structure of a national prosecutor's office. It has to be in accordance with Internal Rules of Procedure of the EPPO and without prejudice to the supervisory and monitoring powers of the PC.

The supervising EP can assess the report of the handling EDP and a draft decision upon termination of the investigation whenever he/she considers it necessary. Although the EP does not take a final decision, he/she reviews the EDP's draft decision and his/her assessment certainly can influence a decision of the competent PC (Art 35(1) of the EPPO Regulation). In some cases, the PC may also delegate his/her decision-making powers to the EP (see 5. 2. below).

5.2. Review by the Permanent Chambers

The prosecutorial review of the PCs of the decisions or actions of the EDPs can be divided into two categories. The first category are the cases where the PCs can review acts before or during the investigation. According to Art 26(3) the PC can instruct an EDP to initiate an investigation. The second category are the cases where the PCs review a case file and a draft decision of the EDPs after the termination of the investigation. Before and during investigation, the PC can use its review powers to (Art 10(4) of the EPPO Regulation):

(a) instruct the EDP to initiate an investigation where no investigation has been initiated (Art 26(3) of the EPPO Regulation);
(b) instruct the EDP to exercise the right of evocation where the case has not been evoked (Art 27(6) of the EPPO Regulation);
(c) allocate or reallocate a case to a MS (Art 26(4) and (5) of the EPPO Regulation).

In addition to that, PCs also review and approve the decisions of EPs to conduct the investigation by themselves.

The main prosecutorial review of the work of the handling EDP is done after the termination of the investigation. Art 35(2) of the EPPO Regulation empowers the PC to, where necessary, undertake its own review of the case file before taking a final decision or giving further instructions to the EDP. According to Art 10(3) the PC can decide to: a) bring a case to judgment; b) dismiss a case; c) apply a simplified prosecution procedure and instruct the EDP to act with a view to finally dispose of the case, d) refer a case to the national authorities, and e) reopen an investigation.

In certain situations, the PC may delegate its decision-making power, thus also its review power, to the supervising EDP. It can delegate the decision to bring a case to judgment and the decision to dismiss a case, except in a situation where there is a lack of relevant evidence (Art 39(1) (a) to (f) of the EPPO Regulation). (cases in Art 39(1) (a) to (f) of the EPPO Regulation). These delegations must be 'duly justified with reference to the degree of seriousness of the offence or the complexity of the proceedings in the individual case, with regard

to an offence that has caused or is likely to cause damage to the financial interests of the Union of less than EUR 100 000' (Art 10(7) of the EPPO Regulation). Additional guidelines are set in the Internal Rules of Procedure.[120]

5.3. Review by the European Chief Prosecutor or his/her Deputy

The ECP has a very limited independent role in the prosecutorial review of the decisions of the EDPs, EPs or PCs. His/her only power is to request the PC to review its decision on the referral of the case to national authorities if he/she considers that the interest in ensuring the coherence of the referral policy of the EPPO so requires. The ECP may request it within three days of receiving the information on the referral. In case the ECP is a member of the relevant PC, the power is exercised by one of the deputies (Art 34(4) of the EPPO Regulation). However, in this case the final decision is taken by the PC.

6. Procedural safeguards for suspects, accused or other persons

In addition to Art 5(1) and (2) of the EPPO Regulation on basic principles of its activities, which stipulate that the EPPO must ensure that its activities respect the rights enshrined in the CFR and that it is bound by the principles of rule of law and proportionality, Art 41 deals with the procedural safeguards. In this regard, the EPPO regulation does not provide for any additional procedural safeguard for the suspects or accused persons in EPPO proceedings, but only mentions applicable minimum procedural rights. However, this is hailed as useful since it reminds every stakeholder of the minimum procedural rights to be honoured and of the need to interpret the national law with the specific European context in mind, and highlights the strong systemic relevance of the rights of suspects and accused persons (Brodowski 'Art 41', 2021, p. 383)

Art 41(1) states that the activities of the EPPO must be carried out in 'full compliance' with the rights of suspects and accused persons enshrined in the CFR, including the right to a fair trial and the rights of defence. In this regard, Art 48 CFR provides for the presumption of innocence and the respect for the rights of the defence for the persons charged, and Art 47 provides for the right to an effective remedy and a fair trial. However, it also refers to other CFR provisions granting specific or fundamental right to the suspect or accused persons in EPPO proceedings (Brodowski 'Art 41', 2021, p. 387). The standards of the ECHR also indirectly apply through Art 52(3) CFR, which provides that the corresponding rights have the same meaning and scope as those laid down by the ECHR, but that Union law can provide more extensive protection.

Art 41(2) sets minimum procedural rights in EPPO proceedings: the rights provided for in Union law, including directives concerning the rights of suspects and accused persons in criminal procedures, as implemented by national law, such as a) the right to interpretation and translation, as provided for in Directive 2010/64/EU[121]; b) the right to information and access to the case materials, as provided for in Directive 2012/13/EU[122]; c) the right of access to a lawyer and the right to communicate with and have third persons informed in the event of detention, as provided for in Directive 2013/48/EU[123]; d) the right to remain silent and the right to be presumed innocent as provided for in Directive (EU) 2016/343[124]; e) the right to legal aid as

[120] Internal Rules of Procedure of the European Public Prosecutor's Office, College decision 003/2020, Art 55: Delegation of powers to conclude cases.

[121] 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 [2010] OJ L 280/1.

[122] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L 142/1.

[123] 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 [2013] OJ L 294/1.

[124] 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 [2016] OJ L 65/1.

provided for in Directive (EU) 2016/1919.[125] Given that the regulation only exemplifies directives, it includes the procedural safeguards for children who are suspects or accused persons in criminal proceedings as provided for in Directive (EU) 2016/800[126] and it is open for any future directives on procedural rights. The common feature of these rights is that they apply from the pre-trial phase of the proceedings.

In addition to the rights provided in Union law, and without prejudice to the rights referred to in this section, suspects and accused persons as well as other persons involved in the proceedings of the EPPO must have all the procedural rights available to them under the applicable national law. Art 41(3) enumerates minimum rights that must be ensured: the possibility to present evidence; request the appointment of experts or expert examination and hearing of witnesses; and request the EPPO to obtain such measures on behalf of the defence. Due to differences in implementation of directives in MSs as well as differences between national criminal procedure laws, the described solution 'cannot avoid that the rights of suspects and accused persons may differ depending on the Member State in which the EPPO conducts the investigation and prosecution' (Herrnfeld 'Introduction', 2021, p. 10).

7. Admissibility of evidence

Art 37 of the EPPO Regulation is the main provision on the admissibility and assessment of evidence. Rules on admissibility and assessment of evidence constitute a core tenet of the right to a fair trial as they safeguard against procedural unfairness and abuse of power by prosecutorial and other investigating authorities (Đurđević, 2012, p. 995). The admissibility of evidence is amongst the most complex issues that defence lawyers will have to tackle in EPPO proceedings.

A first degree of complexity stems from the fact that there are no common, harmonized rules on the admissibility and assessment of evidence. Instead, rules on the collection, use, and exclusion of evidence vary considerably amongst the various Member States participating in the EPPO (Ligeti, Garamvölgyi, Ondrejová, von Galen, 2020, p. 203). Furthermore, Art 37 of the EPPO Regulation does not pose a common supranational test for the admissibility and assessment of evidence, thereby preserving the autonomy of national laws of criminal procedure. The lack of common supranational or European rules on the admissibility and/or exclusion of evidence is not surprising: 'any international – or supra-national – criminal system, which relies on the cooperation of national authorities, is in principle reluctant to elaborate strict exclusionary rules on evidence, as this could undermine both the efficacy of the cooperation system as well as the effectiveness of action of the international, or supra-national, institution itself' (Allegrezza and Mosna, 2018, p. 159).

A second degree of complexity relates to cross-border evidence in EPPO proceedings before national courts. To the extent that offences under the EPPO's material competence will involve more than one Member State, the EPPO will carry out cross-border investigations, resulting in the gathering of cross-border evidence. As a result, defence lawyers involved in EPPO cross-border cases before national courts will need to navigate a complex articulation of diverging national laws of criminal procedure on evidence. In order to effectively respond to this challenge, defence lawyers need to familiarize themselves with the specificities of the rules on evidence in the other Member States participating in the EPPO (Đurđević, 2012, p. 997).

7.1. Evidence

According to the EPPO commentary, 'Evidence relates to all . . . forms of fact or information that can be used to ascertain a belief or proposition that is relevant to the proceedings of the EPPO' (Burchard, 2021, p. 348). For instance, evidence can relate to the elements of the criminal offences under the EPPO's material competence, the modes of liability, etc. Pursuant to Art 5(4) of the EPPO Regulation, 'The EPPO shall conduct its investigations in an impartial manner and shall seek all relevant evidence whether inculpatory or

[125] 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 [2016] OJ L 297/1.

[126] Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings [2016] OJ L 132/1.

exculpatory.'[127] This illustrates that the EPPO is conceptualized as an impartial European criminal justice actor, acting in pursuit of the truth rather than as a conviction-driven body (Ligeti, 2013, p. 9).

7.2. Admissibility of evidence

Art 37(1) of the EPPO Regulation deals with the admissibility of evidence. It provides that '[e]vidence 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.' The wording 'gathered in another Member State or in accordance with the law of another Member State' indicates that Art 37(1) focuses on foreign European evidence in cases with a cross-border element (Burchard, 2021, p. 348). Pursuant to Art 5(3) of the EPPO Regulation, the national law of the handling EDP applies to evidence in purely national EPPO cases. Given the diverging approaches between adversarial and inquisitorial criminal procedure systems on the concept of admissibility of evidence, the wording 'admissibility of evidence' is generally used to ascertain 'whether it is possible and allowed to introduce and/or utilize evidence in a criminal procedure' (Burchard, 2021, p. 348).

7.2.1. A court

The admissibility of evidence can be sought before a court in the participating Member States.[128] According to the EPPO commentary, this can be 'any court . . . that has a role to play, pursuant to the Regulation and its references to the applicable national law in a Member State, in the proceedings of the EPPO' (Burchard, 2021, p. 348). To the extent that Art 37(1) is interpreted broadly, the term 'court' can include courts involved in the pre-trial and/or investigation phases of proceedings (e.g., proceedings on pre-trial detention), rather than courts solely involved in trial proceedings of an EPPO case (Burchard, 2021, p. 348).

7.2.2. Presented by the defendant or the prosecutors of the EPPO

When parties present evidence, they seek to bring such evidence to the attention of the court (Burchard, 2021, p. 349). In this regard, Art 37(1) EPPO Regulation only mentions evidence 'presented by the prosecutors of the EPPO or the defendant'. A literal interpretation of Art 37(1) EPPO Regulation would thus seem to exclude other potential parties from presenting evidence. For instance, it would exclude victims' right to be heard, laid down in Art 10 of the Directive 2012/29/EU, which includes their possibility to 'provide evidence'.[129] It would also exclude 'suspects' who have not yet acquired the status of 'defendant' (Burchard, 2021, p. 349). Nevertheless, authors of the EPPO commentary suggest a broad reading of Art 37(1) EPPO Regulation to include 'all actors that have a right to present evidence before a court in an EPPO related proceeding under the applicable national criminal procedures of the participating Member States' (Burchard, 2021, p. 349).

7.2.3. Evidence shall not be denied admission on the mere ground that it was gathered in another Member State or in accordance with the law of another Member State

The key purpose of Art 37(1) of the EPPO Regulation is that a court cannot refuse evidence 'on the mere ground that it was gathered in another Member State or in accordance with the law of another Member State'. In this regard, Art 37(1) of the EPPO Regulation has been described as a 'non-discrimination clause', in the sense that national courts cannot discriminate between domestic and foreign evidence (Giuffrida and Ligeti, 2019, p. 65). Instead of providing a supranational test for the admissibility of evidence, which is common

[127] Cf. EPPO Regulation, Rec. 65: 'The investigations and prosecutions of the EPPO should be guided by the principles of proportionality, impartiality and fairness towards the suspect or accused person. This includes the obligation to seek all types of evidence, inculpatory as well as exculpatory, either *motu proprio* or at the request of the defence.'

[128] EPPO Regulation, Art 2(1): '"Member State" means, except where otherwise indicated, in particular in Chapter VIII, a Member State which participates in enhanced cooperation on the establishment of the EPPO, as deemed to be authorised in accordance with the third subparagraph of Art 86(1) TFEU, or by virtue of a decision adopted in accordance with the second or third subparagraph of Art 331(1) TFEU'.

[129] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L 315/57, Art 10.

between Member States participating in the EPPO, Art 37(1) of the EPPO Regulation delegates the determination of the rules of admissibility of evidence to the national laws of criminal procedure (Burchard, 2021, p. 349). Therefore, Art 37(1) of the EPPO Regulation preserves the autonomy of national laws of criminal procedure in choosing their (in)admissibility tests in relation to evidence gathered in another Member State or in accordance with the law of another Member State (Burchard, 2021, pp. 349-350).

In this regard, courts of participating Member States may follow either or both of the following admissibility of evidence principles (Ligeti, Garamvölgyi, Ondrejová, von Galen, 2020, p. 204):

- *forum regit actum:* application of the law of the Member State where the trial takes place;
- *locus regit actum:* application of the law of the Member State where the evidence was gathered.

The wording 'on the mere ground' indicates that the admissibility of evidence, gathered in another Member State or in accordance with the law of another Member State, can be denied on other grounds than the ones mentioned, according to the national law on evidence applicable in the relevant court proceedings (Burchard, 2021, p. 349). For instance, a court may *deny* admissibility for evidence:

- gathered in a non-participating Member State or a third State (Burchard, 2021, p. 349).[130]
- 'not gathered pursuant to formalities or procedures . . . that its national criminal procedure dictates . . . (e.g., when a fiancée was not duly informed about his/her right to refuse to testify under German law, even if the interrogation took place in another Member State, where only married persons enjoy this right to refuse testimony)' (Burchard, 2021, p. 350).

In contrast, a court may *grant* admissibility for evidence:

- illegally obtained in another Member State, provided that its national criminal procedure allows for this (Burchard, 2021, p. 350);
- legally obtained in accordance with the law of another Member State, even if its national formalities or procedures were disregarded (Burchard, 2021, p. 350).

7.3. Respect of fundamental rights and principles

In deciding on the admissibility of evidence, national courts have to interpret their national laws of criminal procedure in light of fundamental rights and principles (Burchard, 2021, pp. 350-351). In this regard, Rec. 80 of the EPPO Regulation provides that trial courts should examine whether the admission of evidence, gathered in another Member State or in accordance with the law of another Member State, respects 'the fairness of the procedure and the suspect or accused person's rights of defence under the Charter'. Rec. 80 reiterates that the EPPO Regulation respects the fundamental rights and observes the principles recognized by (in their respective fields of application):

- Art 6 TEU[131];
- the Charter of Fundamental Rights of the EU, in particular Title VI;
- international law and international agreements to which the Union or all the Member States are party, including the ECHR;
- Member States' constitutions.

As highlighted in the EPPO Commentary, in order to respect and observe the aforementioned sources of fundamental rights and principles, national courts may deny the admissibility of evidence which would otherwise be admissible under their national laws of criminal procedure (Burchard, 2021, p. 351). The opposite also applies: national courts may admit evidence which would otherwise be inadmissible under their national laws of criminal procedure (Burchard, 2021, p. 351).

[130] Cf. EPPO Regulation, Art 2(1) on the definition of 'Member State'.

[131] TEU, Art 6, as amended by the Lisbon Treaty, recognizes the Charter as a legally binding source of EU primary law (art 6(1)), envisions the EU accession to the ECHR (art 6(2)), and provides that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of EU law (art 6(3)).

7.3.1. Charter of Fundamental Rights of the EU

Following the Treaty of Lisbon, the Charter is a legally binding source of EU primary law.[132] The Charter contains 50 rights, the majority of which are inspired by the ECHR and other international instruments. Pursuant to Art 51(1) of the Charter, the Charter applies to Member States 'only when they are implementing Union law'. Therefore, for its provisions to be invoked before national courts in EPPO proceedings, practitioners will first need to determine whether the Charter is actually applicable to such proceedings. In this regard, the authors of the EPPO Commentary argue that the Charter does become applicable when national courts become active, including by assessing evidence, in an EPPO proceeding, 'as the latter leads to the applicability of Union law' (Burchard, 2021, pp. 350-351).

As recalled in Rec. 80 of the EPPO Regulation, the following rights, within Title VI ('Justice') of the Charter, are of particular importance to the question of admissibility of evidence:

- Art 47: Right to an effective remedy and to a fair trial;
- Art 48: Presumption of innocence and right of defence;
- Art 49: Principles of legality and proportionality of criminal offences and penalties;
- Art 50: Right not to be tried or punished twice in criminal proceedings for the same criminal offence.

Pursuant to Art 52(3) of the Charter, insofar 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 said Convention'. In its case law, the CJEU held that certain rights under the Charter correspond to those in the ECHR, and should therefore be given the same meaning and scope as the latter are 'interpreted by the case-law of the European Court of Human Rights'.[133] For instance, the CJEU has previously held that insofar as Art 47 of the Charter corresponds to Art 6(1) of the ECHR,[134] it should be given the same meaning and scope as Art 6(1) ECHR, *as interpreted by the European Court of Human Rights*.[135]

7.3.2. ECHR

The issue of admissibility and assessment of evidence will generally fall under Art 6 ECHR, providing the right to a fair trial.[136] Nevertheless, it emerges from ECtHR case law that Art 6 ECHR 'does not lay down any rules on the admissibility of evidence or the way in which evidence should be assessed, these being primarily matters for regulation by national law and the national courts'.[137] Therefore, the European Court of Human Rights does not 'determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible'.[138] Instead, according to ECtHR case law, the central question is 'whether the proceedings as a whole, including the way in which the evidence was obtained, were fair'.[139] Accordingly, '[t]his involves an examination of the "unlawfulness" in question and, where a violation of another Convention right is concerned, the nature of the violation found'.[140]

According to ECtHR case law, '[i]n determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence were respected.'[141] In particular, 'whether the applicant

[132] TEU, Art 6(1); For an overview of EU human rights protection following the Treaty of Lisbon, see Douglas-Scott S (2011).

[133] C-400/10 PPU, *J. McB. v L. E.*, [2010], EU:C:2010:582, para. 53; C-467/18, *Rayonna prokuratura Lom*, [2019], EU:C:2019:765, para. 42; C-419/14, *WebMindLicenses*, [2015], EU:C:2015:832, para. 70; C-256/11, *Dereci and Others,* [2011], EU:C:2011:734, para. 70.

[134] C-279/09, *DEB,* [2010], EU:C:2010:811, para. 32.

[135] T-184/11 P, *Nijs / Cour des comptes,* [2012], EU:T:2012:236, para. 84 (emphasis added).

[136] For an overview of ECtHR case law on administration of evidence, see Guide on Art 6 of the European Convention on Human Rights: Right to a fair trial (criminal limb), updated on 31 August 2021, available at: https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf.

[137] ECtHR, Grand Chamber, 11 July 2017, *Moreira Ferreira v. Portugal (no. 2)*, Appl. no. 19867/12, para. 83; ECtHR, 1 March 2007, *Heglas v. the Czech Republic*, Appl. no. 5935/02, para. 84; ECtHR, 12 July 1988, *Schenk v. Switzerland*, Appl. no. 10862/84, paras. 45-46.

[138] ECtHR, Grand Chamber, 10 March 2009, *Bykov v. Russia*, Appl. no. 4378/02, para. 89.

[139] ECtHR, 27 October 2020, *Ayetullah Ay v. Turkey*, Appl. nos. 29084/07 and 1191/08, paras. 123-130; *Bykov v. Russia*, para. 89.

[140] *Bykov v. Russia*, para. 89.

[141] Ibid., para. 90.

was given the opportunity of challenging the authenticity of the evidence and of opposing its use'.[142] Moreover, 'the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy'.[143] Furthermore, '[w]hile no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker.'[144] In this regard, the Court also attaches weight 'to whether the evidence in question was or was not decisive for the outcome of the proceedings'.[145] Finally, '[i]n the light of the principle of presumption of innocence and a defendant's right to challenge any evidence against him, a criminal court must conduct a full, independent and comprehensive examination and assessment of the admissibility and reliability of evidence pertaining to the determination of the defendant's guilt, irrespective of how the same evidence may have been assessed in any other proceedings.'[146] Examples in ECtHR case law of evidence found to be in breach of the aforementioned principles include:

- evidence obtained as a direct result of ill treatment (breach of Art 3 ECHR – prohibition of torture);[147]
- unfair use of other incriminating witness and material evidence against an accused (breach of Art 6(1) – right to a fair trial);[148]
- use of self-incriminating statements in the proceedings (breach of Art 6(1) ECHR);[149]
- use of planted evidence against an accused (breach of Art 6(1) ECHR);[150]
- evidence obtained as a result of police incitement (breach of Art 6(1) ECHR);[151]
- evidence obtained by unlawful secret surveillance (breach of Art 8 ECHR – right to respect for private and family life).[152]

Conversely, the European Court of Human Rights, noting the increasing need for the use of special investigative methods, such as undercover techniques, in tackling organized crime and corruption, has found that such methods 'cannot in itself infringe the right to a fair trial'.[153] Nevertheless, 'on account of the risk of police incitement entailed by such techniques, their use must be kept within clear limits'.[154] It also found that the use of an illegal recording as the only item of evidence did not, in itself, conflict with the aforementioned principles of fairness, 'even where that evidence was obtained in breach of the requirements of the [ECHR], particularly those set out in Art 8'.[155]

7.4. Assessment of evidence

Art 37(2) of the EPPO Regulation contains the driving principle of the free assessment of evidence. It provides that '[t]he power of the trial court to freely assess the evidence presented by the defendant or the prosecutors of the EPPO shall not be affected by this Regulation.' As explained in the EPPO Commentary, '[t]he assessment of evidence, in this respect, relates to evaluating if a certain piece of evidence . . . has any probative value, and if yes, which probative value.' (Burchard, 2021, p. 351). The factors to be taken into account in assessing

[142] Ibid., para. 90.
[143] Ibid., para. 90.
[144] Ibid., para. 90.
[145] ECtHR, Grand Chamber, 1 June 2010, *Gäfgen v. Germany*, Appl. no. 22978/05, para. 164.
[146] ECtHR, 26 November 2019, *Belugin v. Russia*, Appl. no. 2991/06, para. 68.
[147] *Gäfgen v. Germany*, para. 167: 'incriminating real evidence obtained as a result of acts of violence, at least if those acts had to be characterised as torture, should never be relied on as proof of the victim's guilt, irrespective of its probative value'.
[148] ECtHR, 16 November 2017, *Ilgar Mammadov v. Azerbaijan (no. 2)*, Appl. no. 919/15, paras. 211-39.
[149] *Belugin v. Russia*, paras. 68-80.
[150] ECtHR, 10 April 2014, *Layijov v. Azerbaijan*, Appl. no. 22062/07, paras. 63-77.
[151] ECtHR, Grand Chamber, 5 February 2008, *Ramanauskas v. Lithuania,* Appl. no. 74420/01, paras. 54-74.
[152] *Bykov v. Russia*, paras. 69-83.
[153] *Ramanauskas v. Lithuania,* paras. 49-51.
[154] Ibid., para. 51.
[155] ECtHR, 26 April 2007, *Popescu v. Romania*, Appl. nos. 49234/99 and 71525/01, para. 106.

probative value will depend on the provisions of national laws of criminal procedure, and – depending on Member States' legal system – on any relevant national jurisprudence.

Art 37(2) of the EPPO Regulation only refers to the power of the *trial court*. A literal interpretation of Art 37(2) of the EPPO Regulation would, thus, exclude national courts involved in pre-trial proceedings (Burchard, 2021, p. 351). However, authors of the EPPO Commentary argue that 'given that the Regulation does not want to intervene in applicable national laws of criminal procedure, it seems reasonable to read paragraph 2 broadly to cover all national courts that become involved in EPPO proceedings' (Burchard, 2021, p. 352). The same question in relation to Art 37(1) of the EPPO Regulation as to the list of parties presenting evidence extends to Art 37(2) of the EPPO Regulation since again only the defendant and the prosecutors of the EPPO are mentioned. In this regard, authors of the EPPO Commentary reiterate their interpretation according to which Art 37(2) of the EPPO Regulation applies 'to all actors that have the power to present evidence under national law' (Burchard, 2021, p. 352).

Finally, as with the admissibility of evidence, national courts have to interpret their national laws of criminal procedure in light of the aforementioned sources of fundamental rights and principles, when assessing evidence (Burchard, 2021, p. 351).

7.5. Issues

7.5.1. Defence's ability to collect and present cross-border evidence

A first issue relates to the structural inequality of arms between the prosecution and the defence in relation to their respective ability to gather cross-border evidence (Allegrezza and Mosna, 2018, p. 158). The ability of the defence to *present* cross-border evidence in EPPO-related proceedings depends on the preliminary question to what extent it can actually *collect* such evidence, without relying solely on the EPPO's obligation to seek both inculpatory and exculpatory evidence (cf. Art 5(4) EPPO Regulation). Art 41(3) of the EPPO Regulation provides that '[w]ithout prejudice to the rights referred to in this Chapter, 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* . . . and to request the EPPO to obtain such measures on behalf of the defence' (emphasis added). The wording 'under the applicable national law' of this provision suggests that 'it is a question of the national law governing the proceeding (in case of investigations and prosecutions: the national law of the EDP handling the case) whether a procedural rights exists in a given situation' and that 'the right generally only applies in the specific context of this proceeding, and not Union-wide' (Brodowski, 2021, p. 399). In this regard, it should be noted that the right of the defence to collect evidence in cross-border investigations is not a universally acknowledged right under national laws of criminal procedure. As such, if national law does not provide a right for the defence to present evidence, the defence can only rely on the EPPO's abidance by Art 5(4) of the EPPO Regulation. Indeed, authors of the EPPO Commentary argue that 'in light of the general provision in Art 5(4), the EPPO should be willing to fulfil demands to obtain evidence on behalf of the defence, even if the specific requirements of national law have not been met' (Brodowski, 2021, p. 399).

7.5.2. Evidence gathered in administrative proceedings

Another issue concerns the admissibility, in EPPO proceedings, of evidence gathered in administrative proceedings. For instance, under Art 101(3)(c) of the EPPO Regulation, EPPO may request the European Anti-Fraud Office (OLAF) to conduct administrative investigations which may result in the gathering of evidence that may be of interest in EPPO proceedings. Nevertheless, 'OLAF-and EPPO-collected evidence have different status' (Giuffrida and Ligeti, 2019, p. 282), owing to the different nature of the two bodies: OLAF belonging to the administrative track and the EPPO to the criminal justice track (Weyembergh and Brière, 2018). The recent Regulation (EU, Euratom) 2020/2223 amends Art 11(2) of Regulation 883/2013 (OLAF Regulation)[156] to provide

[156] Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the

that OLAF reports, 'together with all evidence in support and annexed thereto, shall constitute admissible evidence':

> in *criminal proceedings* of the Member State in which their use proves necessary in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors and shall be subject to the same evaluation rules as those applicable to administrative reports drawn up by national inspectors and shall have the same evidentiary value as such reports.[157]

Art 11(2) of Regulation 883/2013, as amended, continues by adding that '[t]he power of the CJEU and national courts and competent bodies in administrative and criminal proceedings to freely assess the evidential value of the reports drawn up by the Office shall not be affected by this Regulation.'[158] Besides the rule providing for equivalence between OLAF reports and reports by national administrative inspectors, neither the OLAF Regulation nor the EPPO Regulation pose any substantial criteria for the (in)admissibility of evidence collected in administrative proceedings. Given that the level of procedural safeguards, concerning evidence in criminal proceedings, might not be the same in relation to evidence in administrative proceedings, defence lawyers might have an interest in challenging the latter's admissibility.

8. Judicial review of EPPO measures

Considering the scope of its investigatory and prosecutorial powers, the EPPO's procedural acts or failures to act might interfere with individuals' rights and freedoms under Union law (Novokmet, 2017, p. 376). Therefore, it is imperative that the EPPO's acts or failures to act are subject to effective judicial review (Novokmet, 2017, p. 376). The principle of effective judicial protection of individuals' rights under EU law is enshrined in the second subparagraph of Art 19(1) TEU which provides that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.'[159] This provision 'gives concrete expression to the value of the rule of law stated in Art 2 TEU',[160] and has been recognized by the CJEU as 'a general principle of EU law stemming from the constitutional traditions common to the Member States', and reaffirmed by Art 47 of the Charter.[161] According to the CJEU, '[t]he very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law.'[162] In so far as the European Union 'is a Union based on the rule of law',[163] 'individual parties have the right to challenge before the courts the legality of any decision or other national measure relating to the application to them of an EU act'.[164] In this

European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 [2013] OJ L 248/1, as amended ('OLAF Regulation').

[157] Regulation (EU, Euratom) 2020/2223 of the European Parliament and of the Council of 23 December 2020 amending Regulation (EU, Euratom) No 883/2013, as regards cooperation with the European Public Prosecutor's Office and the effectiveness of the European Anti-Fraud Office investigations [2020] OJ L 437/49, Art 9b referring to Art 11(2)(b) of the OLAF Regulation (emphasis added).

[158] Ibid.

[159] For an overview of this principle see Prechal and Widdershoven (2020).

[160] C-216/18 PPU, *Minister for Justice and Equality (Deficiencies in the system of justice),* [2018], EU:C:2018:586, para. 50; C-64/16, *Associação Sindical dos Juízes Portugueses,* [2018], EU:C:2018:117, para. 32.

[161] C-64/16, para. 35; C-432/05, *Unibet,* [2007], EU:C:2007:163, para. 37; C-279/09, *DEB,* [2010], EU:C:2010:811, paras. 29-33; C-222/84, *Johnston,* [1986], EU:C:1986:206, para. 18.

[162] C-64/16, para. 36; C-72/15, *Rosneft,* [2017], EU:C:2017:236, para. 73; C‑ 562/13, *Abdida,* [2014], EU:C:2014:2453, para. 45; C‑ 362/14, *Schrems,* [2015], EU:C:2015:650, para. 95.

[163] In the seminal case *Les Verts*, the CJEU held that the Community is 'based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty', see C-294/83, *Les Verts v. Parliament,* [1986], EU:C:1986:166, para. 23.

[164] C-64/16, para. 31; C-583/11 P, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council,* [2013], EU:C:2013:625, paras. 91 and 94.

context, Member States are required to 'establish a system of legal remedies and procedures ensuring effective judicial review' in the fields covered by EU law.[165]

Established as a 'body of the Union',[166] the EPPO's procedural acts and failures to act would normally have been subject to judicial review before the CJEU, in accordance with Arts 263 and 265 TFEU (Herrnfeld, 2021, p. 402). However, Art 86(3) TFEU enabled the EPPO Regulation to determine 'the rules applicable to the judicial review of procedural measures' taken by the EPPO 'in the performance of its functions'. As explained in Rec. 86 of the EPPO Regulation, the competence, under Art 86(3) TFEU, to determine the rules applicable to judicial review 'reflects the specific nature of the tasks and structure of the EPPO, which is different from that of all other bodies and agencies of the Union and requires special rules regarding judicial review'. Accordingly, Art 42 of the EPPO Regulation gives the competence to exercise judicial review to national courts (Art 42(1) EPPO Regulation) and the CJEU (Art 42(2)-(8) EPPO Regulation).

8.1. Competence of national courts

Art 42(1) of the EPPO Regulation deals with the national courts' competence for judicial review. It provides that '[p]rocedural 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.' It continues by stating that '[t]he same applies to 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.'

Three main reasons explain national courts' competence to exercise judicial review under Art 42(1) of the EPPO Regulation. Firstly, the EPPO's hybrid nature, in that it is embedded in national criminal justice systems whilst being an EU body (Herrnfeld, 2021, pp. 405-406). Secondly, the fact that despite being an EU body, the EPPO applies both EU law and national law throughout its operations, with national law, in principle, falling outside the CJEU's jurisdiction.[167] Thirdly, practical reasons, in that national courts would be better placed to access case files, that it would be more convenient for defendants to go to national courts rather than the CJEU, and the need to avoid overburdening the CJEU with a potential deluge of judicial review applications for the whole range of the EPPO's acts (Herrnfeld, 2021, p. 406).

According to Rec. 89 of the EPPO Regulation, the Regulation is 'without prejudice to the possibility for a Member State of the European Union, the European Parliament, the Council or the Commission to bring actions for annulment in accordance with the second paragraph of Art 263 TFEU and to the first paragraph of Art 265 TFEU, and to infringement proceedings under Arts 258 and 259 TFEU'. In other words, Art 42(1) of the EPPO Regulation preserves the CJEU's competence over actions brought by privileged applicants (EU Member States, Commission, Council, European Parliament) against the EPPO's procedural acts or failures to adopt such acts, under the applicable TFEU provision.

8.1.1. Scope of competence

1. <u>Procedural acts of the EPPO intended to produce legal effects vis-à-vis third parties</u>

(a) *Procedural acts*

The term 'procedural acts' is defined neither by the EPPO Regulation nor by reference to national law. According to CJEU case law, 'it follows from the need for a uniform application of EU law, and from the principle of equality, that the 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 European Union, which must take into account the

[165] C-64/16, para. 34; C-583/11 P, paras. 100-101; C-50/00 P, *Unión de Pequeños Agricultores* v *Council,* [2002], EU:C:2002:462, para. 41; C-263/02 P, *Commission v Jégo-Quéré* [2004], EU:C:2004:210, para. 31.

[166] EPPO Regulation, Art 3(1).

[167] TEU, Art 19(1); C-50/00 P, para. 43; C-62/14, *Gauweiler and Others,* [2015], EU:C:2015:400, para. 28.

context of that provision and the purpose of the legislation in question'.[168] It follows that the term 'procedural acts' should be given an autonomous and uniform interpretation throughout the EU (Herrnfeld, 2021, p. 409).

Authors of the EPPO Commentary point out that Art 42 of the EPPO Regulation differentiates between 'procedural acts' and 'administrative decisions', the latter mentioned in Art 42(8) of the EPPO Regulation (Herrnfeld, 2021, p. 409). According to Rec. 89 of the EPPO Regulation, 'administrative decisions' are 'decisions that are not taken in the performance of [the EPPO's] functions of investigating, prosecuting or bringing to judgement'. Therefore, the EPPO Commentary suggests that 'any decision or other act taken by the EPPO in the course of the latter's functions may be considered as "procedural act" of the EPPO' (Herrnfeld, 2021, p. 409).

(b) *Of the EPPO*

Art 42(1) of the EPPO Regulation applies only to procedural acts of the EPPO. As explained in the EPPO Commentary, this article does not seek to give judicial review competence to national courts in relation to 'procedural acts of a national judge/court even when acting on request of the EPPO' (Herrnfeld, 2021, p. 410). The latter remain under national courts' judicial review competence, based on applicable national law (Herrnfeld, 2021, p. 410). Therefore, identifying the author of the act in question will determine the legal basis for national courts' competence to exercise judicial review: Art 42(1) of the EPPO Regulation for procedural acts of the EPPO or applicable national law for acts of a national judge/court.

(c) *Legal effects*

Only the EPPO's procedural acts that are intended to produce legal effects vis-à-vis third parties are subject to judicial review under Art 42(1) of the EPPO Regulation. When an EPPO procedural act is intended to produce legal effects vis-à-vis third parties it is defined neither in the EPPO Regulation nor by reference to national law. Therefore, it should be given an autonomous and uniform interpretation throughout the EU (Herrnfeld, 2021, p. 410).

Rec. 87 of the EPPO Regulation provides certain examples of EPPO procedural acts *intended* or *not intended* to produce legal effects vis-à-vis third parties. It states that '[p]rocedural acts that relate to the choice of the Member State whose courts will be competent to hear the prosecution . . . are intended to produce legal effects vis-à-vis third parties and should therefore be subject to judicial review by national courts, at the latest at the trial stage'. However, the appointment of experts and the reimbursement of witness costs are examples of EPPO procedural acts which are not intended to produce legal effects vis-à-vis third parties, and therefore are not subject to judicial review under Art 42(1) of the EPPO Regulation (see Rec. 87 EPPO Regulation).

As explained in Rec. 87 of the EPPO Regulation, 'Member States should not be required to provide for judicial review by the competent national courts of procedural acts which are not intended to produce legal effects vis-à-vis third parties'. However, Rec. 87 further explains that '[w]here national law provides for judicial review concerning procedural acts which are not intended to produce legal effects vis-à-vis third parties . . . this Regulation should not be interpreted as affecting such legal provisions.' In other words, the EPPO Regulation preserves national courts' competence, *under the applicable national law*, to exercise judicial review over EPPO procedural acts not intended to produce legal effects vis-à-vis third parties. If the applicable national law does not provide for judicial review for such acts, the EPPO Regulation does not oblige the Member State to change its law.

(d) *Third parties*

According to Rec. 87 of the EPPO Regulation, the category 'third parties' includes 'the suspect, the victim, and other interested persons whose rights may be adversely affected by such [procedural] acts'.

2. <u>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 the Regulation</u>

[168] C-108/16 PPU, *Dworzecki,* [2016], EU:C:2016:346, para. 28; C‑ 494/14, *Axa Belgium*, [2015], EU:C:2015:692, para. 21; C-66/08, *Kozłowski*, [2008], EU:C:2008:437, para. 42.

Under Art 42(1) of the EPPO Regulation, national courts are also competent to exercise judicial review over failures of the EPPO to adopt procedural acts which are intended to produce legal effects vis-à-vis third parties. However, only those EPPO procedural acts intended to produce legal effects vis-à-vis third parties, which the EPPO was *legally required to adopt under the EPPO Regulation*, are subject to judicial review. The EPPO Regulation does not provide examples of such acts. One could consider the EPPO's failure to dismiss a case when it was legally required to do so under Art 39 of the EPPO Regulation as falling within the scope of Art 42(1) of the EPPO Regulation. As with EPPO procedural acts not intended to produce legal effects vis-à-vis third parties, the EPPO Regulation preserves national courts' competence to exercise judicial review, *under the applicable national law*, over 'legal actions concerning other failures to act' (see Rec. 87 EPPO Regulation).

8.1.2. Exercise of competence

(a) *Requirements and procedures laid down by national law*

Under Art 42(1) of the EPPO Regulation, the competent national courts shall exercise judicial review 'in accordance with the requirements and procedures laid down by national law'. As explained in the EPPO Commentary, Art 42(1) of the EPPO Regulation 'does not by itself award a right to request judicial review of procedural acts of the EPPO at a national court' (Herrnfeld, 2021, p. 414). Instead, it is the applicable national law that will determine the requirements and procedures for the exercise of such right (Herrnfeld, 2021, p. 414). For instance, it is the applicable national law that will determine the time limits for a judicial review request (Herrnfeld, 2021, p. 414).

(b) *Grounds for judicial review*

According to Rec. 88 of the EPPO Regulation, '[w]hen national courts review the legality of such acts, they may do so on the basis of Union law, including this Regulation, and also on the basis of national law, which applies to the extent that a matter is not dealt with by this Regulation.' On the basis of Union law, judicial review may be carried out on the following grounds mentioned in Art 263(2) TFEU:

- lack of competence;
- infringement of an essential procedural requirement;
- infringement of the Treaties or of any rule of law relating to their application; or
- misuse of powers.

For instance, a potential ground for judicial review raised by defence lawyers could be that an EPPO procedural act, intended to produce legal effects vis-à-vis third parties, infringes a provision of the Charter (Herrnfeld, 2021, p. 415).

(c) *Effects of judicial review*

The potential effects of a judicial review decision by national courts will depend on the applicable national law (Herrnfeld, 2021, p. 417). As explained in the EPPO Commentary, national courts may declare the procedural act void, but may also 'declare an investigation measure ordered by the EPPO to have been taken not in compliance with applicable national law' or may take decisions on substance such as 'to order that the suspect is given access to the case file' (Herrnfeld, 2021, p. 418).

8.1.3. Effective remedies

By reason of the principle of sincere cooperation, set out in Art 4(3) TEU, Member States are obliged to 'ensure, in their respective territories, the application of and respect for EU law'.[169] In this regard, while Art 42(1) of the EPPO Regulation leaves it to the applicable national law to define the requirements and procedures for the exercise of judicial review by a national court, Member States are required to 'provide remedies sufficient to

[169] See also C-64/16, para. 34; Opinion 1/09, Agreement creating a Unified Patent Litigation System, [2011], EU:C:2011:123, para. 68.

ensure effective legal protection in the fields covered by Union law'[170] (Herrnfeld, 2021, pp. 418-419). This obligation flows from EU primary law, and more specifically the principle of effective judicial protection enshrined in Art 19(1) TEU and the right to an effective remedy before a tribunal enshrined in Art 47 of the Charter. Therefore, EU primary law requires Member States to provide effective judicial review for EPPO procedural acts intended to produce legal effects vis-à-vis third parties, or for the failures of the EPPO to adopt such acts when it was legally required to do so under the EPPO Regulation. If the applicable national law of a Member State does not provide for judicial review and/or an effective remedy, the European Commission could initiate an infringement procedure against the concerned Member State in accordance with Art 258 TFEU.

Furthermore, Rec. 87 of the EPPO Regulation underlines that Member States should respect the principles of equivalence and effectiveness, which 'embody the general obligation on the Member States to ensure judicial protection of an individual's rights under EU law'.[171] The principle of equivalence implies that 'national procedural rules governing actions for the protection of individual rights granted by Union law must be no less favourable than those governing similar domestic actions' (Rec. 87 EPPO Regulation).[172] In other words, the judicial review avenues for EPPO procedural acts before national courts must be no less favourable than those for domestic acts. The principle of effectiveness implies that national procedural rules 'must not render practically impossible or excessively difficult the exercise of rights conferred by Union law' (Rec. 87 EPPO Regulation).[173] In other words, it must not be practically impossible or excessively difficult to request judicial review of EPPO procedural acts before national courts in accordance with national procedural rules.

8.2. Competence of the CJEU

Under art 42(2)-(8) of the EPPO Regulation, the CJEU has competence over:

- requests for preliminary rulings;
- EPPO decisions to dismiss a case;
- disputes concerning compensation for damage caused by the EPPO;
- disputes concerning arbitration clauses in contracts concluded by the EPPO;
- disputes concerning staff-related matters;
- dismissal of the European Chief Prosecutor or European Prosecutors; and
- EPPO decisions that affect the data subjects' rights under Chapter VIII of the EPPO Regulation, EPPO decisions which are not procedural acts, and any other administrative decisions.

It is also reiterated that the EPPO Regulation is without prejudice to the CJEU's jurisdiction over actions for annulment in accordance with Art 263(2) TFEU and Art 265(1) TFEU, and infringement proceedings under arts 258 and 259 TFEU, brought by privileged applicants (Member States of the European Union, the European Parliament, the Council or the Commission) (cf. Rec. 89 EPPO Regulation).

8.2.1. Preliminary rulings in accordance with Art 267 TFEU

The CJEU's competence to give preliminary rulings is provided in Art 19(3)(b) TEU, Art 267 TFEU, and is further elaborated in Title III of the Rules of Procedure of the Court of Justice.[174] Useful guidance on preliminary ruling proceedings is also provided in the CJEU's Recommendations to national courts and tribunals (CJEU's Recommendations).[175] The preliminary ruling procedure constitutes a fundamental mechanism of EU law, enabling a judicial dialogue between national courts of Member States and the CJEU, with the ultimate

[170] EPPO Regulation, Rec. 88.

[171] C-403/16, *El Hassani*, [2017], EU:C:2017:960, para. 28; C-317/08, *Alassini and Others,* [2010], EU:C:2010:146, para. 49; C-268/06, *Impact*, [2008], EU:C:2008:223, para. 47; C-33/76, *Rewe-Zentralfinanz and Rewe-Zentral*, [1976], EU:C:1976:188, paras. 5-6.

[172] C-234/17, *XC and Others*, [2018], EU:C:2018:853, para. 22 (and the case-law cited).

[173] Ibid.

[174] Rules of Procedure of the Court of Justice [2012] OJ L 265/1, Title III.

[175] Court of Justice of the European Union, Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings [2018] OJ C 257/1.

objective of ensuring the uniform interpretation and application of EU law within the European Union (CJEU's Recommendations, para. 1). Furthermore, as underlined by the CJEU in the *Foto-Frost* case, 'requests for preliminary rulings, like actions for annulment, constitute means for reviewing the legality of acts of the Community institutions'.[176]

Several key characteristics of the preliminary ruling procedure should be recalled. Firstly, it flows from the text of Art 19(3)(b) TEU that only 'courts or tribunals of the Member States' have the exclusive initiative to request a preliminary ruling on the interpretation or validity of EU law. The role of the defence and the EPPO is, therefore, limited to *inviting* the court or tribunal to submit a request. As explained in the CJEU's Recommendations, '[i]n so far as it is called upon to assume responsibility for the subsequent judicial decision, it is for the national court or tribunal before which a dispute has been brought – and for that court or tribunal alone – to determine, in the light of the particular circumstances of each case, both the need for a request for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court' (CJEU's Recommendations, para. 3). The terms 'court or tribunal' constitute a 'self-standing concept of EU law' (CJEU's Recommendations, para. 4). According to CJEU settled case law, 'in order to determine whether a body making a reference is a "court or tribunal" for the purposes of Art 267 TFEU, which is a question governed by EU law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent'.[177]

Secondly, the request for a preliminary ruling 'must concern the interpretation or validity of EU law, not the interpretation of rules of national law or issues of fact raised in the main proceedings' (CJEU's Recommendations, para. 8). In this regard, the referring court or tribunal should 'set out all the relevant matters of fact and of law that have prompted it to consider that any provisions of EU law may be applicable in the case' (CJEU's Recommendations, para. 9). The CJEU will dismiss preliminary ruling requests which are based on general or hypothetical questions.[178]

Thirdly, according to Art 267 TFEU, whereas courts or tribunals of Member States *may* request a preliminary ruling if they consider that a decision on the question is necessary to enable them to give judgment, those courts or tribunals of Member States, 'against whose decisions there is no judicial remedy under national law', are obliged to request a preliminary ruling. In the context of requests for preliminary rulings on the validity of EU acts, the CJEU has held that 'where a national court or tribunal considers that one or more arguments for invalidity of a European Union act, put forward by the parties or, as the case may be, raised by it of its own motion, are well founded, it is incumbent upon it to stay proceedings and to make a reference to the Court for a preliminary ruling on the act's validity, the Court alone having jurisdiction to declare a European Union act invalid'.[179]

In *CILFIT*, the CJEU laid down the following three exceptions[180] to the obligation to request a preliminary ruling:

(i) the question is irrelevant for the resolution of the dispute;[181]
(ii) the provision of EU law in question has already been interpreted by the Court ('acte éclairé');[182]
(iii) the correct interpretation of EU law is so obvious as to leave no scope for any reasonable doubt ('acte clair')[183].

It should be noted that a violation of the obligation to request a preliminary ruling entails a violation of Art 267 TFEU, which may lead to an infringement procedure in accordance with Art 258 TFEU but may also engender the liability of the Member State in question for damage caused to the individuals as a result of the breach of

[176] C-314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost*, [1987], EU:C:1987:452, para. 16.
[177] C-274/14, *Banco de Santander*, [2020], EU:C:2020:17, para. 51 (and case law cited).
[178] C-244/80, *Foglia v Novello,* [1981], EU:C:1981:302, para. 18.
[179] C-344/04, *IATA and ELFAA*, [2006], EU:C:2006:10, paras. 27 and 30 (and case law cited).
[180] See also a recent Grand Chamber judgment of the CJEU on the CILFIT criteria, C-561/19, *Consorzio Italian Management e Catania Multiservizi and Catania Multiservizi*, [2021], EU:C:2021:799.
[181] C-283/81, *CILFIT*, [1982], EU:C:1982:335, para. 10.
[182] Ibid., para. 14.
[183] Ibid., para. 16.

EU law.[184] Finally, the CJEU's role is limited to giving a useful reply to the questions referred to it by courts or tribunals of Member States, as it is 'for the referring court or tribunal to draw case-specific conclusions, if necessary by disapplying the rule of national law held incompatible with EU law' (CJEU's Recommendations, para. 11).

(a) *Validity of procedural acts of the EPPO*

Pursuant to Art 42(2)(a) of the EPPO Regulation, the CJEU has jurisdiction 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 Union law'. Art 42(2)(a) of the EPPO Regulation only applies to procedural acts of the EPPO (see above). As previously explained, the CJEU is not competent to give preliminary rulings on the validity of national law. The wording 'directly on the basis of Union law' is meant to clarify that 'the preliminary reference procedure under Art 267 TFEU . . . is available only where the question of the validity of a procedural act is raised *vis-à-vis* Union law', such as the provisions of the EPPO Regulation or the Charter (Herrnfeld, 2021, p. 425). The term 'directly' is meant to clarify that 'national courts may not refer to the Court of Justice preliminary questions on the validity of the procedural acts of the EPPO with regard to national procedural law or to national measures transposing Directives, even if [the] Regulation refers to them' (Rec. 88 EPPO Regulation; Herrnfeld, 2021, p. 425).

(b) *Interpretation or validity of Union law*

Pursuant to Art 42(2)(b) of the EPPO Regulation, the CJEU has jurisdiction to give preliminary rulings concerning the interpretation or the validity of provisions of Union law, including the EPPO Regulation. This provision merely reflects the CJEU's existing competence under Art 267 TFEU (Herrnfeld, 2021, p. 431).

(c) *Conflict of competence between the EPPO and the competent national authorities*

Pursuant to Art 42(2)(c) of the EPPO Regulation, the CJEU has jurisdiction to give preliminary rulings concerning the interpretation of Arts 22 and 25 of the EPPO Regulation 'in relation to any conflict of competence between the EPPO and the competent national authorities'.[185] Art 22 concerns the EPPO's material competence, whereas Art 25 concerns the exercise of the EPPO's competence.

Art 25(6) of the EPPO Regulation provides that '[i]n the case of disagreement between the EPPO and the national prosecution authorities over the question of whether the criminal conduct falls within the scope of Art 22(2), or (3) or Art 25(2) or (3), the national authorities competent to decide on the attribution of competences concerning prosecution at national level shall decide who is to be competent for the investigation the case.' As explained in the EPPO Commentary, Art 42(2)(c) of the EPPO Regulation 'presupposes that the national authority competent in accordance with Art 25(6) is a court or tribunal within the meaning of Art 267 TFEU, which would allow such authority to request, in accordance with Art 267(2) TFEU, a preliminary ruling on the interpretation of Arts 22 and 25 of the Regulation' (Herrnfeld, 2021, p. 432). However, since Art 25(6) of the EPPO Regulation allows Member States to 'specify the national authority which will decide on the attribution of competence', such national authority may not be a court or tribunal (Herrnfeld, 2021, p. 432). In this context, the purpose of Art 42(2)(c) of the EPPO Regulation is to 'require Member States to ensure that judicial remedies are possible against the decisions of that authority, so that eventually the national court that decides on such judicial remedy may request a preliminary ruling', in accordance with Art 42(2)(c) (Herrnfeld, 2021, pp. 432-433).

8.2.2. EPPO decisions to dismiss a case

By way of derogation from Art 42(1), Art 42(3) of the EPPO Regulation provides that 'the decisions of the EPPO to dismiss a case, in so far as they are contested directly on the basis of Union law, shall be subject to review before the Court of Justice', in accordance with Art 263(4) TFEU. Art 42(3) of the EPPO Regulation refers to Art 263(4) TFEU because the latter only applies to actions for annulment by natural or legal persons. As previously

[184] C-224/01, *Köbler,* [2003], EU:C:2003:513, paras. 30-50.

[185] EPPO Regulation, Rec. 62: '[t]he notion of competent national authorities should be understood as any judicial authorities which have competence to decide on the attribution of competence in accordance with national law.'

explained, under Rec. 89 EPPO Regulation, the EPPO Regulation is without prejudice to the CJEU's jurisdiction over actions for annulment brought by privileged applicants (Member States, European Parliament, Council, Commission), in accordance with Art 263(2) TFEU. Furthermore, as explained in the EPPO Commentary, Art 42(3) of the EPPO Regulation only applies to the EPPO's decisions to dismiss a case under Art 39(1) of the EPPO Regulation (Herrnfeld, 2021, p. 433). It does not apply to:

- simplified prosecution procedures aiming at the final disposal of a case (Art 40 EPPO Regulation);[186]
- decisions by handling EDPs to '(temporarily) suspend or (provisionally) terminate the investigation by applying relevant provisions of national criminal procedure law' (Herrnfeld, 2021, p. 433);
- when the EPPO determines, in the context of verification of information, that 'there are no grounds to initiate an investigation or to exercise the right of evocation' (Art 24(6) EPPO Regulation) (Herrnfeld, 2021, p. 433);
- an EPPO decision not to exercise its right of evocation (Art 27 EPPO Regulation) (Herrnfeld, 2021, p. 433);
- when the EPPO closes a case because, following a referral, the national authority decides to open an investigation (Art 34(7) EPPO Regulation) (Herrnfeld, 2021, p. 433); and
- failure of the EPPO to dismiss a case when it was legally required to do so.[187]

According to Rec. 81 of the EPPO Regulation, '[t]he grounds for dismissal of a case are exhaustively laid down in this Regulation.' More specifically, Art 39(1)(a)-(g) of the EPPO Regulation provides the following grounds:

- the death of the suspect or accused person or winding up of a suspect or accused legal person;
- the insanity of the suspect or accused person;
- amnesty granted to the suspect or accused person;
- immunity granted to the suspect or accused person, unless it has been lifted;
- expiry of the national statutory limitation to prosecute;
- the suspect's or accused person's case has already been finally disposed of in relation to the same acts;
- the lack of relevant evidence.

EPPO decisions to dismiss a case are subject to judicial review before the CJEU only insofar as they are *contested directly on the basis of Union law*. For instance, applications for judicial review, under Art 42(3) of the EPPO Regulation, will have to contest a decision to dismiss a case directly on the basis of the incorrect application of Art 39(1) of the EPPO Regulation by the EPPO (Herrnfeld, 2021, p. 433). One such situation could be when the applicant considers that Art 39(1) of the EPPO Regulation was incorrectly applied because prosecution had *not* become impossible, pursuant to the law of the Member State of the handling EDP. Conversely, if EPPO decisions to dismiss a case are contested *on the basis of national law*, judicial review may be exercised before national courts under the applicable national law (Herrnfeld, 2021, pp. 433-434).

8.2.3. Other competences

(a) *Compensation for damage*

Art 42(4) of the EPPO Regulation concerns the EPPO's non-contractual liability. It states that the CJEU has jurisdiction 'in accordance with Art 268 TFEU in any dispute relating to compensation for damage caused by the EPPO'.[188] Art 113 of the EPPO Regulation provides the EPPO's general regime of liability. Art 113(3) of the EPPO Regulation provides that '[i]n the case of non-contractual liability, the EPPO shall, in accordance with the general principles common to the laws of Member States of the European Union make good any damage by the EPPO or its staff in the performance of their duties in so far as it may be imputed to them.' Art 113(4) of the

[186] As explained in the EPPO Commentary, decisions taken under Art 40 of the EPPO Regulation remain subject to judicial review before national courts under Art 42(1) of the EPPO Regulation (Herrnfeld, 2021, p. 433).

[187] This would fall under Art 42(1) of the EPPO Regulation.

[188] TFEU, Art 268: '[t]he Court of Justice of the European Union shall have jurisdiction in disputes relating to compensation for damage provided for in the second and third paragraphs of Art 340.'; Art 340(2) TFEU provides that '[i]n the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.'

EPPO Regulation provides that Art 113(3) 'shall also apply to damage caused through the fault of a European Delegated Prosecutor in the performance of his/her duties'. Therefore, Art 42(4) of the EPPO Regulation gives the CJEU competence over disputes relating to compensation for damage caused by the EPPO, as set out in Art 113(3) and (4) of the EPPO Regulation. For instance, when an EDP, through his/her fault, causes damage in the performance of his/her duties, national courts are not competent to hear the dispute, even if the damage relates to an EPPO procedural act (Herrnfeld, 2021, p. 434).

(b) *Arbitration clauses*

Art 42(5) of the EPPO Regulation concerns the EPPO's contractual liability. It states that the CJEU has jurisdiction 'in accordance with Art 272 TFEU in any dispute concerning arbitration clauses contained in contracts concluded by the EPPO'.[189] Art 42(5) must be read together with Art 113 of the EPPO Regulation. Art 113(1) provides that '[t]he contractual liability of the EPPO shall be governed by the law applicable to the contract in question.' Art 113(2) provides that '[t]he Court of Justice shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by the EPPO.' Finally, Art 113(6) provides that '[t]he national courts of the Member States of the European Union competent to deal with disputes involving the contractual liability of the EPPO as referred to in this article shall be determined by reference to Regulation (EU) No 1215/2012 of the European Parliament and of the Council.'[190] Therefore, national courts are competent to deal with disputes involving the EPPO's contractual liability, except for disputes concerning arbitration clauses in contracts concluded by the EPPO, as the latter fall within the CJEU's jurisdiction.

(c) *Staff-related matters*

Pursuant to Art 42(6) of the EPPO Regulation, the CJEU has jurisdiction 'in accordance with Art 270 TFEU in any dispute concerning staff-related matters'.[191] Pursuant to Art 96(1) of the EPPO Regulation, the European Chief Prosecutor, the European Prosecutors, the EDPs, the Administrative Director, and the staff of the EPPO are subject to the Union's Staff Regulations and the Conditions of Employment.[192] The latter also sets out the limits and conditions for the CJEU's jurisdiction in any dispute concerning staff-related matters.

(d) *Dismissal of the European Chief Prosecutor or European Prosecutors*

Pursuant to Art 42(7) of the EPPO Regulation, the CJEU has jurisdiction 'on the dismissal of the European Chief Prosecutor or European Prosecutors, in accordance, respectively, with Art 14(5) and Art 16(5)'. Concerning the European Chief Prosecutor, Art 14(5) of the EPPO Regulation provides that '[t]he Court of Justice may, upon the application of the European Parliament, of the Council or of the Commission, dismiss the European Chief Prosecutor if it finds that he/she is no longer able to perform his/her duties, or that he/she is guilty of serious misconduct.' Concerning the European Prosecutors, Art 16(5) of the EPPO Regulation provides that '[t]he Court of Justice may, upon application of the European Parliament, of the Council or of the Commission, dismiss a European Prosecutor if it finds that he/she is no longer able to perform his/her duties or that he/she is guilty of serious misconduct.'

(e) *Data subjects' rights and administrative decisions of the EPPO*

Finally, pursuant to Art 42(8) of the EPPO Regulation, the CJEU has jurisdiction to exercise judicial review, in accordance with Art 263(4) TFEU, over the EPPO's decisions affecting the data subjects' rights under Chapter VIII of the EPPO Regulation. Art 42(8) of the EPPO Regulation also states that the CJEU has jurisdiction to

[189] TFEU, Art 272: '[t]he Court of Justice of the European Union shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Union, whether that contract be governed by public or private law.'

[190] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351/1, as amended.

[191] TFEU, Art 270 TFEU: '[t]he Court of Justice of the European Union shall have jurisdiction in any dispute between the Union and its servants within the limits and under the conditions laid down in the Staff Regulations of Officials and the Conditions of Employment of other servants of the Union.'

exercise judicial review for the EPPO's decisions which are not procedural acts, such as those concerning the right of public access to documents or decisions dismissing EDPs adopted pursuant to Art 17(3) of the EPPO Regulation, or any other administrative decisions.

CHAPTER V: EPPO RELATIONS WITH ITS PARTNERS AND NON-PARTICIPATING MEMBER STATES

by Constantinides P., Ligeti K.

In carrying out its tasks for the protection of the financial interests of the Union, the EPPO needs strong cooperation with its partners: Eurojust, OLAF, Europol, and other Union institutions, bodies, offices, and agencies (IBOAs). Although each of them has a different mandate and competence, all of them are involved, in some way, in the protection of the financial interests of the Union. In this context, the mutual cooperation between the EPPO and its partners is key to the effective performance of the EPPO's tasks. Moreover, insofar as the EPPO's cases might involve non-participating Member States (NPMS), there is a clear need to articulate the practical modalities for their cooperation. Amongst others, the EPPO has concluded working arrangements with Eurojust, Europol, OLAF, ECA, the European Commission, and the Office of the Prosecutor General of Hungary.[193]

1. Common provisions

Art 99 of the EPPO Regulation lays down the common provisions on the EPPO'S relations with its partners. These concern the establishment and maintenance of cooperative relations (Art 99(1) EPPO Regulation), the exchange of information (Art 99(2) EPPO Regulation), and the conclusion of working arrangements (Art 99(3) EPPO Regulation).

[193] Working Arrangement Between the European Court of Auditors ('ECA') and the European Public Prosecutor's Office ('EPPO') ('EPPO-ECA Working Arrangement'); Agreement Establishing the Modalities of Cooperation Between the European Commission and the European Public Prosecutor's Office ('EPPO-Commission Agreement');Working Arrangement Between the European Public Prosecutor's Office ('EPPO') and the European Union Agency for Criminal Justice Cooperation ('Eurojust') (EPPO-Eurojust Working Arrangement); Working Arrangement Establishing Cooperative Relations Between the European Public Prosecutor's Office ('EPPO') and the European Union Agency for Law Enforcement Cooperation (EPPO-Europol Working Arrangement); Working Arrangement Between the European Anti-Fraud Office ('OLAF') and the European Public Prosecutor's Office ('EPPO') (EPPO-OLAF Working Arrangement); Working Arrangement on Cooperation Between the European Public Prosecutor's Office ('EPPO') and the Office of the Prosecutor General of Hungary (EPPO-Hungary Working Arrangement). The working arrangements are available here: https://www.eppo.europa.eu/en/documents?f%5B0%5D=facet_media_document_category%3A5.

1.1. Cooperative relations

Art 99(1) of the EPPO Regulation states that '[i]n so far as necessary for the performance of its tasks, the EPPO may establish and maintain cooperative relations with institutions, bodies, offices or agencies of the Union in accordance with their respective objectives, and with the authorities of Member States of the European Union which do not participate in enhanced cooperation on the establishment of the EPPO, the authorities of third countries and international organisations.' Rec. 108 EPPO Regulation defines 'international organisations' as 'international organisations and their subordinate bodies governed by public international law or other bodies which are set up by, or on the basis of, an agreement between two or more countries as well as Interpol'. The establishment and maintenance of cooperative relations under Art 99(1) of the EPPO Regulation is circumscribed by their *necessity* to the EPPO's performance of its tasks. However, as explained in the EPPO Commentary, 'the EPPO enjoys a wide margin of appreciation on what actions – both operationally and strategically – it considers necessary to perform its tasks, as long as neither its powers vis-à-vis citizens nor its competence vis-à-vis the Member States exceeds the standards set out in the EPPO Regulation in conjunction with EU primary and human rights law' (Brodowski, 2021, p. 580).

1.2. Exchange of information

The direct exchange of information between EPPO and IBOAs of the Union, authorities in the NPMS and third countries, and international organizations is one of the main forms of cooperation between the EPPO and its partners. Art 99(2) of the EPPO Regulation provides that '[i]n so far as relevant to the performance of its tasks, the EPPO may, in accordance with Art 111, directly exchange all information, with the entities referred to in paragraph 1 of this article, unless otherwise provided for in this Regulation.' Art 111 of the EPPO Regulation, mentioned in Art 99(2), provides the rules on the protection of sensitive non-classified and classified information. The term 'directly' in Art 99(2) means that information can be exchanged, 'outside diplomatic channels, if so accepted by the partner' (Brodowski, 2021, p. 581). Art 99(2) does not concern the exchange of any information, but only information which is *relevant* to the EPPO's performance of its tasks. According to the EPPO Commentary, this standard is met 'as long as – within the EPPO's wide margin of appreciation – a specific link between the information exchange and the EPPO's task exists' (Brodowski, 2021, p. 582). Furthermore, the EPPO Commentary explains that Art 99(2) does not 'constitute a legal basis for the (outgoing) transfer of personal data by the EPPO, nor a legal basis for the transfer of personal data by other entities to the EPPO' (Brodowski, 2021, p. 582).

1.3. Working arrangements

Art 99(3) of the EPPO Regulation constitutes the legal basis allowing the EPPO to conclude working arrangements with institutions, bodies, offices or agencies of the Union, authorities in the non-participating Member States and third countries, and international organizations (Brodowski, 2021, p. 582). According to Art 99(3), '[t]hose working arrangements shall be of a technical and/or operational nature and shall in particular aim to facilitate cooperation and the exchange of information between the parties thereto.' Finally, Art 99(3) clarifies that '[t]he working arrangements may neither form the basis for allowing the exchange of personal data nor have legally binding effects on the Union or its Member States.' As a result, 'neither the EPPO, the Union nor its Member States can be sued for non-performance' (Brodowski, 2021, p. 583).

2. Relations with Eurojust

According to Art 3(3) of the EPPO Regulation, '[t]he EPPO shall cooperate with Eurojust and rely on its support in accordance with Art 100.'[194] Accordingly, Art 100 of the EPPO Regulation provides the framework for EPPO's relations with Eurojust. The working arrangement between the EPPO and Eurojust (EPPO-Eurojust Working Arrangement), which entered into force on 12 February 2021, gives the detailed practical modalities of their cooperation.

[194] For an overview of the EPPO-Eurojust relations see Spiezia (2018).

2.1. General overview of Eurojust's competence

Eurojust operates on the basis of Art 85 TFEU and Regulation (EU) 2018/1727 (Eurojust Regulation).[195] Its mission is to 'support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases, on the basis of operations conducted and information supplied by the Member States' authorities', by Europol, the EPPO, and OLAF.[196]

The Eurojust Regulation sets out the articulation of competence between Eurojust and the EPPO. According to Art 3(1) of the Eurojust Regulation, 'Eurojust shall be competent with respect to the forms of serious crime listed in Annex I', which includes 'crime against the financial interests of the Union'. However, when the EPPO exercises its competence over such crimes, 'Eurojust shall not exercise its competence'. Conversely, Eurojust can exercise its competence with regard to:

- crimes for which the EPPO exercises its competence, 'in those cases where Member States which do not participate in enhanced cooperation on the establishment of the EPPO are also involved and at the request of those Member States or at the request of the EPPO' (Art 3(1) Eurojust Regulation);
- crimes 'affecting the financial interests of the Union in cases involving Member States which participate in enhanced cooperation on the establishment of the EPPO but in respect of which the EPPO does not have competence or decides not to exercise its competence' (Art 3(2) Eurojust Regulation).

2.2. Forms of cooperation

Art 100(1) of the EPPO Regulation provides that '[t]he EPPO shall establish and maintain a close relationship with Eurojust based on mutual cooperation within their respective mandates and on the development of operational, administrative and management links between them'.[197] The cooperation between the EPPO and Eurojust has three main dimensions: institutional, operational, and administrative.

2.2.1. Institutional cooperation

Pursuant to Art 100(1) of the EPPO Regulation, 'the European Chief Prosecutor and the President of Eurojust shall meet on a regular basis to discuss issues of common concern'.[198] Art 12(1) of the EPPO-Eurojust Working Arrangement specifies that they shall meet 'at least once a year to discuss issues of common interest and agree on strategic directions for enhancing their cooperation'.

Art 13 of the EPPO-Eurojust Working Arrangement also provides that both the EPPO and Eurojust 'shall establish a liaison team', which 'shall meet at least once a year . . . to discuss and coordinate institutional and operational matters of general interest, and to assess the practical implementation of [the] Working Arrangement and of the relevant provisions in the applicable Regulations'.

Furthermore, Art 14 of the EPPO-Eurojust Working Arrangement provides the possibility for Eurojust's President to invite a representative of the EPPO to attend the meetings of Eurojust's College and Executive Board, which may be relevant for the EPPO's exercise of its tasks. In this context, the EPPO's representative does not have a right to vote but is provided with the relevant documents supporting the meeting's agenda (Art 14(2)-(3) EPPO-Eurojust Working Arrangement).

Finally, Art 15(1) of the EPPO-Eurojust Working Arrangement allows the EPPO and Eurojust to 'exchange information of strategic nature, such as trends and challenges, lessons learned and other observations and findings related to their respective activities, which could support their work'. Eurojust and the EPPO may also 'invite each other to seminars, workshops, conferences and other similar activities that are relevant to their respective areas of competence' (Art 15(2) EPPO-Eurojust Working Arrangement).

---

[195] Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust) and replacing and repealing Council Decision 2002/187/JHA [2018] OJ L 295/138 ('Eurojust Regulation').

[196] TFEU, Art 85(1); Eurojust Regulation, Art 2(1).

[197] See also Eurojust Regulation, Art 50(1).

[198] This is mirrored in Art 50(1) of the Eurojust Regulation, with the following additional sentence: 'They shall meet at the request of the President of Eurojust or of the European Chief Prosecutor.'

2.2.2. Operational cooperation

Art 100(2) of the EPPO Regulation provides that '[i]n operational matters, the EPPO may associate Eurojust with its activities concerning cross-border cases'. This is mirrored in Art 50(4) of the Eurojust Regulation with slightly different language.[199] Furthermore, Art 50(2) of the Eurojust Regulation provides that 'Eurojust shall treat requests for support from the EPPO without undue delay, and, where appropriate, shall treat such requests as if they had been received from a national authority competent for judicial cooperation.'

Under Art 100(2) of the EPPO Regulation and Art 50(4) of the Eurojust Regulation, Eurojust's involvement is possible only in *cross-border cases*, defined in the EPPO Commentary as 'cases where the territorial scope of the crime, the evidence and/or investigatory or prosecutorial tasks relate to two or more states, that is either participating or non-participating Member States or third countries' (Brodowski, 2021, p. 590). Eurojust's involvement is also circumscribed by the articulation between its own and the EPPO's competence, as mentioned above. Finally, as explained in the EPPO Commentary, 'any request to involve Eurojust must be within the specific investigatory and prosecutorial powers granted to the EPPO and must not constitute a circumvention of any limitations imposed onto the EPPO' (Brodowski, 2021, p. 590).

(a) *Sharing of information*

Art 4(1) of the EPPO-Eurojust Working Arrangement provides that 'the EPPO and Eurojust shall share information available in their respective case management systems and relevant to their respective competences, including personal data'. For instance, Art 4(2) of the EPPO-Eurojust Working Arrangement states that 'Eurojust shall inform the EPPO of any criminal conduct in respect of which it could exercise its competence'. The sharing of information is also mentioned as an example in Art 100(2)(a) of the EPPO Regulation and Art 50(4)(a) of the Eurojust Regulation.[200] In terms of communication channels, Art 10(1) of the EPPO-Eurojust Working Arrangement provides that '[w]hen transmitting operational information to Eurojust, the EPPO shall contact the National Member(s) concerned by the case.' Furthermore, '[o]perational information may also be transmitted to a designated contact point at Eurojust to facilitate the identification of the recipient(s) at Eurojust and to support the identification of possible links between cases.' Respectively, Art 10(2) of the EPPO-Eurojust Working Arrangement provides that '[w]hen transmitting operational information to the EPPO, Eurojust shall address the Central Office or the relevant European Delegated Prosecutor.'

(b) *Transmission and execution of judicial cooperation requests and decisions*

Art 8 of the EPPO-Eurojust Working Arrangement provides that '[p]ursuant to Art 100(2)(b) of the EPPO Regulation, in the framework of EPPO investigations involving Member States that do not take part in the establishment of the EPPO, the EPPO may invite the Eurojust's National Member concerned by the case to provide support in judicial cooperation matters.'[201] Furthermore, '[t]he EPPO may also request the support of Eurojust in transnational cases involving third countries.' As specified in Art 100(2)(b) of the EPPO Regulation, Eurojust's support relates to the transmission and execution of the EPPO's decisions or requests for mutual legal assistance.

(c) *Mutual support*

Art 9(1) of the EPPO-Eurojust Working Arrangement provides that '[w]here relevant, in transnational cases involving Member States that do not take part in the establishment of the EPPO or third countries, the EPPO may request Eurojust to provide support for:

a. The organization of coordination meetings;

[199] Eurojust Regulation, Art 50(4): '[i]n operational matters *relevant to the EPPO's competences*, *Eurojust shall inform the EPPO of and, where appropriate*, associate it with its activities concerning cross-border cases' (emphasis added).

[200] EPPO Regulation, Art 100(2)(a): 'sharing information, including personal data, on its investigations in accordance with the relevant provisions in this Regulation'; Eurojust Regulation, Art 50(4)(a): 'sharing information on its cases, including personal data, in accordance with the relevant provisions in this Regulation'.

[201] EPPO Regulation, Art 100(2)(b): 'inviting 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 European Union that are members of Eurojust but do not take part in the establishment of the EPPO, as well as third countries.'

b. The carrying out of coordinated simultaneous investigations (coordination centres);
c. The setting up of joint investigation teams and their operations;
d. The prevention and solving of conflicts of jurisdiction.'

Moreover, '[i]n operational matters relevant to the EPPO's competence, Eurojust may, where appropriate, request the EPPO to provide support' (Art 9(2) EPPO-Eurojust Working Arrangement).

(d) *Reciprocal access to case management systems*

Pursuant to Art 100(3) of the EPPO Regulation and Art 50(5) of the Eurojust Regulation, the EPPO and Eurojust shall have indirect access to information in each other's case management systems on the basis of a hit/no-hit system. This is further explained in Arts 5 and 6 of the EPPO-Eurojust Working Arrangement. According to these provisions, where the EPPO or Eurojust 'wishes to verify whether information stored in its case management system matches information stored in the Eurojust's [or the EPPO's] case management system, it shall submit a request to Eurojust [or the EPPO] by using the template agreed between the Parties' (Arts 5(1) and 6(1) EPPO-Eurojust Working Arrangement). Subsequently, '[i]n case of a hit, Eurojust shall inform the EPPO and, upon the EPPO's request or at its own initiative, Eurojust may provide the EPPO with additional data related to the information initially provided, after obtaining the consent of the national authority that provided the information to Eurojust' (Art 5(2) EPPO-Eurojust Working Arrangement). Except for the need to obtain the consent of the national authority that provided the information, the same applies with regard to Eurojust's access to the EPPO's case management system (Art 6(2) EPPO-Eurojust Working Arrangement).

2.2.3. Administrative cooperation

Pursuant to Art 100(4) of the EPPO Regulation and Art 50(6) of the Eurojust Regulation, '[t]he EPPO may rely on the support and resources of the administration of Eurojust', and accordingly, 'Eurojust may provide services of common interest to the EPPO'. The provision of such services of common interest, is to be 'regulated by means of a separate arrangement'.[202] This arrangement may also regulate cooperation between the EPPO and Eurojust 'in the area of professional training' (Art 16(2) EPPO-Eurojust Working Arrangement).

3. Relations with OLAF

According to Art 101(1) of the EPPO Regulation, '[t]he EPPO shall establish and maintain a close relationship with OLAF based on mutual cooperation within their respective mandates and on information exchange.' The relationship between the EPPO and OLAF 'shall aim in particular to ensure that all available means are used to protect the Union's financial interests through the complementarity and support by OLAF to the EPPO'. The guiding principle of complementarity in the cooperation between the EPPO and OLAF is explained by the various differences between them in terms of their different natures, tasks, and investigative powers.[203] The working arrangement between the EPPO and OLAF (EPPO-OLAF Working Arrangement), which entered into force on 6 July 2021, gives the detailed practical modalities of their cooperation.

3.1. General overview of OLAF's competence

OLAF, established in 1999 under Commission Decision 1999/352/EC, ECSC, Euratom,[204] operates on the basis of a number of regulations and agreements, including Regulation (EU, Euratom) 883/2013 (OLAF Regulation),[205]

[202] EPPO Regulation, Art 100(4); Eurojust Regulation, Art 50(6); EPPO-Eurojust Working Arrangement, Art 16(1).

[203] For a summary of the differences between the EPPO and OLAF, see Weyembergh A and Brière C (2018), at 64, Table I.

[204] Commission Decision 28 April 1999 establishing the European Anti-fraud Office (OLAF) [1999] OJ L 136/20, as amended ('Commission Decision 28 April 1999').

[205] Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 [2013], OJ L 248/1, as amended ('OLAF Regulation').

and the Interinstitutional Agreement of 25 May 1999.[206] Although it is part of the European Commission, OLAF exercises its investigative powers in complete independence.[207] OLAF is primarily tasked with carrying out 'administrative investigations, both internally (within the EU institutions, bodies, offices and agencies) and externally, concerning illegal activities, in particular fraud and corruption, adversely affecting the Union's financial interests' (Brodowski, 2021, p. 598).[208] Upon completion of an administrative investigation, OLAF's role is limited in drawing up a report with recommendations indicating 'any disciplinary, administrative, financial or judicial action to be taken by the institutions, bodies, offices and agencies and by the competent authorities of the Member States concerned'.[209] Therefore, OLAF is not competent to carry out criminal investigations and does not fulfil a prosecutorial role. Instead, criminal proceedings, subsequent to OLAF's recommendation, are carried out by the competent authorities of the Member States (Brodowski, 2021, p. 600).

3.2. No parallel administrative investigation by OLAF

Pursuant to Art 101(2) of the EPPO Regulation, 'where the EPPO conducts a criminal investigation in accordance with this Regulation, OLAF shall not open any parallel administrative investigation into the same facts'. In other words, EPPO investigations 'take precedence over parallel administrative investigations by OLAF, unless the EPPO specifically requests OLAF to carry out such an investigation on the basis and within the limitations of paragraph 3(c)' (Brodowski, 2021, p. 604). However, as explained in Rec. 103 of the EPPO Regulation, the non-duplication rule is 'without prejudice to the power of OLAF to start an administrative investigation on its own initiative, in close consultation with the EPPO'. According to Rec. 103, the cooperation between the EPPO and OLAF is 'aimed at ensuring the complementarity of their respective mandates, and avoiding duplication'. In this regard, the idea of complementarity between the EPPO and OLAF is 'linked to the complementarity between the administrative and criminal justice tracks in protecting the EU's financial interests' (Weyembergh and Brière, 2018, p. 70). Indeed, according to commentators, the coexistence of OLAF and the EPPO enables them 'to determine on a case-by-case basis which proceedings will be best suited to pursuing a specific behaviour affecting the EU's financial interests' (Weyembergh and Brière, 2018, pp. 70-71).

3.2.1. Forms of cooperation

1) <u>By OLAF to EPPO</u>

(a) *Supportive or complementary actions*

According to Art 101(3) of the EPPO Regulation, '[i]n 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'. Art 101(3) gives the following examples:

- 'Providing information, analyses (including forensic analyses), expertise and operational support' (Art 101(3)(a) EPPO Regulation);
- 'Facilitating coordination of specific actions of the competent national administrative authorities and bodies of the Union' (Art 101(3)(b) EPPO Regulation);
- 'Conducting administrative investigations' (Art 101(3)(c) EPPO Regulation).

In any case, the EPPO's request must be in accordance with OLAF's mandate.

[206] Interinstitutional Agreement of 25 May 1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-fraud Office (OLAF) [1999] OJ L 136/15.

[207] Commission Decision 28 April 1999, Art 3.

[208] Commission Decision 28 April 1999, Art 2; for instance, OLAF is empowered to carry out internal investigations within the EPPO. Cf. EPPO Regulation, Art 110.

[209] OLAF Regulation, Art 11(1).

(b) *Indirect access to OLAF's case management system*

Art 101(5) of the EPPO Regulation provides that '[t]he EPPO shall have indirect access to information in OLAF's case management system [CMS] on the basis of a hit/no hit system.' As explained in the EPPO Commentary, indirect access 'means that the EPPO can submit specific search criteria to OLAF's CMS' (Brodowski, 2021, p. 608). Following the automatic execution of the search request, '[i]f data matching the search criteria is found in OLAF's CMS (hit), only the fact that a match has been found is reported . . . but not the actual information stored in the CMS' (Brodowski, 2021, p. 608). For example, there is no automatic transfer of personal data (Brodowski, 2021, p. 608). Following a hit, further manual action is required to share and disclose the substantive information in accordance with the EPPO and OLAF's respective legal frameworks (Brodowski, 2021, pp. 609-610).

2) By EPPO to OLAF

(a) *Information on cases where the EPPO has decided not to investigate or has dismissed a case*

Pursuant to Art 101(4) of the EPPO Regulation, '[t]he EPPO may, with a view to enabling OLAF to consider appropriate administrative action in accordance with its mandate, provide relevant information to OLAF on cases where the EPPO has decided not to conduct an investigation or has dismissed a case.' In this regard, Art 101(4) of the EPPO Regulation refers to a subsequent 'administrative investigation [by OLAF] into the same facts' (Brodowski, 2021, p. 607). Art 101(4) would only apply if the EPPO has already decided:

- that there are no grounds to initiate an investigation (Art 24(7) EPPO Regulation); or
- not to exercise its right of evocation (Art 27 EPPO Regulation); or
- to dismiss a case (Art 39 EPPO Regulation).

As explained in the EPPO Commentary, even if Art 101(4) of the EPPO Regulation is applicable, the EPPO is not obliged ('*may*') to provide relevant information to OLAF (Brodowski, 2021, p. 608). Instead, the EPPO retains the power to assess whether to do so by taking into account the *ne bis in idem* principle, the potential for an administrative follow-up, etc. (Brodowski, 2021, p. 608).

(b) *Indirect access to EPPO's case management system*

Art 101(5) of the EPPO Regulation also provides that '[t]he EPPO shall take appropriate measures to enable OLAF to have access to information in its case management system on the basis of a hit/no-hit system', as explained above.

4. Relations with Europol

According to Art 102(1) of the EPPO Regulation, '[t]he EPPO shall establish and maintain a close relationship with Europol.' To that end, the working arrangement between the EPPO and Europol (EPPO-Europol Working Arrangement), which entered into force on 19 January 2021, gives the detailed practical modalities of their cooperation. The purpose of this Working Arrangement is 'to establish cooperative relations between the EPPO and Europol within the existing limits of the respective legal frameworks and mandates of the Parties, in particular through the exchange of information' (Art 1, EPPO-Europol Working Arrangement).

4.1. General overview of Europol's competence

Europol operates on the basis of Art 88 TFEU and Regulation (EU) 2016/794 (Europol Regulation).[210] Its objective is to 'support and strengthen action by the competent authorities of the Member States and their mutual cooperation in preventing and combating serious crime *affecting two or more Member States*,

[210] 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) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA [2016] OJ L 135/53 ('Europol Regulation').

terrorism and forms of crime which affect a common interest covered by a Union policy, as listed in Annex I.'[211] Annex I of the Europol Regulation includes 'crime against the financial interests of the Union'. Amongst others, Europol's tasks include the collection, storing, processing, analysis, and exchange of information, including criminal intelligence, but also the coordination, organization, and implementation of investigative and operational actions.[212] In carrying out its tasks, Europol cannot apply coercive measures.[213]

4.2. Forms of cooperation

4.2.1. Request for information and analytical support

According to Art 102(2) of the EPPO Regulation, '[w]here 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'. In this regard, the supply of information by Europol is limited by three factors: its *necessity* for the EPPO's investigations; its *relevance*; and its *relation to the EPPO's competence*. Art 102(2) of the EPPO Regulation provides that the EPPO 'may also ask Europol to provide analytical support to a specific investigation conducted by the EPPO'. In this regard, the analytical support to be provided is limited to the 'personal, temporal, and material scope' of the EPPO's specific investigation (Brodowski, 2021, p. 616).

Art 4 of the EPPO-Europol Working Arrangement further specifies that cooperation between the EPPO and Europol may, in particular, include:

- exchange of specialist knowledge;
- general situation reports;
- information on criminal investigation procedures;
- information on crime prevention methods;
- participation in training activities; and
- advice and support, including through analysis, in individual criminal investigations.

The EPPO-Europol Working Arrangement also contains provisions on the:

- exchange of personal data (Art 9 EPPO – Europol Working Arrangement);
- use of the information transmitted (Art 10 EPPO – Europol Working Arrangement);
- onward transmission of the information (Art 11 EPPO – Europol Working Arrangement);
- assessment of the source and of the information (Art 12 EPPO – Europol Working Arrangement);
- security of processing of personal data (Art 13 EPPO – Europol Working Arrangement);
- protection of information (Art 14 EPPO – Europol Working Arrangement); and
- arrangement on the exchange and protection of classified information (Art 15 EPPO – Europol Working Arrangement).

4.2.2. Mode of cooperation

Art 5 of the EPPO-Europol Working Arrangement provides that both the EPPO and Europol 'shall designate a single point of contact through which all exchange of operational information under [the] Arrangement is undertaken'. Furthermore, Art 6 of the Working Arrangement foresees regular high-level meetings, consultations on policy issues and matters of common interest, and the possibility of a representative of the EPPO to attend the meetings of the Heads of European National Units as observer. Finally, Art 7 of the Working Arrangement allows the EPPO and Europol to 'agree to the secondment of liaison officer(s) or expert(s)'.

[211] Europol Regulation, Art 3(1) (emphasis added); see also TFEU, Art 88(1); the wording 'competent authorities of the Member States' refers to 'all police authorities and law enforcement services existing in the Member States which are responsible under national law for preventing and combatting criminal offences', but also 'other public authorities existing in the Member States which are responsible under national law for preventing and combating criminal offences in respect of which Europol is competent'. Europol Regulation, Art 2(a).

[212] TFEU, Art 88(2); Europol Regulation, Art 4(1)(a) and (c).

[213] Europol Regulation, Art 4(5).

5. Relations with non-participating Member States (NPMS)

Art 105 of the EPPO Regulation provides the framework for the EPPO's relations with NPMS (at the time of writing: Denmark, Hungary, Ireland, Poland, and Sweden).[214]

5.1. Duty of sincere cooperation

As a consequence of establishing the EPPO through enhanced cooperation, the EPPO Regulation is not binding on NPMS.[215] Nevertheless, NPMS remain bound by the principle of sincere cooperation, which emanates from EU primary law and, thus, applies to all EU Member States.[216] The principle translates into both positive and negative duties on the part of NPMS. In terms of positive duties, NPMS must cooperate with the EPPO, for instance, by designating contact points for operational and case-related cooperation.[217] In terms of negative duties, NPMS must not impede the implementation of the EPPO Regulation by the participating Member States and refrain from any measure which could jeopardize the objective of protecting the Union's financial interests.[218] Indeed, Art 4(3) TEU provides that '[p]ursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.' Moreover, '[t]he Member States shall take any appropriate measure, general or particular, to ensure ulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.' Finally, '[t]he Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.'

5.2. Forms of cooperation

Art 105 of the EPPO Regulation provides three main forms of cooperation between the EPPO and NPMS: (a) working arrangements; (b) contact points to facilitate cooperation; and (c) the notification, by participating Member States, of the EPPO as a competent authority for Union acts on judicial cooperation in criminal matters in respect of cases within the EPPO's competence, in their relations with NPMS.

5.2.1. Working arrangements

Art 105(1) of the EPPO Regulation refers to the working arrangements that the EPPO can conclude with NPMS on the basis of Art 99(3) of the EPPO Regulation, and specifies that these 'may in particular, concern the exchange of strategic information and the secondment of liaison officers to the EPPO'. It is reiterated that such working arrangements 'may neither form the basis for allowing the exchange of personal data nor have legally binding effects on the Union or its Member States' (Art 99(3) EPPO Regulation). The working arrangement concluded between the EPPO and the Office of the Prosecutor General of Hungary, which entered into force on 7 April 2021, is an example of a working arrangement in the sense of Arts 99(3) and 105(1) of the EPPO Regulation.

[214] Pursuant to Protocol No 21 and Protocol No 22 to the Lisbon Treaty, Ireland and Denmark opted out from the area of freedom, security and justice (AFSJ). While Denmark opted out completely, Ireland retained the possibility to opt in to any AFSJ-related instruments; see Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice [2016] OJ C 202/295; and Protocol (No 22) on the position of Denmark [2016] OJ C 202/298; for the reasons explaining the non-participation of these Member States, see Aden, Sanchez-Barrueco, Stephenson (2019), at pp. 67-74.

[215] TEU, Art 20(4); EPPO Regulation, Rec. 110.

[216] TEU, Art 4(3); the principle of sincere cooperation is also one of the basic principles of the EPPO's activities. EPPO Regulation, Art 5(6).

[217] EPPO Regulation, Art 105(2).

[218] TFEU, Art 327: 'Any enhanced cooperation shall respect the competences, rights and obligations of those Member States which do not participate in it. Those Member States shall not impede its implementation by the participating Member States.'

5.2.2. Contact points facilitating cooperation

Under Art 105(2) of the EPPO Regulation, '[t]he EPPO may designate, in agreement with the competent authorities concerned, contact points in the [NPMS] in order to facilitate cooperation in line with the EPPO's needs.' As explained in the EPPO Commentary, 'it is the [NPMS] which determines who of its law enforcement officials or which of its authorities shall serve as a contact point; for EPPO, the sole question is whether it accepts that designation' (Brodowski, 2021, p. 638).

5.2.3. Notification of the EPPO as a competent authority for Union acts on judicial cooperation in criminal matters

Art 105(3) of the EPPO Regulation foresees two possibilities. Firstly, the adoption of an EU legal instrument relating to cooperation in criminal matters and surrender between the EPPO and the competent authorities of NPMS. Currently, no such legal instrument exists. According to Rec. 110 of the EPPO Regulation, '[t]he Commission should, if appropriate, submit proposals in order to ensure effective judicial cooperation in criminal matters' between the EPPO and NPMS. According to Rec. 110, '[t]his should in particular concern the rules relating to judicial cooperation in criminal matters and surrender, fully respecting the Union acquis in this field as well as the duty of sincere cooperation in accordance with Art 4(3) TEU.' The EPPO Commentary suggests that Art 82(1) TFEU would be the most appropriate legal basis for the adoption of such a legal instrument in the future (Brodowski, 2021, p. 638).

The second possibility, in the absence of a legal instrument, is for participating Member States to 'notify the EPPO as a competent authority for the purpose of implementation of the applicable Union acts on judicial cooperation in criminal matters in respect of cases falling within the competence of the EPPO, in their relations with [NPMS]'. As explained in the EPPO Commentary, '[t]he Union acts on judicial cooperation in criminal matters refers to all existing, but also future legal instruments adopted on the basis of Art 82(1) TFEU, as well as legal instruments including agreements which were adopted under previous primary law but still in effect' (Brodowski, 2021, p. 639). The 'material and procedural requirements' for the implementation of such Union acts will be governed by 'the national law (in particular the national law implementing Framework Decisions and Directives) of the Member State of the EDP handling the case', except for 'directly applicable provisions within the Union act' in question (Brodowski, 2021, p. 640).

6. Challenges

Several challenges have been raised in relation to Art 105(3) of the EPPO Regulation. Firstly, the extent of NPMS's duty of sincere cooperation, under Art 4(3) TEU, in the context of the EPPO, is unclear.[219] Secondly, there is ambiguity on the legal effect of the notification of the EPPO as a competent authority, with doubts being raised as to whether NPMS would actually 'be legally bound to simply accept the notification without any further ado' (Franssen, 2018, p. 295). In this regard, a commentator argues that 'the NPMS will need to express their willingness to accept the EPPO's role from then onward and to start cooperating with the EPPO rather than with national authorities only as before the notification' (Franssen, 2018, p. 295). Furthermore, there are also conceptual issues as to whether the EPPO can actually be considered a 'competent authority' within the various EU instruments on mutual recognition (Franssen, 2018, pp. 295-296). The latter often use terms such as 'Member State authority' or 'issuing State', which are conceptually incompatible with the EPPO's establishment as a 'body of the Union' (Franssen, 2018, pp. 295-296).

Moreover, reciprocity is another challenge for the cooperation between the EPPO and NPMS. As a commentator rightly points out, 'any legal arrangement on judicial cooperation between the EPPO and the NPMS will need to be of a reciprocal nature and not just operate to the benefit of the EPPO' (Franssen, 2018, p. 296). However, as it stands, Art 105(3) of the EPPO Regulation does not offer any guidance on the practical modalities that would ensure reciprocity in the cooperation between the EPPO and NPMS. Finally, as explained by a commentator, '[t]he likelihood of situations where both the EPPO and the authorities of an NPMS have

[219] Franssen doubts whether the general principle of sincere cooperation would suffice as a legal basis for judicial cooperation between the EPPO and NPMS. See Franssen (2018), p. 295.

competence to investigate and prosecute a PIF case brings the risk of parallel proceedings' (Franssen, 2018, p. 296). In this regard, it has been argued that jurisdictional conflicts should 'at the very least be made subject to an appropriate consultation mechanism between the EPPO and the NPMS', and not be resolved solely on the basis of the *ne bis in idem* principle (Franssen, 2018, p. 297). Arguably, the adoption of an EU legal instrument relating to cooperation in criminal matters and surrender between the EPPO and the competent authorities of the NPMS would bring much needed legal certainty in relation to the aforementioned challenges (Franssen, 2018, p. 297).

CHAPTER VI: CASE STUDIES

Case study 1, Phase I, II, III (related to Ch. II)	*Fictional scenario by Vítková P. (Phase I), Herrnfeld H-H. (Phase II), Laptoš T. (Phase III)* *Indicative answers by Vítková P. (Phase I), Herrnfeld H-H. (Phase II), Laptoš T. (Phase III) and Bojić I., Konforta M.*
Case study 2, 3 (related to Ch. III)	*Fictional scenario and indicative answers by Barletta A., Galati C.D.* *Supervision by Cappelletti F., Rubini P.*
Case study 4 (related to Ch. IV)	*Fictional scenario by Byl T., Costa Ramos V., Simonato M.* *Indicative answers by Sixto Seijas E.* *Supervision by Guerrero Palomares S.*
Case study 5 (related to Ch. IV)	*Fictional scenario and indicative answers by Hristova G., Naydenova K., Tankein S.* *Supervision by Mitreva P.*
Case study 6 (related to Ch. IV)	*Fictional scenario by Herrnfeld H-H,* *Indicative answers by De Matteis L., Herrnfeld H-H, Răzvan Radu F.*
Case study 7 (related to Ch. IV)	*Fictional scenario and indicative answers by Hristova G., Naydenova K., Tankein S.* *Supervision by Mitreva P.*
Case study 8 (related to Ch. V)	*Fictional scenario by Echanove Gonzalez de Anleo J., Mirandola S., Garamvölgyi B.,* *Indicative answers 1 – 10 by Requejo Naveros M.* *Supervision by Guerrero Palomares S.* *Indicative answers 11 – 14 by Hristova G., Naydenova K., Tankein S. Supervision by Mitreva P.*
Case study 9 (related to Ch. V)	*Fictional scenario and indicative answers by Hristova G., Naydenova K., Tankein S.* *Supervision by Mitreva P.*

Case study 1, Phase I (related to Ch. II)

Fictional scenario – Phase I

The police authorities in Berlin, Germany, have discovered that large quantities of cigarettes are being offered on the local market, which apparently carry falsified excise stamps. The cigarettes are being sold to local dealers by an import/export company based in Vienna (its director and sole employee is a German citizen named 'A'). Information received by the Berlin police through Europol indicate that the cigarettes are likely to be produced in Ukraine and shipped via Romania, Hungary and Austria to Germany. The persons believed to be involved in the shipment are a group of Romanian citizens ('B' and 'C') and Hungarian citizens ('D' and 'E'), already well known to the Austrian police based on earlier similar criminal activities.

The Berlin police authorities report this information to a German European Delegated Prosecutor (EDP) in Berlin.

Questions & indicative answers

1. What should the EDP do with the reported information?

Before providing the answer to the first question, it should be mentioned that according to Art 24(1) of the EPPO Regulation, the institutions, bodies, offices and agencies of the Union and the authorities of the Member States competent under applicable national law shall without undue delay report to the EPPO any criminal conduct in respect of which it could exercise its competence in accordance with Arts 22 and 25(2) and (3) of the EPPO Regulation. In this case, the Berlin police authorities followed their obligation and reported the criminal conduct to the German European Delegated Prosecutor.

As to the question about what the EDP should do with the reported information, the first task of the EDP is to register the case. The document containing the information and all the items attached to it shall be converted into an electronically storable format within the Case Management System, disregarding the format in which the information was received (electronic or non-electronic). The applicable legal framework on registration of the case is provided by Arts 24(6) and 44(1) of the EPPO Regulation as well as by the Internal Rules of Procedure of the EPPO (Art 38). Art 44(1) of the EPPO Regulation stipulates that the EPPO shall establish a case management system, which shall be held and managed in accordance with the rules established in the EPPO Regulation and in the Internal Rules of Procedure, while Art 38 of the Internal Rules of Procedure describes registration procedures in more detail.

Art 24(6) of the EPPO Regulation furthermore provides that information provided to the EPPO shall be verified in accordance with the Internal Rules of Procedure. As it arises from the quoted provision, the next step in handling the case is verification. The purpose of verification is to assess whether, on the basis of the information provided, there are grounds to initiate an investigation or to exercise the right of evocation.

In conclusion, every piece of information or report received, disregarding the format, shall be registered and stored in the case management system of the EPPO before the verification if there are grounds to initiate an investigation or to exercise the right of evocation.

2. Would the German EDP have the (internal) competence to initiate an investigation? If not, which other EDPs could be competent?

From the description of the case (as it does not have detailed information about the criminal activity), it is not quite clear if the German EDP has the (internal) competence to initiate an investigation according to Art 26(4) of the EPPO Regulation. However, the mentioned article provides the answer to this question, as it contains the main criteria for assessing competence. Namely, it provides that the case shall as a rule be initiated and handled by a European Delegated Prosecutor from the Member State where the focus of the criminal activity is, or, if several connected offences within the competences of the EPPO have been committed, the Member State where the bulk of the offences has been committed.

In conclusion, the first step for assessing the competence of the EDP is to locate the focus of criminal activity, or, if several connected offences within the competences of the EPPO have been committed, to identify the Member State in which the bulk of the offences has been committed.

In all cases, if it would not be possible to identify the focus of criminal activity or the Member State in which the bulk of the offences has been committed, it is important to underline that Art 26(4) of the EPPO Regulation contains additional criteria which should be taken into account, in order of priority: (a) the place of the suspect's or accused person's habitual residence; (b) the nationality of the suspect or accused person; (c) the place where the main financial damage has occurred. This leads us to the conclusion that the facts of each particular case are decisive in identifying the competent EDP.

Criteria set in Art 26(4) of the EPPO Regulation concerning the competence of the EDPs should not be confused with the competence of the EPPO as such, as provided for in Art 23 of the EPPO Regulation.

3. Assuming the German EDP considers that he/she does not have the internal competence to initiate an investigation, what would happen?

To answer this question, it is essential to underline the role of Permanent Chambers as set in Art 26(3) of the EPPO Regulation, which provides that in a case where no investigation has been initiated by a European Delegated Prosecutor, the Permanent Chamber to which the case has been allocated shall instruct a European Delegated Prosecutor to initiate an investigation. Allocation and reallocation of the cases is one of the most important tasks of Permanent Chambers. In addition to allocation and reallocation of cases, Permanent Chambers have multiple other competencies as stipulated by Art 10 of the EPPO Regulation. More technical information about the functioning of Permanent Chambers and allocation of cases to Permanent Chambers may be found in Arts 15 to 24 of the Internal Rules of Procedure.

4. Assuming the German EDP considers that he/she would have the internal competence to initiate an investigation, what would he/she have to do?

In this case the German EDP should proceed with verification of received information to find out if there are grounds to initiate an investigation (Art 24(6), 26(1) EPPO Regulation). The information subject to verification is not only that contained in the criminal report, but also other relevant information that the EDP may seek from the authority which reported the crime.

Upon verification, during which it is to be determined if there are grounds to initiate the investigation and if the case falls within the competence of EPPO, the EDP will open the case and initiate the investigation, which consists of taking investigation measures available under national criminal procedural law.

The next phase will be the investigation itself, which is comprised of a common set of investigative measures available under the national criminal procedure law of the country where it is initiated, combined with the EPPO Regulation, especially in the field of cross-border investigation.

5. Assuming the German EDP, before initiating an investigation, discovers that the national prosecution office in Austria has already initiated a (national) investigation, what would the German EDP need to do?

In this scenario it needs to be noted that the investigation has not even started yet and that the German EDP only received information about the criminal activity. In cases where the EPPO becomes aware, by means other than the information referred to in Art 24(2) of the EPPO Regulation, of the fact that an investigation of a criminal offence for which it could be competent has already been undertaken by the competent authorities of a Member State, it shall inform these authorities without delay. At this phase there is no need to refer to the Permanent Chamber, but only to inform the Austrian EDP, who will then request the Austrian prosecution service to report the case with a view to a possible evocation of the case (Art 27(3)(6) EPPO Regulation).

Case study 1, Phase II (related to Ch. II)

Fictional scenario – Phase II

The Austrian EDP has exercised the right of evocation and received the case file from the Austrian prosecution service. The Austrian EDP now continues the investigation and determines that house/office searches need to be conducted in Austria, Germany and Hungary.

Questions & indicative answers

1. How are investigations going to be conducted – by whom and under what legal regime?

Art 28(1) of the EPPO Regulation determines the competences of the investigating delegated prosecutor and provides that the EDP can take the investigating measures him/herself or instruct the competent national authorities in his/her member state. What the EDP does depends on the national law. If under national law a prosecutor can take certain investigative measures, then the EDP can also take those measures. If under national law other authorities are competent to undertake measures on behalf of the prosecution service, then he/she will have to instruct the competent authorities of his/her member state. For example, if house searches are within the competence of the police, then he/she will have to turn to the police to perform them.

When we speak about investigation measures and applicable law, we need to look at Art 30 of the EPPO Regulation, which spells out which measures must be available to delegated prosecutors in all Member States. In principle, delegated prosecutors have the same powers as national prosecutors. Art 30(1) of the EPPO Regulation provides that delegated prosecutors have investigative powers which include search of premises and private homes. Under Art 30(5) of the EPPO Regulation the procedures and the modalities for taking the measures shall be governed by the applicable national law.

2.1 What does the Austrian EDP need to do to have the house searches undertaken in the different Member States and which courts would be competent to authorize the house searches?

In respect of other Member States, Art 31 of the EPPO Regulation is applicable as it contains special rules on cross-border investigations within the EPPO territory. The starting point for this answer is that the European Delegated Prosecutor can only undertake investigations in his/her own country and the assisting EDP is the one who would undertake the measures in another Member State. Art 31 of the EPPO Regulation provides that in principle, the delegated prosecutor can order investigative measures in another Member State only if they are available in his/her own country.

So, in this case, the Austrian EDP can order a house search to be conducted in Romania and Germany if it could be ordered under the same conditions in Austria, meaning that the legal regime that applies is the legal regime of the handling EDP. This means that the Austrian EDP will first have to observe his/her own law, before asking his/her colleague in another Member State to undertake investigative measures.

Further steps depend on whether judicial authorization is required. If the EDP can do investigative measures without judicial authorization, then he/she will order his/her colleague in Germany or Romania to undertake the house search. If, however, judicial authorization is required in either or one of the two states, (Austria or the country where the measure is to take place) art 31 of the EPPO Regulation contains rules on the competent court: the principle is that the competent court should always be the court of the Member State where the investigative measure is supposed to be taken. If a court order is required under the law of both states, the same principle applies.

If judicial authorization is required under the Austrian law but not under the law of the country where the measure will take place, the EDP needs to turn to the court in his/her country in order to obtain the house search.

To conclude, there is a double test in being able to take a cross-border investigation measure. The Austrian EDP can order a house search in Germany if it is possible to undertake it in those conditions in Austria. However, the court in Germany, as the court of the country where the measure will take place, will apply German law.

2.2 How can the house searches be undertaken in Hungary?

Considering that Hungary is a non-participating Member State, Art 105 (3) of the EPPO Regulation applies. The Austrian EDP obtains an Austrian court order and then issues a European investigation order to Hungary.

3. The Austrian EDP determines that a telephone interception is necessary to monitor communications among/with the Romanian suspects. He/she requests an EDP in Romania to take the necessary steps. The Romanian EDP, however, replies that in Romania telephone interceptions would not be an investigation measure available under Romanian law in such a case.

Art 31 of the EPPO Regulation on cross-border investigations also contains the answer on the matter of internal

procedures. Namely, given the provision of Art 31(5) of the EPPO Regulation, the assisting EDP does not have the possibility to simply refuse to undertake the order of measure. In other words, he/she is required to undertake the measures which the handling EDP requires him/her to do (or instruct the competent national authority to do so, Art 31(4) of the Regulation). There is, however, the possibility to object to undertake the measure based on the provision of Art 31(5)(d) of the Regulation, which covers the situation in which the assisting EDP considers that the assigned measure does not exist or would not be available in a similar domestic case under the law of his/her Member State. In that case he/she shall inform his/her supervising European Prosecutor and consult with the handling European Delegated Prosecutor with a view to resolving the matter bilaterally.

Note paragraph 7: if the European Delegated Prosecutors cannot resolve the matter within seven working days and the assignment is maintained, the matter shall be referred to the competent Permanent Chamber. The same applies where the assigned measure is not undertaken within the time limit set out in the assignment or within a reasonable time. Further, under paragraph 8, the competent Permanent Chamber shall to the extent necessary hear the EDPs concerned by the case and then decide without undue delay, in accordance with applicable national law as well as this Regulation, whether and by when the assigned measure needed, or a substitute measure, shall be undertaken by the assisting European Delegated Prosecutor, and communicate this decision to the said European Delegated Prosecutors through the competent European Prosecutor.

4. If the Austrian EDP determines that it will be necessary to have the Hungarian suspects arrested and surrendered to Austria, what would he/she need to do?

Art 33 of the EPPO Regulation would apply if the Austrian EDP wants to have someone from Germany arrested and surrendered. In the case of Hungary, as a non-participating Member State, the Austrian EDP obtains a national arrest warrant from the Austrian Court and then issues an EAW to Hungary.

Case study 1, Phase III (related to Ch. II)

Fictional scenario – Phase III

The Austrian EDP considers the investigations complete and there is sufficient evidence to substantiate prosecution of the director of an Austrian company (A) as well the Romanian suspect B (driver of the truck carrying the smuggled cigarettes) and the Hungarian suspect E (owner of a warehouse in Budapest, where the shipment was repacked before being set off to Germany).

At the same time, the investigations have revealed that the Hungarian suspect D, while known to the Austrian police to have been involved in similar crimes before, actually has not been involved in the present case.

The Austrian EDP also determines that the Romanian suspect C actually only played a minor role in the specific case by providing the Romanian suspect B with information about the best route to take while driving through Hungary, avoiding likely police checks currently undertaken by the Hungarian police to identify possible cases of migrant smuggling.

Questions & indicative answers

1. What would the EDP need to do?

Art 35 (1) of the EPPO Regulation and Art 56 of the Internal Rules of Procedure apply.

When the handling EDP considers the investigation complete, he/she shall submit a report to the supervising European Prosecutor. A report is a summary of the case and includes a draft decision whether to prosecute before a national court or to consider a referral of the case, dismissal or a simplified prosecution procedure.

The supervising EP shall forward those documents to the competent PC accompanied, if he/she considers it necessary, by his/her own assessment.

Thus, the Austrian EDP will submit a report to the supervising (Austrian) EP, which, as defined above, is a summary of the case with a draft decision.

2. What are the options in respect of suspects A, B and E?

The option would be submitting a report with a summary of the case and a draft decision to prosecute before a

national court, an Austrian court in this case, in respect of suspects A, B and E. Art 36 (1) and (2) of the EPPO Regulation stipulate that when the EDP submits a draft decision proposing to bring a case to judgment, the Permanent Chamber shall, following the procedures set out in Art 35 of the EPPO Regulation, decide on this draft within 21 days. The Permanent Chamber cannot decide to dismiss the case if a draft decision proposes bringing a case to judgment. Where the Permanent Chamber does not take a decision within the 21-day time limit, the decision proposed by the EDP shall be deemed to be accepted. The Permanent Chamber can also act as stated in Art 56(6) of the Internal Rules of Procedure.

3. How would the EDP need to proceed in the case of suspect D?

Art 39(1) of the EPPO Regulation regulates grounds for dismissal. Therefore, where prosecution has become impossible, pursuant to the law of the Member State of the handling EDP, the Permanent Chamber shall, based on a report provided by the EDP handling the case in accordance with Art 35(1) of the EPPO Regulation, decide to dismiss the case against a person.

Additionally, where a case has been dismissed, the EPPO shall officially notify the competent national authorities and inform the relevant institutions, bodies, offices and agencies of the Union, as well as, where appropriate under national law, the suspects or accused persons and the crime victims, of such dismissal. The dismissed cases may also be referred to OLAF or to the competent national administrative or judicial authorities for recovery or other administrative follow-ups.

To conclude, in the fictional scenario the case of suspect D would be dismissed on the grounds of lack of relevant evidence. The competent national authorities would be notified and, where appropriate under national law, the suspects or accused persons and the crime victims would be informed of the dismissal.

4. What would be the options in respect of suspect C?

Art 40 of the EPPO Regulation and 56(1) of the Internal Rules of Procedure are relevant. Therefore, given the minor role of the suspect, as described in the scenario, a draft decision to apply simplified prosecution procedures is the approach to be taken.

Case study 2 (related to Ch. III)[220]

Fictional scenario

Nicolas, Veronica and Mirko, among other people, set up an organization to defraud the Tax Authority by taking advantage of the VAT system. The aim was to receive undue refund of VAT allowances from the Tax Office. The fraud started in 2014 and went on for several years till 2020 and was carried out involving a number of companies throughout the EU. The companies involved in the fraud scheme included not only the applicants of the undue return, but also the fake suppliers, customers and shippers. One of the companies in the scheme was the Portuguese company Open Oceans, established on 16 December 2001, with a share capital of €5,000. Nicolas was its director and owned a third of the company. The other partners were the Dutch nationals Mary and Marc. Open Oceans purchased mobile phones from its supplier Luntika (located in Spain) who paid no taxes on their sales. These and others mobile phone suppliers sometimes shared the same director. And sometimes the mobile phone supplier company director and the shipping director were the same person. Open Oceans pretended to sell mobile phones to companies based in Spain and also to companies in other European countries, namely Rutter (Austria), Bandona (Italy), Grupotienda (Greece), Cometa (Malta) and Thiene (France). None of these companies had a real commercial activity, they merely simulated the purchase of goods so that they could simulate their sale. Veronica and Mirko were in charge of these companies. They appointed dummies in each country, drafted the invoices and dealt with the deliveries. In this typical tax fraud scheme, these companies did not file any tax returns, except for one: the final buyer. At the end of the chain the last buyer would ask the Tax Office for a VAT refund. Open Oceans not only paid taxes linked to its national sales but also asked for a refund of French VAT linked to European sales. So did the Austrian, Greek, Maltese and French companies. Other companies involved in the fraudulent scheme were the Lithuanian shipping company Viking and the Slovakian tax consultant The Advisor. In order to give the tax declarations the appearance of credibility to the tax returns, Nicolas, Veronica and Mirko drew up the transport documents and invoices necessary to ask for the VAT refund. The total amount delivered by the national tax offices was: €34,456,780 (Spanish), €31,439,848 (Greek), €23,756,290 (Italian), €26,493,374 (Maltese), €28,345,201 (Austrian) and €18,392,291 (French). The loss for the Treasury was therefore more than €150,000,000. This amount is the sum of the VAT refund already received and the VAT refund claimed but refused by the first Tax Office which detected the fraud scheme. The profits of the criminal activity were sent to a bank account in the Virgin Islands. Six months later the money returned to Europe and was invested in the building of a resort on the Croatian Islands under the name of The Advisor. Some of the formal directors of these companies are either wanted or unknown.

Assess the practical and legal issues that must be overcome before the matter is brought to Court.

Questions & Indicative answers

1. ***Have a look at the date and the duration of the offence. The EPPO is competent for an act committed after 20 November 2017. What about the continuing offence and related offence such as money laundering?***

With reference to fraud, several conducts can be identified that, from the chronological point of view, started in 2014 and went on for several years till 2020. According to Art 120 of the EPPO Regulation the first conducts started before the entry into force of the European Public Prosecutor's Office, but because of the nature of the fraud, which should be considered a continuing offence, only the last conducts are relevant in the competence perspective. The case is not specific about the time of the money laundering commission, but it seems to have been most likely committed after the fraud and, therefore, after the entry into force of the EPPO. In any case money laundering can be considered an inextricably linked offence that, according to Art 22 (3) of the EPPO Regulation, falls under the competence of the EPPO.

2. ***Which Member State is the focus of the criminal activity? Or, if several connected offences have been committed, in which Member State was the bulk of the offence committed? For several connected offences, which other Member State can be competent?***

All the fraudulent conducts have as a reference point the Portuguese company Open Ocean, of which all the main subjects involved are shareholders. Portugal is also the Member State where the fraud seems to produce

[220] Disclaimer: fictional case, inspired by case studies from UCPI previous training courses.

the major effects. First of all, the territorial and personal competence of the EPPO is established (according to Art 23 of the EPPO Regulation), because the offences were committed '*in whole or in part within the territory of one or several Member States*' and by nationals of Member States. According to the rule provided by the Art 26 (4) of the EPPO Regulation, regarding the bulk of the offense, the case shall be initiated and handled by the Portuguese EDP. An EDP of a different Member State may, deviating from the above-mentioned rule, initiate or handle the case based on the following criteria: (a) the place of the suspect's or accused person's habitual residence; (b) the nationality of the suspect or accused person; (c) the place where the main financial damage occurred. Consequently, the Netherlands (the Member State of which Mary and Marc are nationals) or France (where the main financial damage occurred because of the VAT refund) can be competent for the case.

3. Have the constituent elements of the offence been met according to the PIF Directive and EPPO Regulation?

Yes, because the fraud affects the Union's financial interests in respect of revenue arising from VAT own resources by the use or presentation of false, incorrect or incomplete VAT-related statements or documents, which diminishes the resources of the Union budget (Art 3 (2) d) PIF Directive).

4. Is this a case of a criminal organization (Art 22 EPPO Regulation), which shall be considered an aggravating circumstance according to Art 8 PIF Directive?

Yes, the conducts described are in line with the concept of criminal organization defined in the Council Framework 2008/841/JHA, to which Art 22 of the EPPO Regulation and Art 8 of the PIF Directive refer: '*criminal organisation means a structured association, established over a period of time, of more than two persons acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit*'.

5. What about the total amount of the damage (that which has already occurred and potential)? Is it more than €10 million?

The amount of €150,000,000 is the sum of the VAT refund already received and the VAT refund claimed but refused by the first Tax Office which detected the fraud scheme. The total amount represents the damage caused or likely to be caused, but in any case, the effective damage seems to be more than €10 million and, consequently, the EPPO is competent (Art 22(1) EPPO Regulation).

6. Are there offences that are inextricably linked to the offence falling within the scope of the PIF Directive?

According to Art 22 of Council Regulation (EU) 2017/1939 the competence of the EPPO covers offences that are inextricably linked to crimes affecting the financial interests of the European Union that are provided for in the PIF Directive. As previously stated, the fraud described in the case is in line with the provision of Art 3 (2) d) PIF Directive). The concept of inextricably linked offences is not defined by the EPPO Regulation or by the PIF Directive, but using the criteria of connection and instrumentality it is possible to say that money laundering can be considered an inextricably linked offence.

7. What can a prosecutor do, knowing that some company directors are either wanted or unknown?

In accordance with the applicable national law, a prosecutor may use, if allowed, the investigative measures provided by Art 30 of the EPPO Regulation and take advantage, cooperating with the EDPs of other Member States, of the cross-border investigation rules defined by Art 31 of the EPPO Regulation.

Case study 3 (related to Ch. III)[221]

Fictional scenario

A senior EU official (Mr X) is suspected of having defrauded his institution (European Food Safety Authority, EFSA) of €10 million during 2019-2020.

The prosecution alleges that he initially deposited the money in Prospera Bank, Parma. Mr X subsequently received a tip-off that police officers had made inquiries at the Prospera Bank. Mr X gave instructions to transfer the money immediately to Prospère Bank in Luxembourg, which was done. He then placed all €10 million in a trust in Luxembourg. The trustees of the trust are the Prospère Bank Trust Company. Some of the money is used to buy an 85-foot yacht, currently in a shipyard in the port of Piraeus, Greece, for refitting. The EPPO decides to prosecute the case in Italy. Mr X is staying in Luxembourg. The Italian European Delegated Prosecutor orders searches and recording of conversation in Mr. X's domicile in Italy; production of documents from EFSA; search of the yacht in Greece and seizure of any relevant documents for identifying the link with the 'dirty money', the identity of the owners or any persons possibly committing money laundering; production of documents from the yacht registry/broker agent/banking transactions/tax documents related to the purchase of the yacht; freezing of the yacht, as it is liable to confiscation; arrest and surrender of Mr X in Luxembourg; and, having discovered the identity of the yacht owner and the links to the 'dirty money', arrest or surrender of this person from Greece to Italy.

Questions & indicative answers

1. ***What kind of crimes have been committed?***

Crimes of misappropriation and money laundering (Art 4 PIF directive) appear to have been committed.

2. ***Is the EPPO competent for these offences?***

Yes, the EPPO can be considered competent for the reported offences. All requirements requested for the material competence (Art 22 EPPO Regulation) and for territorial and personal competence (Art 23 EPPO Regulation) are met.

3. ***Is the perpetrator an official within the scope of the PIF Directive? What if the perpetrator was a national official?***

The perpetrator is a public official according to the PIF Directive (Art 4(4) PID Directive). In this case the perpetrator appears to be a Union official. The PIF Directive would have also applied were Mr X a national official managing Union funds.

4. ***What about co-perpetrators (complicity)?***

Co-perpetrators are punishable for crimes provided by Arts 3 and 4 of the PIF Directive, according to Art 5 of the same PIF Directive.

5. ***Is there a problem with some investigative measures that are mentioned? How can they be ordered or requested?***

Many of the investigative measures that are mentioned in the fictional scenario are cross-border measures. For cross-border measures the EPPO Regulation provides a special regime regulated by Art 31 of the EPPO Regulation. If the national legislation of the assisting European Delegated Prosecutor, for example, provides for a judicial authorization, this authorization needs to be obtained.

[221] Disclaimer: fictional case, inspired by case studies from UCPI previous training courses.

Case study 4 (related to Ch. IV)

Fictional scenario

In EU Member State 'A', criminal proceedings have been initiated against three suspects for criminal activities committed during the period 2016-2019. In particular, the suspects would have allegedly committed several frauds affecting both the EU and the national budget. National authorities in Member State 'A' informed the EPPO about the ongoing case. After one month, a European Delegated Prosecutor (EDP) in Member State 'A' decided to exercise the EPPO's right of evocation.

In the course of the investigation, the EDP in Member State 'A' (the 'handling EDP') decided to search the private home of one of the suspects, a resident in the neighbouring Member State 'B', in order to seize relevant documents concerning one of the EU projects on which an alleged fraud has been committed. For this purpose, she requested an EDP in Member State 'B' (the 'assisting EDP') to conduct such a search in Member State 'B' and seize relevant evidence. The handling EDP also indicated to the assisting EDP to conduct the search between 6 a.m. and 9 p.m., as well as to inform the suspect of the possibility of being assisted by a lawyer during the search.

The assisting EDP, however, initially considered that a production order concerning the documents sought by the handling EDP would have been sufficient to reach the investigative goal, and informed the handling prosecutor accordingly. They could not reach an agreement and the case was brought before the competent Permanent Chamber which, after hearing the handling EDP, confirmed the assignment of the search of the private home to the assisting EDP. The assisting EDP in Member State 'B', therefore, requested and obtained the judicial authorization from a competent court in Member State 'B' as, according to the national laws in both Member State 'A' and Member State 'B', judicial authorization is required for this measure. At 4 p.m. the following day, the assisting EDP conducted the search of the suspect's home in the presence of the suspect and two witnesses – the suspect's neighbours – in compliance with the national law of Member State 'B', and seized the sought-after documents.

After the search, the suspect's lawyer lodged an application with the investigative judge in Member State 'B', asking the search to be declared unlawful, and the evidence thereby obtained to be excluded, since it was disproportionate because a production order would have sufficed, and because all documents found at his/her home were seized, irrespective of their relevance to the investigation. It was also argued that to the contrary of what had been requested by the handling EDP, the suspect was not informed that he could be assisted by a lawyer during the search. She also argued the search was unlawful due to the lack of proper court authorization, since the court order was issued without the investigative judge in Member State 'B' making an independent assessment of the requisites for issuing the search and seizure warrant, as required by the laws of both Member State 'A' and Member State 'B', and by the Charter of Fundamental Rights of the EU.

During the investigations, the defendant's lawyer requested the handling EDP to hear some employees of the company owned by two suspects in Member State 'B', in order to gather evidence that she believed would demonstrate the regularity of the activities conducted by the suspects. The EDP, however, declined this request.

Questions & indicative answers

1. Can the EPPO exercise its competence *ratione materiae* and *ratione temporis* in relation to this case?

On the one hand, the EPPO can exercise its competence regarding only those crimes committed after November 20, 2017, according to Art 120(2) of the EPPO Regulation (*ratione temporis*). On the other hand, the EPPO can exercise its competence *ratione materiae*, according to Art 22 of the EPPO Regulation, in respect of the criminal offences provided for in the PIF Directive, as implemented by national law, irrespective of whether the same criminal conduct could be classified as another type of offence under national law (see Art 22(1)-(4) EPPO Regulation).

a) If not, would a successful challenge of the EPPO competence mean that evidence gathered by the EPPO would be inadmissible before the competent domestic courts?

It does not have to be inadmissible before the competent domestic court. Although there are no common standards on admissibility of evidence within EPPO proceedings, the only rule is respect of the fairness of the proceedings as a whole. Thus, the general standards are applicable: ECtHR case law (applicable to EU cases by way of Art 52(3) Charter and primacy and effectiveness of EU law); exclusion of evidence obtained in violation of Arts 2 and 3 ECHR (evidence obtained by way of torture or ill treatment); no rule on exclusion of derivative illegally obtained evidence (fruit of the poisonous tree).

b) Can the violation of the deadlines provided by the EPPO Regulation to exercise its right of evocation be invoked to challenge the admissibility of evidence gathered by the EPPO?

According to Art 27 of the EPPO Regulation, the EPPO shall take its decision on whether to exercise its right of evocation as soon as possible, but no later than five days after receiving the information from the national authorities and shall inform the national authorities of that decision. So, a defence lawyer can challenge the admissibility of the evidence gathered by the EPPO when the deadline is not met, and the court will have to take a decision on the matter. There are Member States which have illegal evidence decided *ex lege*, thus it is prescribed in detail in the criminal proceedings what should be excluded from the file. There are some Member States which decide *ex iuditio*, which means that the court or the judge decides depending on the violation and on the importance of this evidence. And the aim of this exclusionary rule is also different. In some Member States, it should be excluded if it influences the fairness of the trial; in others, it should be excluded only to prevent fraud or illegal action by Member State authorities.

2. Is the procedure for requesting the authorization for conducting the search in another Member State complied with? What is the applicable law in these cases?

Art 31(3) EPPO Regulation provides that '[i]f judicial authorisation for the measure is required under the law of the Member State of the assisting European Delegated Prosecutor, the assisting European Delegated Prosecutor shall obtain that authorisation in accordance with the law of that Member State. If judicial authorisation for the assigned measure is refused, the handling European Delegated Prosecutor shall withdraw the assignment. However, where the law of the Member State of the assisting European Delegated Prosecutor does not require such a judicial authorisation, but the law of the Member State of the handling European Delegated Prosecutor requires it, the authorisation shall be obtained by the latter European Delegated Prosecutor and submitted together with the assignment.' Therefore, in order to evaluate the results of the current EPPO system, it is actually necessary to analyze the individual legal systems of EU Member States. Consequently, the court of the Member State where the authorization is required must decide if it complied with the law of that Member State.

3. How can the defence challenge the search and seizure?

The defence can challenge the search and seizure invoking noncompliance with domestic law (lack of proper authorization) and 'flagrant denial of justice' as the lawyer was not present during the search.

a) Is the investigative judge in Member State B competent to rule on such issues during the investigative stage?

Yes, if the national law of that Member State allows it.

b) Or are domestic courts only competent to rule on lawfulness of gathering of evidence once and if an indictment has been brought in that Member State?

No, if the national law of that Member State can rule on such issues during the investigative stage, they are competent to rule on lawfulness of gathering of evidence.

c) Could the application be addressed to the EDP or the Chambers or Supervising EP? Do they have the power to issue a ruling on this matter?

See Art 31(5)-(8) EPPO Regulation.

d) Can the issue of the lack of an independent assessment by a court on the requisites for issuing the search and seizure warrant, as required by the laws of both Member State 'A' and Member State 'B', and by

the Charter of Fundamental Rights of the EU, be invoked to challenge the use of evidence?

Yes. The defence lawyer, based on Rec. 80 EPPO Regulation, can challenge the use of evidence since the Regulation aims to respect the different legal systems of the Member States. See Rec. 80 EPPO Regulation.

4. Is the defence argument before the trial court about evidence not collected in accordance with the national criminal procedural law of Member State 'A' grounded?

Yes, since the gathering of evidence did not comply with national law of Member State A (Rec. 80 EPPO Regulation).

a) Can the absence of the lawyer, and of information about the right to be assisted by a lawyer during the search, be invoked to challenge the use of evidence?

Yes. That could be considered a 'flagrant denial of justice' such that the gathering of evidence would be unlawful.

b) What is the legal standard against which lawfulness of the gathering of evidence is to be tested? EU Law? Domestic Law of Member State 'A', 'B', or both?

Both domestic law of Member State A and B and EU Law.

c) Can this be raised in Member State B? (See also above question 2.)

Yes – see Art 31(3) of the EPPO Regulation.

d) If the competent authorities decide that evidence gathered during the search was gathered unlawfully due to this violation, will such evidence be excluded from the case? Would exclusion be based on EU Law or domestic law?

It will depend on the domestic law of the Member State where the case is brought. It will be primarily based on domestic law but also on EU law.

5. Can the violation of the proportionality principle be invoked to challenge the use of evidence and before which court?

Yes. Rec. 65 EPPO Regulation states that '[t]he investigations and prosecutions of the EPPO should be guided by the principles of proportionality, impartiality and fairness towards the suspect or accused person. This includes the obligation to seek all types of evidence, inculpatory as well as exculpatory, either *motu proprio* or at the request of the defence.' It should be invoked before the national court where the evidence is collected (Rec. 88 EPPO Regulation: this Regulation does not exclude the possibility for national courts to review the validity of the procedural acts of the EPPO which are intended to produce legal effects vis-à-vis third parties with regard to the principle of proportionality as enshrined in national law).

a) What is the legal standard against which lawfulness of the gathering of evidence is to be tested? EU Law? Domestic Law of Member State 'A', 'B', or both?

Both.

b) Can the defence raise the fact that the Permanent Chamber did not hear the assisting EDP before taking the decision on the assignment?

Yes – see Art 31(6)-(8) EPPO Regulation.

c) Can this be raised in Member State 'B'? (See also above question 2.)

Yes – based on Art 31(3) EPPO Regulation.

d) If the competent authorities decide that evidence gathered during the search was gathered unlawfully due to this violation, will such evidence be excluded from the case? Would exclusion be based on EU law or domestic law?

Yes, such evidence would be excluded. Substantive law will be based on EU law ex. Rec.s 65 and 88 of the EPPO Regulation. Procedural law will be based on domestic law since it is the competent authority to rule on such issues.

6. Admissibility of evidence gathered by the defence

a) Is the EPPO obliged to hear the witnesses in Member State 'B' upon request of the defence?

In principle only if the national law of Member State B so allows – according to Art 41(3) of the EPPO Regulation.

b) If the defence obtained written statements by the employees in Member State B, could such statements be used as evidence?
Yes, based on Art 37(1) of the EPPO Regulation.

c) Can the defence or the EPPO challenge the admissibility of witnesses' statements because they were not subject to cross-examination?
Yes, if the national law provides this procedural right (see Art 41(3) EPPO Regulation).

7. Can the defence challenge the admissibility of traffic data produced by the service provider?
Only if it is data specifically retained in accordance with national law pursuant to the second sentence of Art 15(1) of Directive 2002/58/EC of the European Parliament and of the Council; or if the offence subject to the investigation is punishable up to four years (Art 30(1) EPPO Regulation).

a) What is the legal standard against which the lawfulness of the gathering of evidence is to be tested? EU Law? Domestic law of Member State 'A', 'B', or both?
Both.

b) If the competent authorities decide that evidence gathered during the search was gathered unlawfully due to this violation, will such evidence be excluded from the case? Would exclusion be based on EU Law or domestic Law?
Yes, such evidence would be excluded. Substantive law will be based on EU law ex. Art 30(1) EPPO Regulation. Procedural law will be based on domestic law since it is the competent authority to rule on such issues.

Case study 5 (related to Ch. IV)

Fictional scenario

In EU Member State 'A' criminal proceedings have been initiated against three suspects, for criminal activity during the period 2016-2019 as members of an organized crime group; they have committed four frauds, three of which affect the EU's financial interests. It has been found that members of the organized criminal group have been allocated funds to Company 'X', which was incorporated under the law of a third country – State 'X' – and ultimately was connected to offshore companies linked to it.

Subsequently, there was a division of the case, as it was established that some of the crimes were related to embezzlement of EU funds and fall within the competence of the EPPO, while other crimes were of national competence. In the course of the investigation conducted by an EDP, evidence was gathered that the organized criminal group set up and operating in Member State 'A' also committed criminal activity in neighbouring Member State 'B'. For the purposes of the investigation, the EDP from Member State 'A' has requested permission to search and seize material evidence from the competent court in Member State 'B', as according to the national laws in both Member State 'A' and Member State 'B' judicial permission was required for this measure.

Upon completion of the investigation, the EDP filed an indictment in the court of Member State 'A'. During the court proceedings an objection was filed by the defendants' lawyers that part of the evidence had not been collected in accordance with the national criminal procedure legislation of Member State 'A'. Further during the investigation, the EDP concluded that evidence for the incorporation of Company 'X' in State 'X' was crucial to prove his/her case. It turned out that between the Member State 'A' and State 'X' a multilateral agreement existed, but at that time State 'X' had not accepted the EPPO as a competent authority for this agreement. During the court trial the defendants' lawyer asked the EPPO to cooperate and use its resources to collect evidence he/she believed would be in favour of the defence. The EDP declined this request.

Questions & indicative answers

1. In which cases can the European Public Prosecutor's Office take charge of the case and lead the case instead of the National Public Prosecutor's Office? Is consent required by national competent authorities?

According to Art 22(2) EPPO Regulation, the EPPO shall be competent for offences regarding participation in a criminal organization as defined in Framework Decision 2008/841/JHA, as implemented in national law, if the focus of the criminal activity of such a criminal organization is to commit any of the offences referred to in Art 22(1) of the EPPO Regulation. Although it is clear from the facts that only three of the four frauds affect the interests of the EU, this does not exclude the EPPO's competence. According to Art 22(3) of the EPPO Regulation, the EPPO shall also be competent for any other criminal offence that is inextricably linked to criminal conduct that falls within the scope of Art 22(1) of the EPPO Regulation. However, the competence with regard to such criminal offences may only be exercised in conformity with Art 25(3) EPPO Regulation. The EPPO may also exercise its competence based on Art 25(4) of the EPPO Regulation, meaning that with the consent of the competent national authorities, it can exercise its competence for offences referred to in Art 22 of the EPPO Regulation in cases which would otherwise be excluded due to application of paragraph 3(b) of Art 25 of the EPPO Regulation if it appears that the EPPO is better placed to investigate or prosecute.

2. Is the procedure for requesting a search and seizure authorization in another Member State complied with? Who is the competent prosecutor? What is the applicable law in these cases?

The procedure for requesting a search and seizure authorization in another Member State is not complied with, because the EDP from Member State 'A' has no authority to request search and seizure from another Member State. The handling EDP should assign such measures to the EDP of the other Member State in which the measures shall be undertaken. In this hypothesis the applicable provision is Art 31(3)(1) of the EPPO Regulation, because the law of Member State 'B' requires judicial authorization for requesting a search and seizure.

3. Should the court in Member State 'A' admit the evidence gathered according to the procedure of search and seizure in Member State 'B'? Is the court obliged to admit the evidence?

According to Art 37 and Rec. 80 of the EPPO Regulation, 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. According to Rec. 80 of the EPPO Regulation the evidence presented by the EPPO in court should 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. However, this is under the condition that the trial court considers its admission to respect the fairness of the procedure and the suspect or accused person's rights of defence under the Charter. The Regulation also stipulates that in line with those principles, and in respecting the different legal systems and traditions of the Member States as provided for in Art 67(1) TFEU, nothing in the EPPO 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, including in common law systems.

4. Does the procedure for making the search and seizure in Member State 'B' change if its national law does not require judicial authorization for this measure in case the national law of the Member State of the handling EDP requires it?

In this case the judicial authorization should be acquired in advance by the handling EDP and incorporated when assigned to his/her colleague EDP in the other Member State, per Art 31(1) EPPO Regulation.

5. Who is the competent prosecutor and what is the procedure for filing an indictment in court?

According to Art 35(1) EPPO Regulation, if the handling EDP considers the investigation to be completed, he/she shall submit a report to the supervising European Prosecutor, containing a summary of the case and a draft decision on whether to prosecute before a national court. The supervising EDP shall forward those documents to the competent Permanent Chamber accompanied, if he/she considers it necessary, by his/her own assessment. When the Permanent Chamber, in accordance with Art 10(3) of the EPPO Regulation, takes

the decision as proposed by the EDP, he/she shall pursue the matter accordingly.

6. Was the objection of the defendant's lawyer about the evidence that had not been collected in accordance with the national criminal procedure legislation of Member State 'A' grounded?

Those objections by the defendant's lawyer have no grounds, as the measures undertaken in Member State 'B' were carried out in accordance with the latter national legislation.

7. Was the request of the defendant's lawyer for the EDP to gather evidence in favour of the defence grounded?

According to Rec. 65 and Art 5 (4) of the EPPO Regulation the investigations and prosecutions by the EPPO should be guided by the principles of proportionality, impartiality and fairness towards the suspect or accused person. This includes the obligation to seek all types of evidence, inculpatory as well as exculpatory, *either motu proprio* or at the request of the defence. This principle is complemented by the obligation stipulated in Rec. 85 and Art 41(3) of the EPPO Regulation, whereby suspects and accused persons shall have the right to request the EPPO to obtain evidence on behalf of the defence.

8. What options does the EDP have to collect the evidence needed from State 'X'?

According to Rec. 109 and Art 104 of the EPPO Regulation, where the notification of the EPPO as a competent authority for the purposes of multilateral agreements already concluded by the Member States with third countries is not possible or is not accepted by the third countries and pending the Union accession to such international agreements, European Delegated Prosecutors may use their status as national prosecutor toward such third countries, provided that they inform and, where appropriate, endeavour to obtain consent from the authorities of third countries that the evidence collected from these third countries on the basis of those international agreements will be used in investigations and prosecutions carried out by the EPPO. The EPPO should also be able to rely on reciprocity or international comity vis-à-vis the authorities of third countries. This should, however, be carried out on a case-by-case basis, within the limits of the material competence of the EPPO and subject to possible conditions set by the authorities of the third countries.

Case study 6 (related to Ch. IV)

Fictional scenario

The Italian police authorities received a report from a whistle-blower claiming that the Italian citizen 'B' (living in Trieste), who is director of an Italy-based company, has been involved in a subsidy fraud scheme concerning a major infrastructure project in the Rijeka region (Croatia). The whistle-blower produced several documents which offered sufficient grounds to believe that 'B' had been obtaining funding from the (state-owned) Croatian Bank for Regional Development and has been redirecting a considerable portion of these funds to a bank account in Luxembourg in order to finance the purchase of real estate property in Barcelona for private purposes. Based on the information received, the Italian police initiates an investigation and reports the case to the local prosecution office. The Italian prosecutor, when reviewing the case considers that the offence may actually fall within the competence of the EPPO, as the funds received by 'B' from the Croatian bank could partially stem from the European Regional Development Fund (co-financing of local infrastructure).

Questions & indicative answers

The prosecutor reports the case to the EPPO and the competent Italian EDP decides to exercise the right of evocation.

1. Can the suspect 'B' obtain judicial review of the decision taken by the Italian EDP to exercise the right of evocation?

The EPPO is established as an EU body, but the CJEU has limited power for judicial control of EPPO acts. For the

purposes of judicial review, the EPPO acts as a national body and the procedural acts of investigation and prosecution are the subject of judicial review in accordance with the applicable national law before the national courts. According to Art 42(1) EPPO Regulation: 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 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. The decision taken by the Italian EDP to exercise the right of evocation (after the national authority had started an investigations) concerns the suspect 'B', but he/she could obtain judicial review only if national (Italian) law provides for such judicial review. (The national criminal procedural codes/acts mostly provide for judicial review of the investigation acts and coercive measures, but not for the decisions to open/evocate the case.)

The competent Permanent Chamber subsequently decides to reallocate the case to an EDP in Croatia on the grounds that the focus of the criminal activity actually has taken place in Croatia.

2. Can the suspect obtain judicial review of the decision to reallocate the case to an EDP in Croatia?

The decisions of the Permanent Chamber on case reallocation and on forum choice are not subject to judicial review by the CJEU, but by the national courts in accordance with domestic (Croatian) law if this law provides for this procedural act to be the subject of judicial review. (In principle, the national criminal procedural codes provide for judicial review only for coercive or investigative measures, but not for the decision to open/reallocate the investigation).

In accordance with the decision taken by the Permanent Chamber, the competent EDP in Croatia continues the investigations. He/She determines that there are sufficient reasons to obtain a national arrest warrant against suspect B from the competent judge/court and to issue an EAW. Based on the EAW, B is arrested by the Italian police. He/She seeks advice from a local lawyer with the intention to avoid being surrendered to Croatia.

3. Can the suspect challenge the Croatian arrest warrant and/or EAW on the grounds that the EPPO is not competent for the case because the majority of funds obtained by B were provided from the Croatian state budget?

According to Art 33 EPPO Regulation, the handling EDP may order or request the arrest or pre-trial detention of the suspect or accused person in accordance with the national law applicable in similar domestic cases. Where it is necessary to arrest and surrender a person who is not present in the Member State in which the handling European Delegated Prosecutor is located, the latter shall issue or request the competent authority of that Member State to issue a European Arrest Warrant in accordance with Council Framework Decision 2002/584/JHA. According to Art 6 of the Council Framework Decision 2002/584/JHA the issuing judicial authority shall be the judicial authority of the issuing Member State, which is competent to issue an EAW by virtue of the law of that State. In this case, the suspect cannot challenge the warrant on the grounds of EPPO competence, because the EDP investigates the case.

4. Can B challenge the execution of the EAW on the grounds that his/her business activity, allegedly being fraud against the financial interest of the EU, has been partially conducted from his/her home/office in Italy (Art 4(7) FD EAW)?

According to Art 4(7)(a) of Council Framework Decision 2002/584/JHA: 'Where the European arrest warrant relates to offences which are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such'. But in this case Art 4(7) of FD EAW is not applicable because the EPPO is the competent authority of the cross-border investigation under the Art 23(a) EPPO Regulation: 'The EPPO shall be competent for the offences referred to in Art 22 where such offences:(a) were committed in whole or in part within the territory of one or several Member States'. And when exercising its competence, the EPPO functions on the territory of the Member

States as within a single legal area.

The suspect's Croatian lawyer turns to the EPPO's Central Office and requests access to the case file. The Central Office forwards the request to the Croatian EDP, who considers this request premature and does not send a reply to the lawyer.

5. How can the lawyer proceed to obtain the case file from the Croatian EDP?

In this case Art 41(2)(b) and Art 45(2) EPPO Regulation are applicable. Art 41 of the EPPO Regulation provides for the right to information and access to the case materials, as provided for in Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings. According to Art 45(2) of the EPPO Regulation access to the case file by suspects and accused persons shall be granted by the handling EDP in accordance with the national law of that EDP's Member State. The Regulation lacks a provision on the moment when this right arises, but according to Art 2(1) of Directive 2012/13/EU, the Directive applies from the time persons are made aware by the competent authorities of a Member State that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings. According to Art 7(4) of Directive 2012/13/EU access to certain materials may be refused if such access may lead to a serious threat to the life or the fundamental rights of another person or if such refusal is strictly necessary to safeguard an important public interest, such as in cases where access could prejudice an ongoing investigation or seriously harm the national security of the Member State in which the criminal proceedings are instituted. Member States shall ensure that, in accordance with procedures in national law, a decision to refuse access to certain materials in accordance with this paragraph is taken by a judicial authority or is at least subject to judicial review. In this case, the suspect's Croatian lawyer can appeal the EDP's refusal before the competent national court.

The prosecutor reports the case to the EPPO and the competent Italian EDP decides to exercise the right of evocation. The competent Permanent Chamber subsequently decides to reallocate the case to an EDP in Croatia on the grounds that the focus of the criminal activity by suspect B was actually in Croatia. The Croatian EDP ('handling EDP') considers that it is necessary to undertake a search of the house and office premises of suspect B in Italy.

6. How does he/she need to proceed, and which judge/court would be competent to order the searches? Can B's lawyers obtain judicial review against the measure?

Although the Italian EDP has exercised the right of evocation, the competent Permanent Chamber has decided to reallocate the case to the Croatian EDP because of the focus of the criminal activity. The decision of the Permanent Chamber determines jurisdiction and the applicable national law. In this case, the Croatian EDP is handling EDP and the Italian EDP is assisting EDP. According to Art 31(1) EPPO Regulation: 'Where a measure needs to be undertaken in a Member State other than the Member State of the handling European Delegated Prosecutor, the latter European Delegated Prosecutor shall decide on the adoption of the necessary measure and assign it to a European Delegated Prosecutor located in the Member State where the measure needs to be carried out.' In accordance with Art 31(3) EPPO Regulation, 'If judicial authorisation for the measure is required under the law of the Member State of the assisting European Delegated Prosecutor, the assisting European Delegated Prosecutor shall obtain that authorisation in accordance with the law of that Member State.' In this case, the Italian assisting EDP is obliged to act under Art 31(4) EPPO Regulation: 'The assisting European Delegated Prosecutor shall undertake the assigned measure, or instruct the competent national authority to do so.' The searches shall be carried out in accordance with this Regulation and Italian law (Art 32 EPPO Regulation). If the Italian Criminal Procedural Code provides for judicial review of this measure, B's lawyers can obtain judicial review before the Italian court.

Assuming the house search produces evidence, which is not relevant for the EPPO case but may be relevant to

an unrelated criminal investigation conducted by the Italian authorities, the EDP forwards this evidence to his/her Italian colleague in charge of that criminal investigation.

7. Can B's Italian lawyer challenge this in an Italian court?

According to Art 30(5) EPPO Regulation, the EDPs may only order the measures referred to in paragraphs 1 and 4 where there are reasonable grounds to believe that the specific measure in question might provide information or evidence useful to the investigation, and where there is no less intrusive measure available which could achieve the same objective. The procedures and the modalities for taking the measures shall be governed by the applicable national law, but if during the enforcement of the house search, there are indications or evidence related to another crime, national law is applicable. In this case the assisting EDP has to communicate this circumstance to the handling EDP because this crime may be connected to the case investigated by the EPPO. The house search itself is subject to judicial review and if it has been carried out lawfully, the evidence found could be forwarded to the national authority. The EU applicable law is Art 24(8) EPPO Regulation: 'Where it comes to the knowledge of the EPPO that a criminal offence outside of the scope of the competence of the EPPO may have been committed, it shall without undue delay inform the competent national authorities and forward all relevant evidence to them.' B's Italian lawyer could challenge this during the proceedings before the national court.

The Croatian EDP considers it necessary to order the interception of telephone communications between B (still living in Italy) and a potential accomplice of B, a Bulgarian resident ('C').

8. How does the EDP need to proceed, and which judge/court would be competent?

The EPPO Regulation does not contain any specific rules of the implementation of this measure, but on the ground of Rec. 73 EPPO Regulation, the rules on the execution of an EIO regarding the interception of communications would be applicable to the cross-border investigations of the EPPO proceedings. According to Art 30(6) EIO Directive a request for an interception of telecommunications may be executed by transmitting telecommunications immediately to the issuing State (EPPO). In this case the EPPO needs to request authorization in Italy and Bulgaria, because the measure is to be carried out in these Member States. The EDP could not have power to contact directly the national courts, but he/she has to contact the assisting EDP in Italy and Bulgaria according to Art 31 EPPO Regulation. The national Code of Criminal Procedure of any Member State lists crimes where the telephone interception could apply. It could create difficulties of investigation if this measure is not provided for the particular crime (Art 30(3) EPPO Regulation). In this case, according to Art 30(4) EPPO Regulation, the EDPs shall be entitled to request or to order any other measures in their Member State that are available to prosecutors under national law in similar national cases, in addition to the measures referred to in paragraph 1.

When the investigations are completed, B and C are informed – in accordance with national law – about the telephone interceptions conducted.

9. Where and how can B and C obtain judicial review of the ordered investigation measure?

They can obtain judicial review in accordance with the procedure under the Italian Code of Criminal Procedure (about the telephone interception of B) and in accordance with the Bulgarian Code of Criminal Procedure (about the telephone interception of C); otherwise, the applicable rule is Art 14 EIO Directive.

The Croatian EDP considers it necessary to have the funds at the bank account in Luxembourg as well as the real estate property in Barcelona frozen as these may be subject to later confiscation by the trial court. The bank account is held under the name of the Bulgarian suspect C.

10. How does the EDP need to proceed, and which judge/court would be competent to order the freezing of the account and the real estate property?

This measure is provided by Art 30(1)(d) EPPO Regulation but it is to be governed by the applicable national law (Art 30(2) EPPO Regulation). The Croatian EPD could order this measure only if there is reason to believe that the suspect will seek to frustrate the judgment ordering confiscation. Croatian EDP needs to proceed in accordance with Art 31 EPPO Regulation, namely to assign the measure to EDPs located in Spain and Luxembourg where the measure needs to be carried out.

11. Where and how can B and/or C obtain judicial review of the ordered investigation measure?

They can obtain judicial review in accordance with the national procedure under the national Code of Criminal Procedure of Luxembourg and Spain.

The Italian prosecutor had reported the case to the competent Italian EDP, who decided to exercise the right of evocation. The competent Permanent Chamber subsequently decided to reallocate the case to an EDP in Croatia on the grounds that the focus of the criminal activity by suspect B was actually in Croatia. Following further investigations, the Croatian EDP considers the investigations to be completed and having produced sufficient evidence to bring the case to trial. On proposal by the EDP, the Permanent Chamber decides to prosecute the case in Croatia and instructs the EDP accordingly.

12. B's lawyer wants to challenge that decision on the grounds that the business activity, allegedly being fraud against the financial interest of the EU, has primarily been conducted by B from his/her home/office in Italy and thus the case should be brought to trial in Italy. What can he/she do?

Art 26(4)(a) EPPO Regulation establishes that a case shall as a rule be initiated and handled by an EDP from the Member State where the focus of the criminal activity is or, if several connected offences within the competences of the EPPO have been committed, the Member State where the bulk of the offences has been committed. An EDP of a different Member State that has jurisdiction for the case may only initiate or be instructed by the competent Permanent Chamber to initiate an investigation where a deviation from the rules in the previous sentence is duly justified, taking into account the following criteria, in order of priority: the place of the suspect's or accused person's habitual residence. If B's lawyer wants to challenge that decision, he/she could invite the competent court of Croatia to submit a request for a preliminary ruling to CJEU under Art 42(2)(c) of EPPO Regulation.

13. In particular, B's lawyer considers that the EPPO has not properly interpreted the provisions of Art 26(4) EPPO Regulation. What can he/she do?

According to Art 267(b) TFEU and Art 42(2)(b) EPPO Regulation, the CJEU is competent to give preliminary rulings on the validity and interpretation of EPPO acts. According to Art 19(3)(b) TEU only 'courts or tribunals of the Member States' have the exclusive initiative to request a preliminary ruling on the interpretation or validity of EU law. This means that B's lawyer could only invite the court or tribunal to submit a request for a preliminary ruling to the CJEU, but it is up to the national court to determine the need for a request for a preliminary ruling.

Suspect B had been surrendered to Croatia on the basis of an EAW. During the trial, B's lawyer argues that a telephone interception ordered by an Italian court on request of the EPPO has been illegally conducted as – under Croatian law – the offence in question does not allow telephone interceptions to be ordered.

14. Can the lawyer successfully object to the introduction of the taped conversations as evidence in the proceedings?

If B's lawyer successfully proves that the telephone interception has been illegally conducted, he/she may ask the court not to treat the interception as evidence. But in this case the applicable law is Croatian law under Art 2 FD EAW.

The Croatian EDP considers the investigations to be completed but that they did not produce sufficient evidence

to bring the case to trial. He/She proposes to the Permanent Chamber to dismiss the case on the grounds of lack of relevant evidence.

15. The (state-owned) Croatian Bank for Regional Development, having suffered the majority of the damage, considers that the investigations should be continued, as they believe that further evidence may be obtained. What possibilities does the bank have to challenge the decision to dismiss the case?

EPPO decisions to dismiss a case are subject to judicial review before the CJEU under Art 42(3) EPPO Regulation when they are contested directly on the basis of Union law. But if EPPO decisions to dismiss a case are contested on the basis of national law, judicial review may be exercised before national courts under the applicable national law. According to Art 39(4) EPPO Regulation, when a case has been dismissed, the EPPO shall officially notify the competent national authorities and shall inform the crime victims of such dismissal. In accordance with Art 47 of the Charter, everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy before a tribunal. In this regard, the CJEU shall review the decisions of the EPPO to dismiss a case if they are contested directly on the basis of EU law. This can be a case where, pursuant to Art 263(4) TFEU, a legal person (in this case the Croatian Bank for Regional Development) institutes proceedings against this act.

16. The European Commission considers that the investigations should be continued as they believe that further evidence may be obtained. What possibilities does the Commission have to challenge the decision to dismiss the case?

According to Rec. 89 of EPPO Regulation, the EPPO Regulation is without prejudice to the possibility for the Commission to bring actions for annulment in accordance with the second paragraph of Art 263 TFEU and to the first paragraph of Art 265 TFEU, and to infringement proceedings under Arts 258 and 259 TFEU. Therefore, if the Commission considers that the further evidence may be obtained, under Art 263 TFEU, the Commission may bring action under Art 263(2) TFEU against the decision of EPPO on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

Case study 7 (related to Ch. IV)

Fictional scenario

In Member State 'A' criminal proceedings were instituted against G.P. A few months later, it was established that G.P. is suspected of being an accomplice in several cross-border crimes, including corruption, falling within the competence of the EPPO. The EPPO exercised its right of evocation, and the case was assigned to the EDP from Member State 'B'. The EDP ordered a pre-trial detention of G.P. for 72 hours, following which an EAW was issued. Consequently, G.P. was arrested in Member State 'C'. Ultimately, the case was reopened in Member State 'X' and during the proceedings the defendant's lawyer objected before the competent national court that in the pre-trial phase there were significant procedural violations of the defendant's rights, as neither the detention order for 72 hours nor the EAW had been subject to prior judicial review. The prosecutor objected, pointing out that all the requirements of the national law of Member State 'X' were respected during the first instance proceedings and the national legislation did not require a judicial review of the detention order up to 72 hours, nor prior judicial review for the issuance of an EAW.

The defendant's lawyer also asked the court not to take into consideration an expertise carried out in Member State 'A', as they have not been authorized or subsequent approved by the court as the national law of Member State 'X' requires.

The investigation continued in Member States 'A', 'B' ,'C' and 'X'. When it was finalized, the handling EDP of Member State 'B' decided to bring the case to judgment and he/she filed a draft decision recommending this before the Permanent Chamber. However, the Permanent Chamber did not take any decision within 30 days. Seeing this, the EDP decided to deem his/her proposal as accepted and brought the case to judgment by filing an indictment on his/her own, but he/she did so in Member State 'X'. The

defendant's lawyer argued that the court of Member State 'X' is not the competent national authority and consequently the national court of Member State 'X' accepted his/her arguments and declared itself not competent for the case. So did the national courts in Member Sates 'A', 'B' and 'C'.

Once the jurisdictional issue was settled the EPPO decided to dismiss the case. An NGO fighting corruption in the EU contested the dismissal of the case based on Union law.

Questions & indicative answers

1. Were the rights of the defendant violated because of lack of preliminary judicial review of his/her 72-hour detention and the EAW?

According to Art 33 EPPO Regulation, the handling EDP may order or request the arrest or pre-trial detention of the suspect, as was the case with the detention for 72 hours in accordance with the national law applicable in similar domestic cases. The same article provides that where it is necessary to arrest and surrender a person who is not present in the Member State in which the handling EDP is located, which is the case in the case study, the latter shall issue or request the competent authority of that Member State to issue an EAW in accordance with Council Framework Decision 2002/584/JHA.

When discussing this question, the CJEU's judgment of 10 March 2021 in case C-648/20 PPU should be taken under consideration in which the CJEU held that Art 8(1)(c) of Council Framework Decision 2002/584/JHA, read in the light of Art 47 of the Charter and the case law of the Court, must be interpreted as meaning that the requirements inherent in the effective judicial protection that must be afforded to a person who is the subject of a European arrest warrant for the purpose of criminal prosecution are not satisfied where both the European arrest warrant and the judicial decision on which that warrant is based are issued by a public prosecutor – who may be classified as an 'issuing judicial authority' within the meaning of Art 6(1) of that framework decision – but cannot be reviewed by a court in the issuing Member State prior to the surrender of the requested person by the executing Member State.

2. Was the defendant's lawyer right to object against the expertise on the grounds of lack of judicial control?

According to Rec. 87 EPPO Regulation, a Member State should not be required to provide for judicial review by the competent national courts of procedural acts which are not intended to produce legal effects vis-à-vis third parties, such as the appointment of experts or the reimbursement of witness costs.

3. Was the EDP of Member State 'B' competent to decide whether to bring the case to judgment on his/her own? Did he/she follow the right procedure? Was he/she competent to decide where to bring the case to judgment and to do so in Member State 'X'?

According to Art 36(1) EPPO Regulation, when the EDP submits a draft decision proposing to bring a case to judgment, the Permanent Chamber shall, following the procedures set out in Art 35 of the EPPO Regulation, decide on this draft within 21 days. The Permanent Chamber cannot decide to dismiss the case if a draft decision proposes bringing a case to judgment. According to Art 36(2) of the EPPO Regulation, where the Permanent Chamber does not take a decision within the 21-day time limit, the decision proposed by the EDP shall be deemed to be accepted. According to Art 36(3) of the EPPO Regulation, where more than one Member State has jurisdiction over the case, the Permanent Chamber shall in principle decide to bring the case to prosecution in the Member State of the handling EDP. However, the Permanent Chamber may, taking into account the report provided in accordance with Art 35(1) of the EPPO Regulation, decide to bring the case to prosecution in a different Member State, if there are sufficiently justified grounds to do so, taking into account the criteria set out in Art 26(4) and (5) of the EPPO Regulation, and instruct an EDP of that Member State accordingly.

4. Who should decide which is the competent national authority for the case?

According to Art 42(2)(c) EPPO Regulation, the CJEU shall have jurisdiction, in accordance with Art 267 TFEU, to give preliminary rulings concerning the interpretation of Arts 22 and 25 of the EPPO Regulation in relation to

any conflict of competence between the EPPO and the competent national authorities. The Member State in which the EPPO's activities should be carried out is decided by the EPPO, in accordance with Arts 26(4) and 36(3) of the EPPO Regulation. At the same time, whether a case shall be dealt with by the EPPO or by national prosecutors is decided by the national authorities as mentioned in Art 25(6) of the EPPO Regulation.

5. Before which court should the NGO have contested the dismissal of the case? Would the court in question accept the NGO as a valid party?

According to Art 42(1) EPPO Regulation, the general principle is that 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. However, Art 42(3) of the EPPO Regulation provides that by way of derogation the decisions of the EPPO to dismiss a case, insofar as they are contested directly on the basis of Union law, shall be subject to review before the CJEU in accordance with Art 263(4) TFEU. However, it is doubtful whether the EPPO's dismissal of the case could be considered as addressing the NGO or being of direct and individual concern to it.

Case study 8 (related to Ch. V)

Fictional scenario

OLAF opened administrative investigations against several companies based in Austria and Hungary that received EU funds for supporting agriculture before the start of the EPPO. In the course of the investigation, it became clear that the companies submitted false documents to illegally obtain the EU funds, thus OLAF reported the case to the EPPO in relation to the Austrian companies after EPPO started its activities. The EPPO decided to open an investigation for fraud against the EU financial interests and assigned it to the Austrian EDP. The EPPO investigations revealed that all the EU funds received by the different Austrian companies were then transferred to Italian bank accounts based on fake invoices and withdrawn/used to buy goods and services in Italy. The EPPO thus asked OLAF to provide an analysis of the Austrian companies' structure and of the total amount of EU funds received and to carry out a forensic analysis of the evidence acquired. OLAF's analysis revealed that all the Austrian companies could be traced back to the same two Italian nationals and that they received in total €700,000 in EU funds. The EPPO investigations were thus extended to also cover the offence of money laundering of the proceeds of the PIF offences. In the same context, OLAF proposed to the EPPO the possibility to open a complementary investigation to ensure effective recovery, as there is a time-barring element and the recovery of the funds is imminent.

Questions & indicative answers

1. Can the EPPO request OLAF to carry out an analysis on the companies?

Yes. According to Art 101(3) EPPO Regulation, 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 providing information and analyses, expertise and operational support. As stated in Art 12e, paragraph 2 of Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF), as amended by Regulation (EU, Euratom) 2020/2223 of the European Parliament and of the Council of 23 December 2020 (the 'OLAF Regulations'), the request must be transmitted in writing and must specify at least: (a) the information relating to the EPPO investigation insofar as relevant for the purpose of the request; (b) the measures which the EPPO requests the Office to perform; (c) where appropriate, the envisaged timing for carrying out the request.

2. Can the EPPO request OLAF to carry out on-the-spot forensic analysis of the evidence acquired?

Yes. According to Art 101(3) EPPO Regulation, the EPPO may also request OLAF to provide forensic analyses.

3. Could OLAF continue the administrative investigations into the fraud case after the EPPO has opened its criminal investigation?

No. According to Art 101(2) EPPO Regulation, where the EPPO conducts a criminal investigation, OLAF cannot

open any parallel administrative investigation into the same facts. This would go against the principle of non-duplication of investigations. As established in Art 12d, paragraph 1 of the OLAF Regulations, the OLAF Director-General must discontinue an ongoing investigation and must not open a new investigation where the EPPO is conducting an investigation into the same facts.

4. Can OLAF propose the conduct of a complementary investigation?

Yes. As stated in Art 12f, paragraph 1 of the OLAF Regulations, where the EPPO is conducting an investigation and the OLAF Director-General, in duly justified cases, considers that an investigation by OLAF should also be opened in accordance with the mandate of the OLAF with a view to facilitating the adoption of precautionary measures or of financial, disciplinary or administrative action, OLAF must inform the EPPO in writing, specifying the nature and purpose of the investigation. After receipt of such information and within a time limit of 20 working days, the EPPO may object to the opening of an investigation or to the performance of certain acts pertaining to the investigation. In the event that the EPPO does not object within the time limit of 20 working days, the Office may open an investigation, which it must conduct in consultation with the EPPO on an ongoing basis. If the EPPO subsequently objects, OLAF shall suspend or discontinue its investigation, or refrain from performing certain acts pertaining to the investigation.

5. Can OLAF act independently in the conduct of a complementary investigation?

According to Art 12f, paragraph 1 of the OLAF Regulations, OLAF cannot act independently in the conduct of a complementary investigation.

6. What are the results of such an investigation?

The results of the investigation shall support and complement EPPO's activity by facilitating administrative recovery and preventing further harm to the EU finances through administrative measures.

7. If OLAF supports the EPPO through a complementary investigation which procedural guarantees does it need to apply?

According to Art 12f, paragraph 1 of the OLAF Regulations, OLAF cannot act independently in the conduct of a complementary investigation. The procedural guarantees to which OLAF's investigation must be subject are the guarantees laid down both in the EPPO Regulations and in national laws.

Additional facts: The EPPO asked Europol to provide any information available related to the Italian suspects. Europol provided a report indicating the suspects' details (dates of birth and residence) and that they owned several companies in Austria and in Hungary. Europol also reported that the suspects were closely linked to a mafia organized criminal group in Italy and one of the suspects was under two separate investigations in Italy for drug trafficking and money laundering. The EPPO also asked Eurojust whether it had any information concerning the two Italian suspects stored in its case management system (CMS).

8. Can the EPPO make such a request to Europol?

Yes. According to Art 102 (2) EPPO Regulation, where necessary for the purpose of its investigations, the EPPO may 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.

9. Could Europol transmit to the EPPO the mentioned information?

Yes. As stated in Art 20 Europol Regulation (EU) 2016/794, Member States shall, in accordance with their national law and Art 7(5), have access to, and be able to search, all information which has been provided for the purposes of points (a) and (b) of Art 18(2). In particular, Art 18(2)(a) refers to cross-checking aimed at identifying connections or other relevant links between information related to:

(i) persons who are suspected of having committed or taken part in a criminal offence in respect of which Europol is competent, or who have been convicted of such an offence;

(ii) persons regarding whom there are factual indications or reasonable grounds to believe that they will commit criminal offences in respect of which Europol is competent.

This provision must be completed with Art 18 (5) Europol Regulation (EU) 2016/794, which states that categories of personal data and categories of data subjects whose data may be collected and processed for each purpose referred to in paragraph 2 are listed in Annex II. Even though this is the version of the Regulation currently in force, it must be noted that negotiations are ongoing on a Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/794, as regards Europol's cooperation with private parties, the processing of personal data by Europol in support of criminal investigations, and Europol's role in research and innovation (the 'Proposal'). The Proposal adds a new Art 18a, which provides that where necessary for the support of a specific criminal investigation, Europol may process personal data outside the categories of data subjects listed in Annex II where: (a) a Member State or the EPPO provides an investigative case file to Europol pursuant to point (a) of Art 17(1) for the purpose of operational analysis in support of that specific criminal investigation within the mandate of Europol pursuant to point (c) of Art 18(2); and (b) Europol assesses that it is not possible to carry out the operational analysis of the investigative case file without processing personal data that does not comply with the requirements of Art 18(5). This assessment shall be recorded.

10. Is Eurojust required to inform the EPPO of any hit in its CMS with the data provided by the EPPO? Is Eurojust required to provide further information (including personal data) on the hit in its CMS to the EPPO?
According to Art 20 (2) in fine of Europol Regulation (EU) 2016/794, in the case of a hit, Europol must initiate the procedure by which the information that generated the hit must be shared, in accordance with the decision of the provider of the information to Europol. The Proposal adds a new Art 20a, paragraph 3, which provides that Europol shall take all appropriate measures to enable the EPPO to have indirect access to information provided for the purposes of points (a), (b) and (c) of Art 18(2) on the basis of a hit/no hit system.

Additional facts: In Hungary, the same Italian nationals were being investigated for fraud against the EU financial interests and money laundering in relation to very similar facts: they set up companies in Hungary, which obtained a total of €400,000 of EU agricultural funds by submitting false documents and then transferred the funds illegally received to Italian bank accounts. The Hungarian prosecutor – unaware of the investigations opened by the EPPO – contacted Eurojust with the request to transmit and facilitate the execution of an EIO towards Italy, to obtain information on the bank accounts and on the suspects' assets. In Italy, one of the Italian nationals was being investigated for money laundering in relation to funds of unknown origin received from Austrian and Hungarian companies. The Italian prosecutor thus asked Eurojust to facilitate the execution of an EIO towards Austria and Hungary to obtain information on the companies providing the funds. When the Hungarian prosecutor learned that the EPPO was also conducting an investigation, he/she requested the EPPO to exchange the evidence gathered so far. The EPPO in the meantime evoked the Italian investigations concerning money laundering of the funds coming from the Austrian and Hungarian companies and contacted Eurojust to facilitate coordination with the Hungarian authorities, both in relation to evidence gathering and in order to solve any possible jurisdictional issue and avoid risks of *ne bis in idem*.

11. Can Eurojust assist in the execution of the requests by the Hungarian and by the Italian prosecutors?
According to Art 85 TFEU, Eurojust is competent to support coordination between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States. The money laundering meets the definition of serious crime affecting Hungary, Austria and Italy. This crime is included in Annex I of Eurojust Regulation (EU) 2018/1727 which lists the forms of serious crime with which Eurojust is competent to deal in accordance with Art 3(1) Eurojust Regulation. The Eurojust assistance in the case presented is grounded on Art 2(1) and (3) Eurojust Regulation.

12. Can Eurojust support the EPPO in relation to jurisdictional issues, in relation to the money laundering offences?
According to Art 3(1) Eurojust Regulation, Eurojust can exercise its competence with regard to crimes for which the EPPO exercises its competence, 'in those cases where Member States which do not participate in enhanced cooperation on the establishment of the EPPO are also involved and at the request of those Member States or at the request of the EPPO'. In this case Hungary is an NPMS and consequently Eurojust

can exercise its competence. It is also provided for in Art 8 of the EPPO-Eurojust Working Arrangement: '[p]ursuant to Art 100(2)(b) of the EPPO Regulation, in the framework of EPPO investigations involving Member States that do not take part in the establishment of the EPPO, the EPPO may invite the Eurojust's National Member concerned by the case to provide support in judicial cooperation matters.' As specified in Art 100(2)(b) of the EPPO Regulation, Eurojust's support relates to the transmission and execution of the EPPO's decisions or requests for mutual legal assistance.

13. Can Hungary request Eurojust assistance in relation to exchanging evidence with the EPPO?

Hungary can request such assistance and in accordance with its functions provided for in Art 4 (2) (g) of Eurojust Regulation, Eurojust can assist Hungary and the EPPO in relation to exchanging evidence.

14. Can Hungary issue an EIO to request the evidence gathered by the EPPO?

The cooperation between the EPPO and Hungary is regulated by Art 105(2) EPPO Regulation and the working agreement between the EPPO and the Office of the Prosecutor General of Hungary. According to Art 1(3) of the working agreement, for gathering evidence the parties shall apply the relevant EU acts on judicial cooperation in criminal matters or other multilateral legal instrument where applicable.

15. Can Hungary and the EPPO set up a JIT to further investigate this case together?

Yes, they can. The legal ground for setting up a JIT is Art 4(1)(f) Eurojust Regulation. Additionally, Art 9(1)(c) of the EPPO-Eurojust Working Arrangement provides that '[w]here relevant, in transnational cases involving Member States that do not take part in the establishment of the EPPO or third countries, the EPPO may request Eurojust to provide support for: the setting up of joint investigation teams and their operations.'

16. Can the EPPO issue an EAW or EIO towards Hungary to arrest the Italian suspect located in Hungary and should Hungary execute it?

Under Art 33 EPPO Regulation, the EDP might ask the judge to issue an EAW or EIO to be executed in Hungary where the intervention of the national member of Eurojust could facilitate or support the enforcement.

Case study 9 (related to Ch. V)

Fictional scenario

OLAF received information concerning a situation where officials were suspected of being involved in the award of Union grants to firms in which they had interests. These firms were in several Member States and even in financial centres outside the EU. Before opening an official case, OLAF transmitted the information to the EPPO which opened a case and started conducting a criminal investigation regarding embezzlement of European funds. Later, in the course of the investigation, the EDP requested OLAF, in accordance with OLAF's mandate, to support the EPPO's investigation by conducting administrative investigations. The defendant's lawyer objected and said that according to the EPPO Regulation this cannot be done.

During the investigation the handling EDP noticed that one of the suspects had been a suspect in one of his/her previous cases for murder on which he/she was working ten years earlier as a national prosecutor and which was suspended. Based on the mutual cooperation with Europol, the EDP requested information for this suspect for the period ten years earlier regarding the murder case in the hope that it could be reopened. Europol declined the request and did not give the EDP the information requested. The EDP contacted Europol again, this time requesting information he/she needed for the EPPO case and Europol granted the request. The defendant's lawyer objected this action, saying that all the information collected by Europol cannot be used during the EPPO investigation, as it was collected previously, on different grounds and this harms his/her client's right of proper defence according to the ECtHR.

During the course of the investigation, the EDP wanted to share with Eurojust a list with witnesses. Because the list contained a lot of personal data, the EDP asked prior authorization for the transfer to Eurojust by the Permanent Chamber. Meanwhile, the Prosecutor's Office of a third country informed the EDP that his/her country is conducting a criminal investigation against one of the suspects of the EPPO case who was a citizen of

the third country. The third country's Prosecutor's Office filed a formal request to the EPPO to share with his/her office some of the evidence and information relevant to his/her case and collected during the course of the EPPO investigation. Finally, the EPPO decided to dismiss the case on the grounds that the case involves no criminal act and transferred the case back to OLAF. The defendant's lawyer argued that the case should be closed, as most of the investigation was done by the EPPO, and OLAF cannot benefit from the information collected during this stage.

Questions & indicative answers

1. Can OLAF, after transmitting the information to the EPPO, open a parallel administrative case? On what grounds?

According to Art 101(2) EPPO Regulation, where the EPPO conducts a criminal investigation in accordance with this Regulation, OLAF shall not open any parallel administrative investigation into the same facts.

2. Was the lawyer right to object to the EDP's request to OLAF, in accordance with its mandate, to support the EPPO investigation by conducting administrative investigations?

Even if Art 101(2) EPPO Regulation provides that where the EPPO conducts a criminal investigation in accordance with this Regulation, OLAF shall not open any parallel administrative investigation into the same facts, this should be done without prejudice to the actions set out in paragraph 3 of the same article. It is exactly there where it is stipulated that 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, facilitating coordination of specific actions of the competent national administrative authorities and bodies of the Union and conducting administrative investigations.

3. Was Europol right to decline the EDP's request for information regarding the murder suspect? On what grounds?

Europol was right to do so because the EPPO shall be able to obtain, at its request, any relevant information held by Europol as long as such information is necessary for the purpose of its investigations and concerning any offence within its competence (see Art 102(2) EPPO Regulation). The first EDP's request concerned a crime which was not within the EPPO's competence, and the information was not necessary for the purpose of the EPPO's investigations.

4. Why did Europol first decline the EDP's request but granted the second one? On what grounds?

The second request for information from Europol concerned relevant information, was necessary for the purpose of the EPPO's investigations and concerned an offence within its competence. Keeping this in mind, the EDP's second request was within the scope of the cooperation between the EPPO and Europol, as laid down in Art 102(2) EPPO Regulation.

5. Was the defendant's lawyer right to object that information obtained by Europol cannot be used in the EPPO investigation?

The EPPO Regulation authorizes the EDP to cooperate with Europol and, where necessary for the purpose of its investigations, to be able to obtain, at its request, any relevant information held by Europol, concerning any offence within its competence. The EPPO may also ask Europol to provide analytical support to a specific investigation conducted by the EPPO. All this information would be obtained based on legal grounds and can be used during the investigation and the trial (see Art 102 EPPO Regulation).

6. Was the defendant's lawyer right to object against an administrative investigation conducted by OLAF at the same time as the EPPO criminal investigation? On what grounds?

The lawyer had no legal grounds to object – see answer to question 2 above.

7. Was the EDP right to ask for authorization from the Permanent Chamber before transferring personal data to Eurojust?

According to Art 100(2)(a) EPPO Regulation, in operational matters, the EPPO may associate Eurojust with its

activities concerning cross-border cases, including by sharing information, including personal data, on its investigations in accordance with the relevant provisions in the EPPO Regulation. Prior approval by the Permanent Chamber is not required.

8. Does the EPPO have the right to share information collected during the EPPO investigation with a third country's Prosecutor's Office? If yes, on what grounds and what is the procedure to be followed? Who decides whether the transfer will take place or not? Which law is followed?

According to Art 104(6) EPPO Regulation, the EPPO may, upon request, provide the competent authorities of third countries or international organizations, for the purpose of investigations or use as evidence in criminal investigations, with information or evidence which is already in the possession of the EPPO. This can be done only after the handling EDP has consulted the Permanent Chamber. Once this consultation has taken place, the handling EDP decides on any such transfer of information or evidence in accordance with the national law of his/her Member State and the EPPO Regulation.

REFERENCE LIST

Legislation

Commission Decision of 28 April 1999 establishing the European Anti-fraud Office (OLAF) [1999] OJ L 136/20.

Commission Delegated Regulation (EU) 2020/2153 of 14 October 2020 amending Council Regulation (EU) 2017/1939 as regards the categories of operational personal data and the categories of data subjects whose operational personal data may be processed in the index of case files by the European Public Prosecutor's Office [2020] OJ L 431/1.

Consolidated version of the Treaty on European Union [2012] OJ C326/01.

Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47.

Council Act of 19 June 1997 drawing up the Second Protocol of the Convention on the protection of the European Communities' financial interests [1997] OJ C221/11.

Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests [1995] OJ C 316/48.

Council Act of 29 November 1996 drawing up, on the basis of Art K.3 of the Treaty on European Union, the Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the protection of the European Communities' financial interests [1996] OJ C 151/1.

Council Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources [1970] OJ L 94/19.

Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime, [2008] OJ L 300/42.

Council Regulation (EEC) No 1/58 determining the languages to be used by the European Economic Community (OJ 17, 6.10.1958, p. 385/58).

Council Regulation 1/58 determining the languages to be used by the European Economic Community [1958] OJ 17/385.

Council Regulation 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') [2017] OJ L283/1.

Council Regulation 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027 [2020] OJ L 433I/11.

Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC [2015] OJ L 141/73.

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 [2016] OJ L 297/1.

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 [2016] OJ L 65/1.

Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, [2016] OJ L 119/89.

Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) [2002] OJ L 201/37.

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 [2010] OJ L 280/1.

Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L 142/1.

Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L 315/57.

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 [2013] OJ L 294/1.

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

Directive 2016/800/EU of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings [2016] OJ L 132/1

Directive 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 [2017] OJ L 198/29.

EEC/EAEC Council: Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community [1962] OJ 45/1385.

Protocol (no 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice [2016] OJ C 202/295.

Protocol (No 22) on the position of Denmark [2016] OJ C 202/298.

Regulation (EU, Euratom) 2020/2223 of the European Parliament and of the Council of 23 December 2020 amending Regulation (EU, Euratom) No 883/2013, as regards cooperation with the European Public Prosecutor's Office and the effectiveness of the European Anti-Fraud Office investigations [2020] OJ L 437/49.

Regulation (EU, Euratom) 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999, [2013] OJ L 248/1, as amended.

Regulation (EU, Euratom) No 741/2012 of the European Parliament and of the Council of 11 August 2012 amending the Protocol on the Statute of the Court of Justice of the European Union and Annex I thereto [2012] OJ L 228/1.

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1.

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) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA [2016] OJ L 135/53.

Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust) and replacing and repealing Council Decision 2002/187/JHA [2018] OJ L 295/138.

Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351/1, as amended.

Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L 145/43.

Regulation 2018/1725 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, which replaces Regulation (EC) No 45/2001 and Decision No 1247/2002/EC [2018] OJ L 295/39.

Rules of Procedure of the Court of Justice [2012] OJ L 265/1.

Cases

ECtHR, 1 March 2007, Heglas v. the Czech Republic, Appl. no. 5935/02.

ECtHR, 10 April 2014, Layijov v. Azerbaijan, Appl. no. 22062/07.

ECtHR, 12 July 1988, Schenk v. Switzerland, Appl. no. 10862/84.

ECtHR, 16 November 2017, Ilgar Mammadov v. Azerbaijan (no. 2), Appl. no. 919/15.

ECtHR, 26 April 2007, Popescu v. Romania, Appl. nos. 49234/99 and 71525/01.

ECtHR, 26 November 2019, Belugin v. Russia, Appl. no. 2991/06.

ECtHR, 27 October 2020, Ayetullah Ay v. Turkey, Appl. nos. 29084/07 and 1191/08.

ECtHR, Grand Chamber, 1 June 2010, Gäfgen v. Germany, Appl. no. 22978/05.

ECtHR, Grand Chamber, 10 March 2009, Bykov v. Russia, Appl. no. 4378/02.
ECtHR, Grand Chamber, 11 July 2017, Moreira Ferreira v. Portugal (no. 2), Appl. no. 19867/12.
ECtHR, Grand Chamber, 5 February 2008, Ramanauskas v. Lithuania, Appl. no. 74420/01.
Judgment of 1 April 2004, Commission v Jégo-Quéré, EU:C:2004:210.
Judgment of 10 January 2006, IATA and ELFAA, C-344/04, EU:C:2006:10.
Judgment of 13 December 2017, El Hassani, C-403/16, EU:C:2017:960.
Judgment of 13 March 2007, Unibet, C-432/05, EU:C:2007:163.
Judgment of 15 April 2008, Impact, C-268/06, EU:C:2008:223.
Judgment of 15 May 1986, Johnston, C-222/84, EU:C:1986:206.
Judgment of 15 May 2012, Nijs / Cour des comptes, T-184/11 P, EU:T:2012:236.
Judgment of 15 November 2011, Dereci and Others, C-256/11, EU:C:2011:734.
Judgment of 15 October 2015, Axa Belgium, C‑ 494/14, EU:C:2015:692.
Judgment of 16 December 1976, *Rewe-Zentralfinanz and Rewe*-Zentral, C-33/76, EU:C:1976:188.
Judgment of 16 December 1981, Foglia v Novello, C-244/80, EU:C:1981:302.
Judgment of 16 June 2015, Gauweiler and Others, C-62/14, EU:C:2015:400.
Judgment of 17 December 2015, WebMindLicenses, C-419/14, EU:C:2015:832.
Judgment of 17 July 2008, Kozłowski, C-66/08, EU:C:2008:437.
Judgment of 18 December 2014, Abdida, C‑ 562/13, EU:C:2014:2453.
Judgment of 18 March 2010, Alassini and Others, C-317/08, EU:C:2010:146.
Judgment of 19 September 2019, Rayonna prokuratura Lom, C-467/18, EU:C:2019:765.
Judgment of 21 January 2020, Banco de Santander, C-274/14, EU:C:2020:17.
Judgment of 22 December 2010, DEB, C-279/09, EU:C:2010:811.
Judgment of 22 October 1987, Foto-Frost v Hauptzollamt Lübeck-Ost, C-314/85, EU:C:1987:452.
Judgment of 23 April 1986, Les Verts v. Parliament, C-294/83, EU:C:1986:166.
Judgment of 24 May 2016, Dworzecki, C-108/16 PPU, EU:C:2016:346.
Judgment of 24 October 2018, XC and Others, C-234/17, EU:C:2018:853.
Judgment of 25 July 2002, Unión de Pequeños Agricultores v Council, C-50/00 P, EU:C:2002:462.
Judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice), C-216/18 PPU, EU:C:2018:586.
Judgment of 27 February 2018, Associação Sindical dos Juízes Portugueses, C-64/16, EU:C:2018:117.
Judgment of 28 March 2017, Rosneft, C-72/15, EU:C:2017:236.
Judgment of 3 October 2013, Inuit Tapiriit Kanatami and Others v Parliament and Council, C 583/11 P, EU:C:2013:625.
Judgment of 30 September 2003, Köbler, C-224/01, EU:C:2003:513.
Judgment of 5 October 2010, J. McB. v L. E., C-400/10 PPU, EU:C:2010:582.
Judgment of 6 October 1982, CILFIT, C-283/81, EU:C:1982:335.
Judgment of 6 October 2015, Schrems, C‑ 362/14, EU:C:2015:650.
Judgment of 6 October 2021, Consorzio Italian Management e Catania Multiservizi and Catania Multiservizi, EU:C:2021:799.
Judgment of the Court of 21 September 1989, Commission of the European Communities v Hellenic Republic, C-68/88, EU:C:1989:339.
Opinion 1/09 of the Court (Full Court) of 8 March 2011, Agreement creating a Unified Patent Litigation System, EU:C:2011:123.

Official materials

Agreement Establishing the Modalities of Cooperation Between the European Commission and the European Public Prosecutor's Office.
Commission, 'Commission contribution to the Intergovernmental Conference on institutional reform: Criminal law protection of the Communities' financial interests' COM (2000) 608.
Commission, 'Communication from The Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of the Regions. Better protection of the Union's financial interests: Setting up the European Public Prosecutor's Office and reforming Eurojust' COM(2013) 532 final.
Commission, 'Communication from the Commission to the European Parliament, the Council and the national Parliaments on the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office with regard to the principle of subsidiarity, in accordance with Protocol No 2' COM(2013) 851 final.

Commission, ‘Communication from the Commission to the European Parliament and the European Council – A Europe that protects: an initiative to extend the competences of the European Public Prosecutor’s Office to cross-border terrorist crimes’, COM (2018) 641 final.
Commission, ‘Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor’ COM (2001) 715 final.
Commission, ‘Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law’ COM (2012) 0363 final.
Commission, ‘Proposal for a Regulation of the Council setting up the European Public Prosecutor’s Office’ COM (2013) 534.
Commission, ‘Report from the Commission to the European Parliament and the Council on the implementation of 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’ COM(2021) 536 final.
Commission, ‘Report from the Commission to the European Parliament and the Council ‘31st Annual Report on the protection of the European Union’s financial interests - Fight against fraud’, 3 September 2019.
Court of Justice of the European Union, Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings [2018] OJ C 257/1.
Decision of the College of the European Public Prosecutor's Office of 2 December 2020 Laying Down Guidelines on Simplified Procedures and on the Delegation of Powers of the Permanent Chambers Respectively, College Decision 023/2020.
Decision of the College of the European Public Prosecutor's Office of 11 August 2021 Amending and Supplementing the Internal Rules of Procedure of the EPPO and the Decision on Permanent Chambers, College Decision 085/2021.
Decision of the College of the European Public Prosecutor's Office of 21 April 2021 Adopting Operational Guidelines on Investigation, Evocation Policy and Referral of Cases 029/2021.
Decision of the College of the European Public Prosecutor's Office (EPPO) 002/2020.
Decision of the College of the European Public Prosecutor's Office (EPPO) of 30 September 2020 on internal language arrangements.
Decision of the College of the European Public Prosecutor's Office (EPPO) of 29 September 2020 laying down rules on conditions office of employment of the European delegated prosecutors, as amended by decision 017 of 24 March 2021of the college of the EPPO.
Decision of the College of the European Public Prosecutor's Office (EPPO) of 25 November 2020 on the Permanent Chambers.
ECHR, ‘Guide on Art 6 of the European Convention on Human Rights: Right to a fair trial (criminal limb)’, updated on 31 August 2021, available at: https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf.
European Commission for Democracy through Law (Venice Commission), ‘Report on European Standards as Regards the Independence of the Judicial System: Part II – The Prosecution Service’, Strasbourg, 3 January 2011, CDL-AD(2010)040.
European Public Prosecutor’s Office, ‘Internal rules of procedure of the European Public Prosecutor’s Office’ (2021/C 22/03) adopted by the College of the European Public Prosecutor's Office (EPPO), decision 003/2020.
Explanatory Memorandum to the Commission’ Proposal for a PIF Directive’ COM(2012) 363 final, 9.
Interinstitutional Agreement of 25 May 1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-fraud Office (OLAF) [1999] OJ L 136/15.
Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service - Adopted by the Venice Commission - at its 85th plenary session (Venice, 17-18 December 2010), CDL-AD(2010)040-e (Venice Commission, CDL-AD(2010)040-e).
Working Arrangement Between the European Anti-Fraud Office (‘OLAF’) and the European Public Prosecutor’s Office (‘EPPO’).
Working Arrangement Between the European Court of Auditors (‘ECA’) and the European Public Prosecutor’s Office (‘EPPO’).
Working Arrangement Between the European Public Prosecutor’s Office (‘EPPO’) and the European Union Agency for Criminal Justice Cooperation (‘Eurojust’).
Working Arrangement Establishing Cooperative Relations Between the European Public Prosecutor’s Office (‘EPPO’) and the European Union Agency for Law Enforcement Cooperation (‘Europol’).
Working Arrangement on Cooperation Between the European Public Prosecutor’s Office (‘EPPO’) and the Office of the Prosecutor General of Hungary.

National legislation and official materials

Projet de loi modifiant le Code de procédure pénale aux fins de la mise en œuvre du règlement (UE) 2017/1939 du Conseil du 12 octobre 2017 mettant en oeuvre une coopération renforcée concernant la création du Parquet européen, Chambre des Députés, N° doc. parl. 7759/07.

Loi du 11 août 1998 portant introduction de l'incrimination des organisations criminelles et de l'infraction de blanchiment au code pénal et modifiant:1° la loi modifiée du 19 février 1973 concernant la vente de substances médicamenteuses et la lutte contre la toxicomanie;2° la loi modifiée du 5 avril 1993 relative au secteur financier;3° la loi modifiée du 6 décembre 1991 sur le secteur des assurances;4° la loi modifiée du 9 décembre 1976 relative à l'organisation du notariat;5° la loi du 20 avril 1977 relative à l'exploitation des jeux de hasard et des paris relatifs aux épreuves sportives;6° la loi du 28 juin 1984 portant organisation de la profession de réviseur d'entreprises;7° le code d'instruction criminelle, Mémorial A n° 73 de 1998.

Loi du 12 mars 2020 portant modification du Code pénal ; du Code de procédure pénale ; de la loi modifiée du 12 février 1979 concernant la taxe sur la valeur ajoutée ; aux fins de transposition de la directive (UE) 2017/1371 du Parlement européen et du Conseil du 5 juillet 2017 relative à la lutte contre la fraude portant atteinte aux intérêts financiers de l'Union au moyen du droit pénal, Mémorial A n° 153 de 2020.

Loi du 31 mars 2021 portant modification de la loi modifiée du 7 mars 1980 sur l'organisation judiciaire en vue de l'organisation de l'Office des procureurs européens délégués, Mémorial A n° 282 de 2021.

Report on the French implementing legislation: Assemblée Nationale, 'Rapport fait au nom de la Commission des lois constitutionnelles, de la législation et de l'administration générale de la République sur le projet de loi, adopté par le Sénat après engagement de la procédure accélérée, relatif au Parquet européen et à la justice pénale spécialisée (no 2731)', No 3592, 25 novembre 2020.

Texte coordonné du 12 septembre 1997 de la loi du 7 mars 1980 sur l'organisation judiciaire, Mémorial A n° 69 de 1997, as amended.

Pravilnik o uvjetima i postupku predlaganja kandidata za imenovanje delegiranih europskih tužitelja, Narodne novine no 139/2020.

Pravilnik o uvjetima i postupku predlaganja kandidata za imenovanje europskog tužitelja, Narodne novine no 23/2019.

Projet de loi relatif à la mise en application du règlement (UE) 2017/1939 du Conseil du 12 octobre 2017 mettant en œuvre une coopération renforcée concernant la création du Parqueteuropéen et modifiant leCode de procédurepénale, Chambre des Députés, N° doc. parl.7759, 11.03.2021.

Zakon o državnom odvjetništvu, Narodne novine no 67/2018.

Zakon o kaznenom postupku, Narodne novine no 152/2008, 76/2009, 80/2011, 121/2011, 91/2012, 143/2012, 56/2013, 145/2013, 152/2014, 70/2017, 126/2019, 126/2019.

Zakon o međunarodnoj pravnoj pomoći u kaznenim stvarima, Narodne novine no 178/2004.

Zakon o pravosudnoj suradnji u kaznenim stvarima s državama članicama Europske unije, Narodne novine no 91/2010, 81/2013, 124/2013, 26/2015, 102/2017, 68/2018, 70/2019, 141/2020.

Zakon o provedbi Uredbe Vijeća (EU) 2017/1939 od 12. listopada 2017. o provedbi pojačane suradnje u vezi s osnivanjem ureda Europskog javnog tužitelja (»EPPO«), Narodne novine no 146/2020.

Zakon o sudovima, Narodne novine nos 28/2013, 33/2015, 82/2015, 82/2016, 67/2018, 126/2019, 130/2020.

Zakon o Uredu za suzbijanje korupcije i organiziranog kriminaliteta, Narodne novine no 76/2009, 116/2010, 145/2010, 57/2011, 136/2012, 148/2013, 70/2017.

Books and Articles

Aden H, Sanchez-Barrueco M L, Stephenson P (2019) 'The European Public Prosecutor's Office: strategies for coping with complexity' (Study requested by the CONT Committee of the European Parliament).

Allegrezza S, Mosna, A (2018) 'Cross-Border Criminal Evidence and the Future European Public Prosecutor. One Step Back on Mutual Recognition?', in L B Winter (ed), *The European Public Prosecutor's Office: The Challenges Ahead*, (Springer).

Bonačić M (2020) 'The European Public Prosecutor's Office and Croatian Criminal Justice: Implementation Requirements and Possible Solutions', 27 *Hrvatski ljetopis za kaznene znanosti i praksu* 303.

Brodowski D (2021) 'Article 100: Relations with Eurojust', in H H Herrnfeld, D Brodowski, C Burchard (eds), *European Public Prosecutor's Office: Article -by-Article Commentary* (Baden-Baden, Oxford: Nomos, Beck, Hart).

Brodowski D (2021) 'Article 101: Relations with OLAF', in H H Herrnfeld, D Brodowski, C Burchard (eds), *European Public Prosecutor's Office: Article -by-Article Commentary* (Baden-Baden, Oxford: Nomos, Beck, Hart).

Brodowski D (2021) 'Article 102: Relations with Europol', in H H Herrnfeld, D Brodowski, C Burchard (eds), *European Public Prosecutor's Office: Article -by-Article Commentary* (Baden-Baden, Oxford: Nomos, Beck, Hart).

Brodowski D (2021) 'Article 105: Relations with Member States of the European Union which do not participate in enhanced cooperation on the establishment of the EPPO', in H H Herrnfeld, D Brodowski, C Burchard (eds), *European Public Prosecutor's Office: Article -by-Article Commentary* (Baden-Baden, Oxford: Nomos, Beck, Hart).

Brodowski D (2021) 'Article 21: Internal rules of procedure of the EPPO', in H H Herrnfeld, D Brodowski, C Burchard (eds), *European Public Prosecutor's Office: Article -by-Article Commentary* (Baden-Baden, Oxford: Nomos, Beck, Hart).

Brodowski D (2021) 'Article 22: Material competence of the EPPO', in H H Herrnfeld, D Brodowski, C Burchard (eds), *European Public Prosecutor's Office: Article -by-Article Commentary* (Baden-Baden, Oxford: Nomos, Beck, Hart).

Brodowski D (2021) 'Article 39', in H H Herrnfeld, D Brodowski, C Burchard (eds), *European Public Prosecutor's Office: Article -by-Article Commentary* (Baden-Baden, Oxford: Nomos, Beck, Hart).

Brodowski D (2021) 'Article 41: Scope of the rights of the suspects and accused persons', in H H Herrnfeld, D Brodowski, C Burchard (eds), *European Public Prosecutor's Office: Article -by-Article Commentary* (Baden-Baden, Oxford: Nomos, Beck, Hart).

Brodowski D (2021) 'Article 99: Common provisions', in H H Herrnfeld, D Brodowski, C Burchard (eds), *European Public Prosecutor's Office: Article -by-Article Commentary* (Baden-Baden, Oxford: Nomos, Beck, Hart).

Burchard C (2021) 'Article 37: Evidence', in H H Herrnfeld, D Brodowski, C Burchard (eds), *European Public Prosecutor's Office: Article -by-Article Commentary* (Baden-Baden, Oxford: Nomos, Beck, Hart).

Burchard C (2021) 'Article 6: Independence and accountability', in H H Herrnfeld, D Brodowski, C Burchard (eds), *European Public Prosecutor's Office: Article -by-Article Commentary* (Baden-Baden, Oxford: Nomos, Beck, Hart).

Burchard C (2021) 'Article 8: Status and structure of the EPPO', in H H Herrnfeld, D Brodowski, C Burchard (eds), *European Public Prosecutor's Office: Article -by-Article Commentary* (Baden-Baden, Oxford: Nomos, Beck, Hart).

Calderoni F (2008) 'A Definition that Could Not Work: The EU Framework Decision on the Fight against Organised Crime', 16 *European Jnl of Crime, Criminal Law and Criminal Justice* 265.

Ceccarelli D (2021) 'The EPPO and the Fight against VAT Fraud: a Legal Obstacle in the Regulation?', 1 *Eucrim* 47.

Csonka P (2019) '10 Years after Lisbon How "Lisbonised" Is the Substantive Criminal Law in the EU?', 4 *Eucrim* 261.

De Angelis F (2020), 'The European Public Prosecutor's Office (EPPO) – Past, Present, and Future', 4 *Eucrim* 272.

De Hert P, Vagelis P (2019), 'Data protection and the EPPO', 10(1) *New Journal of European Criminal Law* 34.

Delmas-Marty M (1997) *Corpus Juris introducing penal provisions for the purpose of the financial interests of the European Union*, (Paris, Economica).

Di Francesco Maesa C (2017) 'Repercussions of the Establishment of the EPPO via Enhanced Cooperation - EPPO's Added Value and the Possibility to Extend its Competence', 3 *Eucrim* 156.

Douglas-Scott S (2011) 'The European Union and Human Rights after the Treaty of Lisbon', 11 *Human Rights Law Review* 645.

Đurđević Z (2012) 'Judicial Control in Pre-Trial Criminal Procedure Conducted by the European Public Prosecutor's Office', in K Ligeti (ed), *Toward a Prosecutor for the European Union Volume 1: A Comparative Analysis* (Oxford, Hart).

Đurđević Z (2018) 'Legislative or regulatory modifications to be introduced in participant member states to the enhanced cooperation' (International Conference on Enhanced Cooperation for the Establishment of the EPPO, Fondazione Leilo e Lisli Basso/OLAF, available at www.fondazionebasso.it/2015/publications/ebook-international-conference-of-enhanced-cooperation-for-the-establishment-of-the-eppo).

Franssen N (2018) 'The future judicial cooperation between the EPPO and non-participating Member States', 9 *New Journal of European Criminal Law* 291.

Giuffrida F (2017) 'Cross-Border Crimes and the European Public Prosecutor's Office', 3 *Eucrim* 149.

Giuffrida F, Ligeti K (2019), 'Admissibility of OLAF Final Reports as Evidence in Criminal Proceedings', available at: https://orbilu.uni.lu/bitstream/10993/40141/1/ADCRIM_final_report.pdf.

Grasso G, Sicurella R, Giuffrida F (2020) 'EPPO material competence: analysis of the PIF Directive and Regulation' in Ligeti K, Antunes M J and Giuffrida F (eds), *The European Public Prosecutor's Office at Launch* (CEDAM).

Herrnfeld H H (2018) 'The EPPO's Hybrid Structure and Legal Framework: Issues of Implementation – a Perspective from Germany', 2 *Eucrim* 117.

Herrnfeld H H (2021) 'Article 23: Territorial and personal competence of the EPPO', in H H Herrnfeld, D Brodowski, C Burchard (eds), *European Public Prosecutor's Office: Article -by-Article Commentary* (Baden-Baden, Oxford: Nomos, Beck, Hart).

Herrnfeld H H (2021) 'Article 42: Judicial review', in H H Herrnfeld, D Brodowski, C Burchard (eds), *European Public Prosecutor's Office: Article -by-Article Commentary* (Baden-Baden, Oxford: Nomos, Beck, Hart).

Herrnfeld H H (2021) 'Introduction', in H H Herrnfeld, D Brodowski, C Burchard (eds), European Public Prosecutor's Office: Article -by-Article Commentary (Baden-Baden, Oxford: Nomos, Beck, Hart).

Kuhl L (2017) 'The European Public Prosecutor's Office – More Effective, Equivalent and Independent Criminal Prosecution against Fraud', 3 *Eucrim* 135.

Ligeti K (2013) *Draft Model Rules, The European Model Rules for the Procedure of the European Public Prosecutor's Office* (Project of the University of Luxembourg, available at http://hdl.handle.net/10993/42085).

Ligeti K (2020) 'The Structure of the EPPO: Features and Challenges', 27(1) *Croatian Annual of Criminal Sciences and Practice* 33.

Ligeti K, Garamvölgyi B, Ondrejová A, von Galen M (2020), 'Admissibility of Evidence in Criminal Proceedings in the EU', 3 Eucrim 201.

Maschl-Clausen, I (2021) 'The Permanent Chambers at the Heart of the EPPO's Decision-Making', 1 *Eucrim*, 55.

Meij A, (2015) 'Some Explorations into the EPPO's Administrative Structure and Judicial Review', in L H Erkelens, A W H Meij, M Pawlik (eds), *The European Public Prosecutor's Office: An extended arm or a Two-Headed dragon?* (The Hague, T.M.C. Asser Press).

Mitsilegas V, (2021) 'European prosecution between cooperation and integration: The European Public Prosecutor's Office and the rule of law', 28(2) *Maastricht Journal of European and Comparative Law Volume* 245.

Mitsilegas, V (2020) 'The European Public Prosecutor's Office between the EU and National Law: the Challenge of Effective Judicial Protection', 27(1) *Croatian Annual of Criminal Sciences and Practice* 79.

Nies J (2019) 'La répartition des rôles entre le Parquet européen et les parquets nationaux', 1(7) Journal des tribunaux Luxembourg 11.

Novokmet A (2017) 'The European public prosecutor's office and the judicial review of criminal prosecution', 8 *New Journal of European Criminal Law* 374.

Pajčić M (2020), 'How Independent is the European Public Prosecutor's Office "de facto"?', 27(1) *Croatian Annual of Criminal Sciences and Practice* 89.

Picotti L (2005) 'La lutte contre la fraude communautaire dans la perspective du Traité établissant une Constitution pour l'Europe', in F Ruggieri (ed) La protection des intérêts financiers de l'Union et le rôle de l'Olaf vis-à-vis de la responsabilité des personnesmorales et des chefs d'entreprises et l'admissibilitémutuelle des preuves (Brussels, Bruylant).

Prechal S, Widdershoven R (2020) 'Principle of effective judicial protection', in M Scholten, A Brenninkmeijer (eds), *Controlling EU Agencies: The Rule of Law in a Multi-jurisdictional Legal Order* (Edward Elgar).

Sabadell Carnicero M C (2021) 'The independence of the European Public Prosecutor's Office' 1 *Eucrim* 57.

Salazar L (2017) 'Definitivamente approvato il regolamento istitutivo della procura europea (EPPO)', 10 *Diritto Penale Contemporaneo* 328.

Satzger H (2015) 'The Future European Public Prosecutor and the National Prosecution: Potential Conflicts and How They Could be Avoided', in P Asp (ed), *The European Public Prosecutor's Office – Legal and Criminal Policy Perspectives,* (Stockholm, Stiftelsen Skrifter utgivna av Juridiska fakulteten vid Stockholms universitet).

Sellier E, Weyembergh A (2018) 'Criminal procedural laws across the European Union – A comparative analysis of selected main differences and the impact they have over the development of EU legislation' (Study requested by the LIBE committee of the European Parliament).

Sicurella R (2013) 'Il diritto penale applicabile dalla Procura Europea: diritto penale sovrannazionale o diritto nazionale 'armonizzato'? Le questioni in gioco', in S Allegrezza, G Grasso, G Illuminati, R Sicurella (eds),

Le sfide dell'attuazione di una Procura Europea: definizione di regole comuni e loro impatto sugli ordinamenti interni (Milan, Giuffrè).

Sokanović L (2020), 'Protection of the Financial Interests of European Union In Croatia: Recent Developments and Old Questions', 4 *EU and comparative law issues and challenges series (ECLIC*) 1040.

Spiezia F (2018) 'The European Public Prosecutor's Office: How to Implement the Relations with Eurojust?', 2 *Eucrim* 130.

Van Den Wyngaert C (2004) 'The Protection of the Financial Interests of the EU in the Candidate States. Perspectives on the Future of Judicial Integration in Europe – Final Report', in P Cullen (ed) *Enlarging the fight against fraud in the European Union: penal and administrative sanctions, settlement, whistleblowing and corpus juris in the candidate countries, Academy of European Law* (Köln, Bundesanzeiger).

Vervaele J (2000) 'Foreword' in M Delmas-Marty, J Vervaele (eds), *The Implementation of the Corpus Juris in the Member States ('Florence proposal')* (Utrecht, Intersentia).

Vervaele J (2017) 'The material scope of competence of the European Public Prosecutor's Office: Lex uncerta and unpraevia?', in C Briére, A Weyembergh A (eds) *The needed balances in EU criminal law* (Oxford, Portland, Hart Publishing).

Vilas Alvarez D (2018) 'The Material Competence of the European Public Prosecutor's Office', in L Bachmaier (ed), *The European Public Prosecutor's Office* (Heidelberg, Springer).

Weyembergh A, Brière, C (2018) 'The future cooperation between OLAF and the European Public Prosecutor's Office', 9 *New Journal of European Criminal Law* 62.

Тонева, Г. Европейската прокуратура и необходимите промени в българското законодателство. Налагат ли се конституционни промени?, сп. „De Jure", том 10, бр. 2, 2019 г. Available at: https://static1.squarespace.com/static/5502d30ee4b0f063546540ec/t/5ee87ffc43b4df3c53985a97/1 5922954 21928/ERRO_KRB.pdf.