UDK 341.645(4)EU
343.131.5
341.176(4)EU
343.359(4)EU
339.923:061.1](4)EU
Received on 14 February 2020
Preliminary communication

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THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE BETWEEN EU AND NATIONAL LAW: THE CHALLENGE OF EFFECTIVE JUDICIAL PROTECTION**

Even though the European Public Prosecutor's Office (EPPO) aims to Europeanise prosecution, the relationship between EU and national law is not always clear, and many areas concerning the EPPO are left to national laws to regulate. As a consequence, effective judicial protection and remedies are not secured in the EPPO Regulation. Bearing in mind that the EPPO is a European agency, fundamental rights and the rule of law must be safeguarded in its operation. The focus of this article is on three levels of effective judicial protection in the operation of the Regulation at the EU level: preliminary questions before the CJEU, EU benchmarks on the rights of the defence, and the relationship between the EPPO and the European Anti-Fraud Office (OLAF). The article aims to shed light on the gaps in, but also on the potential avenues for, effective judicial protection in the context of the operation of the EPPO.

Keywords: EPPO, effective judicial protection, Court of Justice of the European Union (CJEU), defence rights, OLAF

1. INTRODUCTION: THE EPPO REGULATION AS A COMPLEX AND UNEVEN INSTITUTIONAL FRAMEWORK

This contribution will address the challenge of effective judicial protection in the operation of the European Public Prosecutor's Office (EPPO). In doing so, it is necessary to view the operation of the EPPO within the framework of

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** Paper for the proceedings of the International Conference on the "Integration of the EPPO in National Criminal Justice Systems: Institutional, Procedural and Cooperative Challenges", Zagreb, 11-12 April 2019. I would like to thank the organisers for the invitation to this excellent conference and for the opportunity to contribute to the proceedings.

its complex institutional development. Lengthy negotiations leading to the adoption of the EPPO Regulation have demonstrated clearly the challenges of establishing an agency whose aim is to Europeanise prosecution in view of concerns over the impact of such a body on national sovereignty and maintaining the diversity of national criminal justice systems. The result has been a complex, multi-layered institutional framework based on the interaction between action at the Union and at the national level. In this model of interaction, the relationship between EU and national law is not always clear; a number of areas of day-to-day work of the EPPO are left for national law to regulate. In the effort to achieve compromise on the institutional structure of the EPPO, the protection of the fundamental rights of persons under investigation and prosecution has emerged only as an afterthought – as will be seen below, provisions on effective judicial protection and remedies are elliptical and limited in the EPPO Regulation. The article will focus on three levels of effective judicial protection at the EU level in the operation of the Regulation: effective judicial protection before the Court of Justice of the European Union; the applicability of EU benchmarks on the rights of the defence in the context of the operations of the EPPO; and the legal framework applicable to the relationship between the EPPO and the European Anti-Fraud Office, OLAF. The article will conclude by highlighting the key gaps in effective judicial protection in the current legal framework and address the need to treat the EPPO as a truly European agency whose operation must be underpinned by watertight fundamental rights and rule of law safeguards.

2. A LIMITED JURISDICTION OF THE COURT OF JUSTICE OF THE EUROPEAN UNION (CJEU)[1]

The EPPO Regulation presents a significant deficit in judicial protection by establishing very limited jurisdiction of the CJEU in reviewing EPPO acts. This minimalistic approach to the jurisdiction of the Court of Justice was already adopted by the Commission in its initial proposal for the EPPO Regulation.[2] The Commission proposal essentially excluded the judicial review of the EPPO at EU level. Article 36 of the Commission's draft stated clearly that when adopting procedural measures in the performance of its functions, the European Public Prosecutor's Office would be considered as a *national* authority for the purpose of judicial review.[3] It was further added that where provi-

[1] For a detailed analysis, see V Mitsilegas, *EU Criminal Law After Lisbon* (Hart, 2016) chapter 4.

[2] Proposal for a COUNCIL REGULATION on the establishment of the European Public Prosecutor's Office, COM/2013/0534 final – 2013/0255 (APP)

[3] Article 36(1).

sions of national law were rendered applicable by this Regulation, such provisions would not be considered as provisions of Union law for the purpose of Article 267 of the Treaty.[4] Shielding the EPPO from EU judicial scrutiny was also confirmed elsewhere in the Commission's draft where judicial review of certain EPPO decisions were excluded in general.[5] The Commission justified the exclusion of EU judicial review on three main grounds: on the perceived specificity and difference of the EPPO from all other Union bodies and agencies which require special rules on judicial review;[6] on the strong link between the operations of the EPPO and the legal orders of the Member States;[7] and on the need to respect the principle of subsidiarity.[8] The Commission's approach towards the limited judicial review of the EPPO at EU level was encapsulated in the Preamble to the draft Regulation as follows:

"Article 86(2) of the Treaty requires that the European Public Prosecutor's Office exercise its functions of prosecutor in the competent courts of the Member States. Acts undertaken by the European Public Prosecutor's Office in the course of its investigations are closely related to the prosecution which may result therefrom and have effects in the legal order of the Member States. In most cases they will be carried out by national law enforcement authorities acting under the instructions of European Public Prosecutor's Office, sometimes after having obtained the authorisation of a national court. It is therefore appropriate to consider the European Public Prosecutor's Office as a national authority for the purpose of the judicial review of its acts of investigation and prosecution. As a result, national courts should be entrusted with the judicial review of all acts of investigation and prosecution of the European Public Prosecutor's Office which may be challenged, and the Court of Justice of the European Union should not be directly competent with regard to those acts pursuant to Articles 263, 265 and 268 of the Treaty, since such acts should not be considered as acts of a body of the Union for the purpose of judicial review.

In accordance with Article 267 of the Treaty, national courts are able or, in certain circumstances, bound to refer to the Court of Justice questions for preliminary rulings on the interpretation or the validity of provisions of Union law, including this Regulation, which are relevant for the judicial review of the acts of investigation and prosecution of the European Public Prosecutor's Office. National courts should not be able to refer questions on the validity of the acts of the European Public Prosecutor's Office to the Court of Justice,

[4] Article 36(2).
[5] This applies to the decision to dismiss a case following a transaction – Article 29(4).
[6] Explanatory Report, paragraph 3.3.5.
[7] Ibid.
[8] Ibid, 5.

since those acts should not be considered acts of a body of the Union for the purpose of judicial review.

It should also be clarified that issues concerning the interpretation of provisions of national law which are rendered applicable by this Regulation should be dealt with by national courts alone. In consequence, those courts may not refer questions to the Court of Justice relating to the interpretation of national law to which this Regulation refers."[9]

The Commission's argumentation can be questioned at many levels.[10] The possibilities allowed by the Treaty of Lisbon for specific rules concerning judicial review of EU agencies in general[11] and the EPPO in particular (Article 86(4) TFEU) do not mean that these rules can entail the total *exclusion* of EU judicial review for EU agencies, including the EPPO. The exclusion of such review would be a direct attack to the rule of law in the European Union and would challenge the obligation of the EU to uphold fundamental rights as enshrined in the ECHR and the Charter, and in particular Articles 47 and 49 of the Charter. Exclusion of EU judicial review of the EPPO would in particular be hard to reconcile with the right to effective judicial protection, which has assumed a central role in EU constitutional law in recent years.[12] Finally, the Commission's approach to the judicial review of the EPPO rests on a wrong understanding of the application of the principle of subsidiarity. The subsidiarity test to be met is whether the European Union level is the right level of legislative action with regard to the establishment of the EPPO in order to achieve the stated legislative objectives.[13] The question of judicial review is a meta-question concerning the functioning of the EPPO, which should arise after the decision on whether the establishment of an EPPO *per se* meets the requirements of the subsidiarity test.

Notwithstanding the rule of law concerns arising from limiting the jurisdiction of the CJEU as regards the acts of the EPPO, the finally adopted EPPO Regulation has introduced a very limited review by the Luxembourg Court of

[9] Preamble, Recitals 37-39.

[10] See V Mitsilegas, "The European Public Prosecutor before the Court of Justice. The Challenge of Effective Judicial Protection" in G Giudicelli-Delage, S Manacorda and J Tricot (eds), *Le Contrôle Judiciaire du Parquet Européen. Nécessité, Modèles, Enjeux*, Collection de l'UMR de Droit Comparé de Paris (Université Paris 1) (Société de Législation Comparée, volume 37, 2015) pp 67-87.

[11] Article 263(5) TFEU.

[12] See for instance the Court's rulings in the *Kadi* litigation, and in particular the Court's findings in *Kadi II* - Joined Cases C584/10 P, C593/10 P and C595/10 P *European Commission v Kadi*.

[13] For a detailed and negative subsidiarity assessment of the Commission's draft EPPO Regulation, see House of Lords European Union Committee, *Subsidiarity Assessment: The European Public Prosecutor's Office,* 3rd Report, session 2013-14, HL Paper 65.

EPPO acts. The main provision in this context is Article 42 of the EPPO Regulation. The CJEU has a very limited role in actions for the annulment of EPPO acts under Article 263 TFEU, covering only decisions of the EPPO to dismiss a case.[14] This means that key EPPO acts, including the decision to initiate an investigation/prosecution and decisions in conflicts of jurisdiction cases are not subject to direct review before the CJEU. Limiting the Court's jurisdiction in this manner is problematic in terms of scrutiny and accountability, as we have an EU agency with operational powers not accompanied by EU judicial review vis-à-vis a number of key decisions having direct impact on the position of the individuals concerned. In addition to its limited jurisdiction under Article 263 TFEU, the CJEU has jurisdiction in disputes related to compensation for damage caused by the EPPO under Article 268 TFEU. But the key avenue of judicial review of EPPO acts is the preliminary reference mechanism under Article 267 TFEU. According to Article 42(2) of the EPPO Regulation, the CJEU has jurisdiction to give preliminary rulings concerning:

a. 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;
b. the interpretation or the validity of provisions of Union law, including the EPPO Regulation;
c. the interpretation of Articles 22 and 25 of the EPPO Regulation in relation to any conflict of competence between the EPPO and the national authorities.

In view of the limited jurisdiction of the CJEU regarding the direct review of EPPO acts, the preliminary reference avenue will be key for national courts to ensure effective judicial protection in the context of EPPO operations. National courts, including lower courts, must be encouraged to send questions to the CJEU when aspects of the operation of the EPPO at national level (in particular regarding action by the European Delegated Prosecutors) impinges on the protection of fundamental rights, effective judicial protection and the rule of law.

3. MINIMUM STANDARDS ON DEFENCE RIGHTS AND THEIR POTENTIAL IN THE OPERATION OF THE EPPO

Upholding procedural safeguards and the rights of the defence in the operations of the EPPO is of fundamental importance. Operational acts of the EPPO in the context of acts of European Delegated Prosecutors will be gov-

[14] Article 42(3) of the EPPO Regulation.

erned by the national law of the Member State where these acts take place. Yet it should be recalled that European Union law benchmarks are also applicable in this context. The scope of the rights of suspects and accused persons in the operation of the EPPO is circumscribed in Article 41 of the EPPO Regulation. Article 41 sets out a minimalist legal framework, with further action required by all actors at national level to ensure effective protection of fundamental rights in compliance with EU law and national law. The activities of the EPPO must be carried out in full compliance with the rights of suspects and accused persons as enshrined in the Charter, including the right to a fair trial and the rights of defence.[15] Without prejudice to rights under EU law, 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, including the possibility to present evidence, to request the appointment of experts or expert examination and hearing of witnesses, and to request the EPPO to obtain such measures on behalf of the defence.[16] As a minimum, any suspect or accused in the criminal proceedings of the EPPO will have the procedural rights provided by EU law, including rights enshrined in the following EU defence rights Directives as implemented in national law, such as: the right to interpretation and translation,[17] the right to information, [18] the right of access to a lawyer,[19] the right to legal aid,[20] and the presumption of innocence and the right to remain silent.[21]

In order to ensure the effective protection of fundamental rights in the operation of the EPPO, Member States must make sure that these Directives are fully implemented in compliance with EU law. In particular, it is imperative that national implementing legislation establishes meaningful avenues for the exercise of these rights and an effective remedy at national level. A number of the provisions of these Directives (including access to a translator, to an

[15] Article 41(1) of the Regulation.

[16] Article 41(3) of the Regulation.

[17] EU Parliament and Council, Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings [2010] OJ L 280/1.

[18] EU Parliament and Council, Directive 2012/13/EU on the right to information in criminal proceedings [2012] OJ L 142/1.

[19] EU Parliament and Council, Directive 2013/48/EU 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.

[20] EU Parliament and Council, Directive 2016/1919/EU 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.

[21] EU Parliament and Council, Directive 2016/343/EU 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.

interpreter and to a lawyer) entail direct effect.[22] This means that the defendant can evoke these rights directly before national courts, in cases where Member States have not implemented these Directive provisions adequately, fully or in compliance with EU law. These rights apply fully in EPPO proceedings. The EU Directives contain minimum standards only, Member States are free to provide higher standards of protection under national law, and these standards will also be applicable in EPPO proceedings. While the EU defence rights measures contain minimum standards only, the CJEU has accepted that the principle of effectiveness of EU law is fully applicable in terms of their operation.[23] EU defence rights benchmarks are thus real, legally enforceable standards in domestic legal orders[24] and authorities, including courts in Member States, are under a duty to ensure the effective protection and exercise of these rights, including in the context of the operation of the EPPO.

4. THE NEED FOR AN INTEGRATED AND CONSISTENT APPROACH TO EFFECTIVE JUDICIAL PROTECTION IN THE OPERATIONS OF THE EPPO AND OLAF

An important but relatively under-explored dimension of effective judicial protection in the operation of the EPPO concerns the applicable standards in the context of the relationship between the EPPO and OLAF. The EPPO Regulation provides for concrete avenues of cooperation with OLAF as follows: 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:

(a) providing information, analyses, expertise and operational support;
(b) facilitating coordination of specific actions of the competent national administrative authorities and bodies of the Union;
(c) conducting administrative investigations.[25]

This provision is not adequate to address the full scope of potential EPPO-OLAF collaboration in the future. There are a number of cases where there may be continuity between the "administrative" work of OLAF and the "criminal law" work of the EPPO – with OLAF acts potentially shielded from the

[22] The Spanish Constitutional Court has confirmed that provisions of the Directive on the right to information entail direct effect. See STC 13/2017 of 30 January 2017.

[23] Case C-216/14 *Covaci* ECLI:EU:C:2015:686; Joined Cases C-124/16 *Ianos Tranca*, C-188/16 *Tanja Reiter* and C-213/16 *Ionel Opria* ECLI:EU:C:2017:228*;* see also Case C-216/4 *Covaci* ECLI:EU:C:2015:305, Opinion of AG Bot, paras 32-33, 74.

[24] On the points above and for further analysis of the defence rights Directives, see Mitsilegas (n 1) chapter 6.

[25] Article 101(3) of the EPPO Regulation.

effective judicial protection of deemed "administrative" acts which do not affect the legal situation of the affected individual.[26] Procedural safeguards must be aligned not downwards, but upwards in order to address this situation. There must be continuity of a high level of procedural safeguards to match the operational continuity between OLAF and the EPPO. The same applies in cases involving OLAF-EPPO synergy in investigations involving Member States participating in the EPPO on the one hand, and non-participating Member States on the other. There is a danger of investigative "forum shopping" and the choice of using OLAF rather than EPPO investigations if standards are not aligned. Alignment of standards can contribute towards achieving legal certainty. As the OLAF Supervisory Committee has noted, it is of the opinion that the requirements of foreseeability and guarantees of effective safeguards against arbitrary decisions, including via judicial review, should be applicable in the described situations, to the same extent as in criminal proceedings. The emerging paradox is that in cases where OLAF were to take action as provided for in Article 101(3) of the EPPO, it could have more powers than national law enforcement and judicial authorities, which are bound by strict criminal law procedural provisions relating to fundamental rights and guarantees.[27]

5. CONCLUSION: THE NEED FOR ON-GOING VIGILANCE IN ENSURING EFFECTIVE JUDICIAL PROTECTION IN THE CONTEXT OF EPPO OPERATIONS

The article has aimed to cast light on the gaps, but also on potential avenues, for effective judicial protection in the context of the operation of the EPPO. Currently, there are significant limits to Union judicial protection avenues for the acts of what is essentially an EU agency with coercive powers, with the legal uncertainty surrounding the relationship of the EPPO with OLAF aggravating the judicial protection deficit. A lot is thus left to national systems and national law to ensure effective judicial protection and the effective exercise of procedural rights, with national standards required to develop in conformity with the growing EU *acquis* in the field. Prosecutors, defence lawyers and judges working in the EPPO system need to be aware of these challenges and of the requirement to give full effect to fundamental rights and the rule of law under EU law. In this context, this author would call for increased vigilance of the gaps in the law and in judicial protection which may arise from the current legal framework and the interaction between EU law and national law in the operation of the EPPO. The role of national courts is key in this context. National courts are

[26] For a critique of this approach, see Mitsilegas (n 10).

[27] Opinion 2/2017, para 80.

entrusted to make judgments on the legality and fundamental rights compliance of EPPO acts at national level with EU law and to ensure the effective exercise of defence rights, also as enshrined in EU law, in national legal orders. While direct actions against EPPO acts before the CJEU are limited by the EPPO Regulation, the role of the mechanism of preliminary rulings in ensuring the development of EPPO operations in conformity with EU law and the Charter is key. Advocates before national courts and judges themselves should not hesitate to send questions of rights, protection and the parameters of the coercive powers of the EPPO to Luxembourg.

REFERENCES

1. Giudicelli-Delage, G., Manacorda, S., and Tricot, J. (eds) "Le Contrôle Judiciaire du Parquet Européen. Nécessité, Modèles, Enjeux", Collection de l'UMR de Droit Comparé de Paris (Université Paris 1), Société de Législation Comparée, volume 37.
2. House of Lords European Union Committee, Subsidiarity Assessment: The European Public Prosecutor's Office, 3rd Report, session 2013-14, HL Paper 65.
3. Mitsilegas, V., *EU Criminal Law After Lisbon* (Hart Publishing, 2016).
4. Mitsilegas, V. and Giuffrida, F., "The European Public Prosecutor before the Court of Justice" in Geelhoed, W., Erkelens, L.H., and Meij, A.W.H,, *Shifting Perspectives on the European Public Prosecutor's Office* (T.M.C. Asser Press, 2018).

DIRECTIVES:

1. EU Parliament and Council, Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings [2010] OJ L 280/1.
2. EU Parliament and Council, Directive 2012/13/EU on the right to information in criminal proceedings [2012] OJ L 142/1.
3. EU Parliament and Council, Directive 2013/48/EU 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.
4. EU Parliament and Council, Directive 2016/1919/EU 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.
5. EU Parliament and Council, Directive 2016/343/EU 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.

CASE LAW:

1. STC 13/2017 of 30 January 2017.
2. Case C-216/14 *Covaci* ECLI:EU:C:2015:686
3. Joined Cases C-124/16 *Ianos Tranca*, C-188/16 *Tanja Reiter* and C-213/16 *Ionel Opria* ECLI:EU:C:2017:228
4. Case C-216/4 *Covaci* ECLI:EU:C:2015:305, Opinion of AG Bot.

Sažetak

URED EUROPSKOG JAVNOG TUŽITELJA IZMEĐU PRAVA EU-a
I NACIONALNOG PRAVA: IZAZOV UČINKOVITE SUDSKE ZAŠTITE.

Cilj je ovog članka rasvijetliti propuste, ali i postojeće mogućnosti osiguranja sudske zaštite temeljnih prava u kontekstu djelovanja Ureda europskog javnog tužitelja. Iako je Ured EJT-a europsko tijelo postupka, zaštita temeljnih ljudskih prava na razini EU-a u svezi s njegovim djelovanjem Uredbom Vijeća (EU) 2017/1939 od 12. listopada 2017. o provedbi pojačane suradnje u vezi s osnivanjem Ureda europskog javnog tužitelja nije osigurana u dovoljnoj mjeri, već je uglavnom prepuštena nacionalnim pravnim sustavima i sudovima. Ni sam odnos između nacionalnog prava i prava EU-a nije u potpunosti razjašnjen.

Članak se fokusira na tri nivoa osiguranja učinkovite sudske zaštite na razini EU-a u kontekstu Uredbe. U prvom dijelu razmatra se učinkovitost sudske zaštite pred Sudom Europske unije. Ta zaštita u stvarnosti je ograničena. Jurisdikcija Suda EU-a postoji samo u sporovima vezanima za naknadu štete koju je prouzročio Ured EJT-a prema čl. 268. UFEU-a, ima ograničenu ulogu u tužbama za poništavanje akata Ureda EJT-a prema čl. 263. UFEU-a pokrivajući samo odluke Ureda EJT-a o odbacivanju slučaja te mu se mogu postaviti preliminarna pitanja u određenim slučajevima. No upravo je posljednje ključno za nacionalne sudove u osiguranju učinkovite sudske zaštite u svezi s djelovanjem Ureda EJT-a.

U drugom dijelu rada razmatra se primjenjivost minimalnih standarda prava obrane u kontekstu djelovanja Ureda EJT-a. Opseg prava osumnjičenih i optuženih osoba u djelovanju Ureda EJT-a minimalistički je uređen čl. 41. Uredbe o Uredu EJT-a. Provedbu te zaštite osiguravaju akteri na nacionalnoj razini u skladu s pravom EU-a i nacionalnim pravom. Uz osiguranje prava obrane i prava na pravično suđenje u skladu s Poveljom kao minimum bilo koji osumnjičenik ili optuženik u kaznenom postupku Ureda EJT-a imat će procesna prava predviđena pravom EU-a uključujući pravo na tumačenje i prijevod, pravo na informacije, pravo na pristup odvjetniku, pravo na pravnu pomoć i pretpostavku nedužnosti te pravo na šutnju. Od iznimne je važnosti zato i adekvatna implementacija relevantnih direktiva s obzirom na to da zaštitu osiguravaju nacionalna prava, a države članice uvijek mogu osigurati i višu razinu zaštite.

Treći dio rada bavi se analizom pravnog okvira primjenjivog na odnos između Ureda EJT-a i Europskog ureda za borbu protiv prijevara, OLAF-a. Uredba o Uredu EJT-a predviđa suradnju s OLAF-om. Tijekom istrage koju provodi Ured EJT-a Ured može zatražiti od OLAF-a informacije te stručnu i operativnu podršku, pomoć oko koordinacije određenih radnji nadležnih nacionalnih upravnih tijela i tijela Unije, kao i provođenje upravnih istraga. Iako Uredba o Uredu EJT-a uređuje suradnju s OLAF-om, potencijal te suradnje mnogo je širi. Autor napominje da se i u tom odnosu mora osigurati kontinuitet visoke razine zaštite prava.

Zaključno autor upozorava na postojanje praznina u djelotvornoj sudskoj zaštiti u trenutačnom pravnom okviru. Ured EJT-a treba tretirati kao europsko tijelo čiji rad mora biti poduprt čvrstom zaštitom temeljnih prava i zaštitnim mjerama vladavine prava uopće.

Ključne riječi: Ured EJT-a, učinkovita sudska zaštita, Sud EU-a, prava obrane, OLAF