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A SHORT OVERVIEW OF SOME CHALLENGING ISSUES REGARDING THE SUCCESSFUL FUNCTIONING OF THE EPPO

The EPPO is a kind of hybrid authority with cumulative competences encompassing investigative and prosecutorial functions. The concept of the EPPO has reactualised the locus regit actum principle. The applicable national law is the law of the MS whose European Delegated Prosecutor is handling the case. National law will apply to the extent that a matter is not regulated by the EPPO Regulation, and, in the case where a matter is governed by both national law and the EPPO Regulation, the latter will prevail. The way of determining the national law and the possibilities of applying one national law during the investigation and another during the trial makes it hard for citizens to foresee the consequences of the proceedings, which means that this may be considered unfair and in contradiction with the equality of arms principle. Regarding the principles for cooperation, outside the EU, cooperation is based on the principle of mutual legal assistance, and, inside the EU and linked with the EPPO, cooperation is based on the principle of sincere cooperation, as the key principle of general application in the EU legal order. Having in mind that admissibility rules are closely connected with the legality of gathered evidence and exclusionary rules, this is an issue that raises concerns since there are huge differences between the legal systems of participating MSs, non-participating MSs (NPMSs), and third countries. The need for judicial review of the EPPO's procedural acts is commonly deemed necessary, but there is no accepted model, either regarding the scope of judicial review, or the EPPO's autonomous powers. Having in mind differences in national legislations, the dilemma of whether decisions to open, conduct or close a criminal investigation fall within the discretion of the EPPO or whether they are related to human rights and are subject to judicial review presents itself as a stumbling block. It is also necessary to amend and adjust national legislation regarding the

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prosecution office, and court competences and codes of criminal procedure as preconditions for the successful integration of the EPPO into national criminal justice systems.

Keywords: EPPO, investigative and prosecutorial competences, judicial review, human rights, the European Court of Human Rights (ECtHR), sincere cooperation, admissibility of evidence, exclusionary rules

1. INTRODUCTION

The adoption of Council Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (hereinafter: the EPPO Regulation) occurred two decades after the question was raised of the existence of the EPPO as a competent authority for the investigation and prosecution of criminal cases regarding the protection the Union's financial interests. It entered into force on 20 November 2017 (Art. 120(1)), but the EPPO will assume its tasks no earlier than November 2020.¹

Due to the enlargement of the EU with new Member States, and the possibility of countries with candidate status to use EU funds, the number of EU fund beneficiaries significantly increased, which multiplied the risks of misuse of EU funds.

Efforts to protect the Union's financial interests were not on the agenda for decades because, at the beginning, the EU budget depended on the contributions of each Member State, and thus the states themselves protected their own funds.

The protection of financial interests related to the EU budget can be found in the Court of Justice decisions of the 1980s, where the Court ruled that actions that damage the EU budget should be punished under the same conditions as actions that damage the national budget of the MS.²

The legislative framework regarding the protection of the Union's financial interests has been significantly upgraded and expanded since the adoption of the PFI Convention of 1995 with accompanying protocols,³ when min-

¹ Council Regulation 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (EPPO) [2017] OJ L 283/1.

² Case 68/88 Commission of the European Communities vs. Hellenic Republic, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61988CJ0068_SUM&from=MT.

³ Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests [1995] OJ C 31/48; Protocol to the Convention [1996] OJ C 313; 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

imum rules relating to the definition of criminal offences and sanctions in the area of fraud affecting the EU's financial interests were established through documents regulating different issues (a common system of value added tax; the prevention of the use of the financial system for the purposes of money laundering or terrorist financing; 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), which contributed to the harmonisation of the legislation,⁴ up to the latest PIF Directive.⁵

When analysing the protection of financial interests related to the EU budget, 2017 will be considered a key year due to the higher degree of compliance of incriminations and sanctions related to fraud, corruption, money laundering and similar offences with the PIF Directive, as well as regarding efforts toward the establishment and functioning of the EPPO Office through Regulation 2017/1939.

The right to punishment (*ius puniendi*) stems from the sovereignty of states and must be treated as an issue that increases the resistance of some MSs to participate in enhanced cooperation for the establishment of the EPPO. Hence, there was opposition between the enthusiasm of the Commission and the cold reactions of the MSs, underpinned by the traditional reluctance of the latter to give up their sovereignty in the sensitive field of criminal law.⁶

Communities' financial interests [1997] OJ C 151; Second Protocol to the Convention [1997] OJ C 221/11.

⁴ European Commission, "Implementation by Member States of the Convention on the Protection of the European Communities' financial interests and its protocols" COM(2004) 709 final; Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ L 347; Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organized crime [2008] OJ L 300; 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; 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.

⁵ 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 [2017] OJ L 198/29.

⁶ Fabio Giuffrida, "The European Public Prosecutor's Office: King without kingdom?", CEPS Research Reports, No 2017/03, February 2017, <https://www.ceps.eu/publications/european-public-prosecutor%E2%80%99s-office-king-without-kingdom>.

The efforts to establish the EPPO started under the assumption that the EPPO project would be acceptable to all MSs, except to the UK, Ireland and Denmark.⁷ Such a situation has contributed to the substantially amended wording of the 2013 Proposal for an EPPO Council Regulation⁸ in the text accepted in the EPPO Regulation.

The 2013 Proposal for an EPPO Council Regulation proved to be one of the most controversial files, with points of disagreement on some of the crucial aspects of the file during the negotiations between the European Parliament, the Council and the Commission.⁹ Reaching an agreement on the EPPO was not easy, and in the course of the negotiations, the structure and competences of the EPPO in particular underwent significant changes.¹⁰ While the Commission proposal concentrated on a clear rationale of operational added value, the negotiations in the Council were conducted by a strong majority of MSs who had the aim of keeping the EPPO's functions under their close control and retaining the guiding influence of their respective national judiciaries.¹¹

There has been criticism even regarding Art. 86 TFEU, which is understood to allow the EU to considerably interfere with the MSs' administration of justice.¹²

The obstacles to the functioning of the EPPO can to a great extent be derived from the principles of national criminal proceedings. Although the EPPO Regulation's Preamble determines that its provisions do not affect the powers of national trial courts, it is inevitable for the participating MSs to introduce legal bases regarding the national court(s) that will be competent for offences prosecuted by the European Delegated Prosecutor. The view that the

⁷ Nicholas Franssen, "The Future Judicial Cooperation between the EPPO and Non-participating Member States (2018) 9(3) *NJECL*, pp 291-299, https://www.researchgate.net/publication/328003219_The_future_judicial_cooperation_between_the_EPPO_and_non-participating_Member_States.

⁸ European Parliament resolution of 12 March 2014 on the proposal for a Council regulation on the establishment of the European Public Prosecutor's Office (COM(2013)0534 — 2013/0255(APP)) (2017/C 378/18) [2017] OJ C 378/151.

⁹ Ivana Kiendl Krišto & Cecilia Isaksson, "Implementation of the Treaty Provisions Concerning Enhanced Cooperation" (Study), European Parliamentary Research Service, Ex-Post Evaluation Unit, December 2018, [http://www.europarl.europa.eu/RegData/etudes/STUD/2018/627152/EPRS_STU\(2018\)627152_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/627152/EPRS_STU(2018)627152_EN.pdf).

¹⁰ Peter Csonka, Adam Juszcak & Elisa Sason, "The Establishment of the European Public Prosecutor's Office: The Road from Vision to Reality" (2017) 3 *eurim*, pp 125-135.

¹¹ Lothar Kuhl, "The European Public Prosecutor's Office: More Effective, Equivalent, and Independent Criminal Prosecution against Fraud?" (2017) 3 *eurim*, pp 135-143.

¹² Ben Smulders, "Is the Commission Proposal for a European Public Prosecutor's Office Based on a Harmonious Interpretation of Articles 85 and 86 TFEU?" 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?* (Asser Press/Springer, 2015).

EU criminal justice system is far from harmonised and that it strongly depends on its interaction with the national legal systems of the MSs needs to be accepted. Hence, the proposed decentralised structure of the EPPO will inevitably result in the application of a mixture of European and national law.¹³

The EPPO is understood mainly from the perspective of the problematic balance and intersection of EU law and national law, evaluating whether such a mixed regulation is functional to the aim of guaranteeing better protection of the Union's financial interests.¹⁴

Having in mind all the issues related to the EPPO, the consideration that its competences will be limited to the traditional field of PIF offences must be accepted,¹⁵ as well as crimes that are "inextricably linked" to PIF offences (Art. 22(3)),¹⁶ although the European Parliament has already shown its support for an EPPO dealing also with organised crime,¹⁷ as well as with cross-border terrorist crimes.¹⁸

2. APPLICABLE LAW AND PRINCIPLES FOR COOPERATION

It is clear that the EPPO competences according to *ratione territoriae* cover the territories of all participating MSs, but there is a need for establishing modes of cooperation with NPMSs and third countries.

Having in mind the competences of the European Delegated Prosecutor, the applicable national law will be the law of the MS whose European Delegated Prosecutor is handling the case in accordance with Art. 13(1) of the EPPO Regulation. A 'handling European Delegated Prosecutor' means a European Delegated Prosecutor responsible for investigations and prosecutions, which he has initiated, which have been allocated to him or which he has

¹³ Michiel Luchtman & John Vervaele, "European Agencies for Criminal Justice and Shared Enforcement (EUROJUST and the European Public Prosecutor's Office)" 2014 10(5) *Utrecht Law Review*, <http://www.utrechtlawreview.org>.

¹⁴ Fabio Giuffrida, "The European Public Prosecutor's Office: King without Kingdom?" CEPS Research Reports, No 2017/03, February 2017, <https://www.ceps.eu/publications/european-public-prosecutor%E2%80%99s-office-king-without-kingdom>.

¹⁵ Klip, A. "The Substantive Criminal Law Jurisdiction of the European Public Prosecutor's Office" (2012) 20(4) *European Journal of Crime, Criminal Law and Criminal Justice*, pp 367-376.

¹⁶ Art. 22(3) of the EPPO Regulation.

¹⁷ European Parliament resolution of 25 October 2016 on the fight against corruption and follow-up of the CRIM resolution (2015/2110(INI)), http://www.europarl.europa.eu/doceo/document/TA-8-2016-0403_EN.html?redirect.

¹⁸ A Europe that protects: an initiative to extend the competences of the European Public Prosecutor's Office to cross-border terrorist crime, Communication from the Commission to the European Parliament and the European Council, COM(2018) 641 final.

taken over using the right of evocation according to the EPPO Regulation. The decision for allocating a case to a European Delegated Prosecutor has at least the preliminary effect of determining jurisdiction and, consequently, the applicable national law. In principle, a case must be initiated and handled by the European Delegated Prosecutor from the MS where the focus of the criminal activity is, or the MS where the bulk of the offences has been committed (Art. 26(4)), but the Permanent Chamber has the power to deviate from this rule. Namely, 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 MS and, accordingly, instruct the European Delegated Prosecutor of that MS. Since there is no judicial review of such a decision taken by the Permanent Chamber, there is room for criticism. The Permanent Chambers play a crucial role in investigations and prosecutions.¹⁹

Shared law enforcement competences could raise dilemmas in practice since the EPPO can concentrate the investigation to a particular state, while carrying out specific investigative acts elsewhere. There are concerns that the decentralised structure of the EPPO could prejudice the rights of suspects since the concept creates an incentive for prosecutors to make strategic choices based on where the most lenient national rules apply, so the EPPO will always find a legal path for its investigative measures, using rules that are most convenient in a given instance.²⁰

Since there are huge differences in the legal systems of MSs, this issue deserves attention because of the guarantees of the defence in the context of the principle of legality. There is established case law by the ECtHR regarding the consequences of the principle of legality enshrined in Article 7 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) - there is no punishment without law, so only the law can define a crime and prescribe a penalty. The concept of “law” within the meaning of Article 7 comprises qualitative requirements, in particular those of accessibility and foreseeability as regards both the definition of an offence and the penalty the offence in question carries or its scope.²¹

National law applies to the extent that a matter is not regulated by the EPPO Regulation, and in the case where a matter is governed by both national law and the EPPO Regulation, the latter shall prevail.

¹⁹ Peter Csonka, Adam Juszcak & Elisa Sason, “The Establishment of the European Public Prosecutor’s Office: The Road from Vision to Reality” (2017) 3 *eucri*, pp 125-135.

²⁰ Meijers Committee, “Gaps and Inconsistencies in Legal Protection in EU Criminal Law CM1503 Legal Protection and the Future European Public Prosecutor’s Office”, www.commissie-meijers.nl.

²¹ Council of Europe/European Court of Human Rights, “Guide on Article 7 of the European Convention on Human Rights”, 2018, https://www.echr.coe.int/Documents/Guide_Art_7_ENG.pdf.

However, the competent Permanent Chamber, acting through the European Prosecutor who is supervising the investigation or the prosecution, may, in a specific case, give instructions in compliance with applicable national law to the handling European Delegated Prosecutor, where this is necessary for the efficient handling of the investigation or prosecution, in the interest of justice, or to ensure the coherent functioning of the EPPO. Similar to this, the supervising European Prosecutors may, in a specific case, in compliance with applicable national law and with the instructions given by the competent Permanent Chamber, give instructions to the handling European Delegated Prosecutor, whenever necessary for the efficient handling of the investigation, prosecution, interest of justice or to ensure the coherent functioning of the EPPO.

Principles for cooperation in criminal matters have undergone significant changes, starting from the traditional cooperation between non-EU countries in accordance with ratified international documents on mutual legal assistance, through specific forms of cooperation between MSs (EAW, EEW, EIO etc.), up to the new principles of cooperation established with the setting up of the EPPO. It must be acknowledged that the focus of international cooperation in criminal matters began as part of the national criminal procedure and, with the establishment of the EPPO, the matter will be returned within the scope of the national criminal procedure. Actually, the evolution has returned to its roots.²²

However, outside the EU, the cooperation of the EPPO with third countries will still be grounded on the principles of mutual legal assistance: the principle of sovereignty and security, the principle of specialty, dual incrimination, the prohibition of double punishment, reciprocity, urgency and efficiency in acting, the direct communication and cooperation of judicial authorities, mutual trust, and the mutual recognition and enforcement of court decisions.

In this respect, pursuant to Art. 104(3) and (4) of the EPPO Regulation, international agreements with one or more third countries concluded by the EU or to which the EU has acceded in accordance with Art. 218 TFEU in areas that fall under the competence of the EPPO, such as international agreements concerning cooperation in criminal matters between the EPPO and those third countries, shall be binding on the EPPO. In the absence of such an agreement in cases where it is permitted under the relevant multilateral international agreement and subject to the third country's acceptance, MSs shall recognise and notify the EPPO as the competent authority for the purpose of implementing multilateral international agreements on legal assistance in criminal matters concluded by them. However, Art. 104(7) enables the handling European Delegated Prosecutor to request the competent authority of his MS to issue an extradition request in accordance with applicable treaties and/or national law.

²² Bachmaier Winter, Lorena (ed), *The European Public Prosecutor's Office: The Challenges Ahead* (Springer, 2018).

When evidence is gathered on behalf of another country, two rules may apply: *locus regit actum* or *forum regit actum*. *Locus regit actum* is a principle of international cooperation in criminal matters according to which, in gathering evidence, the law of the place where the facts occurred is applied, or in other words, the applicable law is the law of the requested state according to the place of execution of the request. *Forum regit actum* is a principle according to which the applicable law is the law of the requesting state where the procedure is pending.²³

Within the mutual legal assistance system, the *forum regit actum* principle was commonly accepted due to the disadvantages that the *locus regit actum* principle had for the defence. By applying the *locus regit actum* principle, the defence did not have the possibility of challenging the gathered evidence, and the judicial authorities of the requesting country failed to examine the manner in which evidence had been gathered by the foreign authorities and nonetheless accepted it as admissible.

The concept of the EPPO has re-actualised the *locus regit actum* principle when deciding upon applicable law. It is impossible to apply the *forum regit actum* principle since the Delegated European Prosecutor cannot know while conducting an investigation in which MS the trial will take place. The general rule is that investigations will be carried out in the MS of the European Delegated Prosecutors in charge of the case. This principle cannot be applied due to the competence of the Permanent Chamber, before deciding to bring a case to judgment, and upon a proposal of the handling European Delegated Prosecutor, to take the decision of joining several cases, where investigations have been conducted by different European Delegated Prosecutors against the same person(s) with a view to prosecuting these cases in the courts of a single MS which, in accordance with its law, has jurisdiction for each of those cases.

However, besides the question of the applicable law, while carrying out its tasks, the EPPO needs to establish cooperation with EU bodies and agencies, as well as with the national authorities and NPMSs. Cooperation with NPMSs is established pursuant to Art. 99(3) of the EPPO Regulation. The MSs that take part in the enhanced cooperation must notify the NPMS that the EPPO will act as a competent authority in criminal matters within its competence. However, the crucial question is what precise legal effect such a unilateral notification would have on the NPMS.²⁴

²³ *EU Cross-Border Gathering and Use of Evidence in Criminal Matters: Current Landscape* (Max Planck Institute for Comparative and International Criminal Law, Freiburg), <http://www.ejtn.eu/Documents/EJTN-funded%20activities%202015%20docs/Scandici%20CR/Scandici%20Evidence%20Presentation.pdf>; Bachmaier Winter, Lorena (ed), *The European Public Prosecutor's Office: The Challenges Ahead* (Springer, 2018).

²⁴ Nicholas Franssen, "The Future Judicial Cooperation between the EPPO and Non-participating Member States" (2018 9(3) *NJECL*, pp 291-299, <https://www.researchgate.net/pub->

Pursuant to Art. 99, the EPPO may establish and maintain cooperative relations with EU institutions, bodies, offices or agencies in accordance with their respective objectives, and with the authorities of NPMSs, the authorities of third countries and international organisations.

This cooperation should be exercised according to the principle of sincere cooperation, as a key principle of general application in the EU legal order. Sincere cooperation understood as a concept where EU law and international law interact in subtle equilibrium and loyalty could be acknowledged as a metaconstitutional principle of EU law.²⁵

The principle of sincere cooperation ensures the fulfilment of the obligations arising from Art. 4(3) TEU or resulting from the acts of EU institutions, but also includes acting in good faith, with mutual respect and readiness for mutual assistance among the EU and MSs.²⁶ This principle must also be respected by NPMSs, having in mind the common interest of all EU MSs for the protection of the financial interests of the Union.

In the light of this principle, both the EPPO and the competent national authorities should support and inform each other with the aim of efficiently combatting crimes falling under the competence of the EPPO. In addition, under the principle of sincere cooperation, all national authorities and the relevant EU bodies (EUROJUST, Europol and OLAF) should actively support the investigations and prosecutions of the EPPO, as well as cooperate with it, from the moment a suspected offence is reported to the EPPO until the moment it determines whether to prosecute or otherwise dispose of the case.

Regarding cooperation between OLAF and the EPPO, there are several issues that are very important: avoiding the duplication of efforts, which will prevent parallel administrative and criminal investigations into the same facts, exchanging information, supporting the EPPO's activities, facilitating coordination, and conducting administrative investigations complementing those conducted by the EPPO.²⁷ OLAF becomes a close and reliable partner of the EPPO,

lication/328003219_The_future_judicial_cooperation_between_the_EPPO_and_non-participating_Member_States.

²⁵ Marcus Klammert, *The Principle of Loyalty in EU Law* (Oxford University Press, 2014); Judicaël Etienne, "Loyalty Towards International Law as a Constitutional Principle of EU Law?" Jean Monnet Working Paper 03/11, <http://jeanmonnetprogram.org/wp-content/uploads/2014/12/110301.pdf>; Panos Koutrakos, "Institutional Balance and Sincere Cooperation in Treaty-Making under EU Law," (2019) 68(1) *International & Comparative Law Quarterly*, pp 1-33.

²⁶ Peter Van Elsuwege, "The Duty of Sincere Cooperation and Its Implications for Autonomous Member State Action in the Field of External Relations" in M.Varju (ed), *Between Compliance and Particularism: Member State Interests and European Union Law* (Springer, 2019) pp 283-298.

²⁷ Anne Weyembergh & Chloé Briere, "The Future Cooperation between OLAF and the European Public Prosecutor's Office (EPPO): In-Depth Analysis", Policy Department for Bud-

so the proposal of amending OLAF's legal framework, in addition to the above-mentioned, provides for a number of important clarifications that will strengthen the effectiveness of OLAF's administrative investigations.²⁸ Beyond the complementarity of administrative (OLAF) and criminal (EPPO) investigations, the crucial issue remains as to how to develop optimal synergies.²⁹ The establishment of the EPPO requires OLAF to adapt its investigative activities, which means that OLAF will need to work in close cooperation with the EPPO in order to allow both authorities to perform their tasks efficiently and effectively.³⁰

In light of the establishment of the EPPO by means of enhanced cooperation, the division of competences between the EPPO and EUROJUST with respect to crimes affecting the financial interests of the Union needs to be clearly established.³¹ EUROJUST has analysed the steps that a PIF case will follow from the initiation of an investigation to the execution phase, and considered the possible involvement and support of the EPPO during the different stages and phases of a PIF case lifecycle.³² As of the date on which the EPPO assumes its investigative and prosecutorial tasks, in accordance with Art. 120(2) of the EPPO Regulation, EUROJUST will not exercise its competence with regard to crimes within EPPO competence, except in those cases where NPMS are also involved and at the request of those MSs, or at the request of the EPPO.³³

Pursuant to Recital 109 of the EPPO Regulation, pending the conclusion of new international agreements by the EU or the accession by the EU to multi-

getary Affairs Directorate General for Internal Policies of the Union PE 603.789 - June 2017, [http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/603789/IPOL_IDA\(2017\)603789_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/603789/IPOL_IDA(2017)603789_EN.pdf).

²⁸ http://europa.eu/rapid/press-release_IP-18-3862_en.htm.

²⁹ Lothar Kuhl, "The European Public Prosecutor's Office: More Effective, Equivalent, and Independent Criminal Prosecution against Fraud?" (2017) 3 *eu crim*, pp 135-143.

³⁰ 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; Proposal for a Regulation amending Regulation (EU, Euratom) No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) as regards cooperation with the European Public Prosecutor's Office and the effectiveness of OLAF investigations, COM/2018/338 final; Koen Bovend'Eerd, "The Commission Proposal Amending the OLAF Regulation" (2018) 1 *eu crim*, <https://eucrim.eu/articles/commission-proposal-amending-olaf-regulation/>.

³¹ 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.

³² Contribution from EUROJUST on the Relationship between the Future European Public Prosecutor's Office and EUROJUST - Article 86 TFEU EUROJUST Operational Support during the Lifecycle of an EPPO PIF Case, <https://www.parliament.uk/documents/lords-committees/eu-sub-com-e/european-public-prosecutor-office/AnnexIV-ife-cycle-PIF-EPPO-case.pdf>;

³³ Art. 3, EUROJUST Regulation (EU) 2018/1727.

lateral agreements already concluded by the MSs, on legal assistance in criminal matters, the MSs should facilitate the exercise by the EPPO of its functions pursuant to the principle of sincere cooperation.

3. ADMISSIBILITY OF EVIDENCE

The rights of the suspect are protected by the EPPO Regulation that refers to EU directives concerning the rights of suspects and accused persons in criminal procedures,³⁴ and also with the rights enshrined in the EU Charter. Besides this EU level of protection, the defence has rights guaranteed by national legislations applied by the European Delegated Prosecutor while conducting pre-investigative procedures, investigation and prosecution.

Probably the most crucial issue when discussing the obstacles or preconditions for the successful implementation of the EPPO Regulation is linked with the admissibility of evidence. This issue raises concerns since there are huge differences between the legal systems of participating MSs, non-participating MSs, and third countries.³⁵

Admissibility rules are closely connected with the legality of gathered evidence and exclusionary rules.³⁶ Both are divergent and, more or less, stringent in different MSs and third countries.

Having in mind the nature of the relevant subject matter (*ratione materiae*) in regard to the EPPO, most of the evidence will be gathered in an administrative manner by customs authorities. Since procedures and formalities widely diverge among different MSs, the exclusionary rules developed in the 2013 Proposal for a Council Regulation on the establishment of the EPPO were removed from the final text of the EPPO Regulation.

In accordance with the 2013 Proposal, the trial court cannot exclude evidence presented by the EPPO as inadmissible on the grounds that the condi-

³⁴ Art. 41(2) Directive 2010/64/EU; Directive 2012/13/EU; Directive 2013/48/EU; Directive (EU) 2016/343; Directive (EU) 2016/1919.

³⁵ Martyna Kusak, *Mutual Admissibility of Evidence in Criminal Matters in the EU: A Study of Telephone Tapping and House Search* (Maklu Publishers, 2016), <https://biblio.ugent.be/publication/8198774/file/8198787.pdf>; Elodie Sellier & Anne Weyembergh, "Criminal Procedural Laws across the European Union: A Comparative Analysis of the Selected Main Differences and the Impact They Have over the Development of EU Legislation", Policy Department for Citizens' Rights and Constitutional Affairs Directorate General for Internal Policies of the Union PE 604.977 - August 2018, <http://www.europarl.europa.eu/supporting-analyses>.

³⁶ Zlata Đurđević, "Admissibility of Evidence, Judicial Review of the Actions of the European Public Prosecutor's Office and the Protection of Fundamental Rights, Protecting Fundamental and Procedural Rights from the Investigations of OLAF to the Future EPPO", http://www.europeanrights.eu/olaf/pdf_eng/4-Admissibility%20of%20evidence-zd.pdf.

tions and rules for gathering this type of evidence are different under the applicable national law. Thus, evidence presented by the EPPO to the trial court, where the court considers that its admission would not adversely affect the fairness of the procedure or the rights of defence as enshrined in Arts. 47 and 48 of the EU Charter, will be admitted in the trial without any validation or similar legal process, even when the national law of the MS where the court is located provides for different rules on the gathering or presentation of such evidence.

In the final text of the EPPO Regulation, the reluctance of the EU legislator to adopt an exclusionary rule is evident. Starting from the title of Art. 37 - "Evidence", although the text of the provision refers to the admissibility of evidence, it is clear that this title is not fully in line with the content of the provision. It should be understood as a compromise achieved after a long and very demanding process of negotiation.³⁷

The high degree of differentiation between the exclusionary rules accepted in the national legal systems of the MSs has led to a provision which is a type of 'inclusionary rule' accepted by the EPPO Regulation, rather than an exclusionary rule. Evidence presented by the prosecutors of the EPPO or the defendant to a court must not be denied admission on the mere ground that the evidence was gathered in another MS or in accordance with the law of another MS. This provision aims at enhancing the possibilities of admission of evidence gathered by the EPPO and does not allow the exclusion of evidence obtained under the principle of *locus regit actum*.

Taking into account the rights of the defence and the protection of fundamental rights during criminal proceedings, there is a need to adopt minimum rules for excluding evidence for which no information has been provided by the MS on how it was gathered.

Minimum requirements at the gathering phase (procedure, guarantees, pre-conditions) are closely connected with the admissibility/exclusionary rules, the possibility of the defence to challenge the evidence, and the decision of the judicial authorities on whether the evidence should be admitted or excluded.

According to the ECtHR, absolutely inadmissible is only evidence obtained through torture, police incitement, self-incriminating statements or breaches of the right to remain silent.³⁸ Even the ECtHR's case law cannot be of great

³⁷ Valsamis Mitsilegas and Fabio Giuffrida, "Raising the Bar? Thoughts on the Establishment of the European Public Prosecutor's Office" (2017, 30 November) *CEPS*, https://www.ceps.eu/system/files/PI%202017-39%20Mitsilegas_Giuffrida_0.pdf.

³⁸ Enni Lehto, "Applicability of Article 3 of the European Convention on Human Rights at the Borders of Europe" (2018) 1 *Helsinki Law Review*, pp 54-77; Jeremy McBride, *Human Rights and Criminal Procedure: The Case Law of the European Court of Human Rights* (Council of Europe Publishing, 2009); *Selmouni v. France*, Appl. No. 25803/94 (ECtHR, judgement of 28 July 1999); *Soering v. United Kingdom*, Appl. no. 14038/88, (ECtHR, judgement of 7 July 1989) Series A, No. 161; Greek Case, Judgement of 18 November 1969, Yearbook of

help regarding exclusionary rules. There are no rules on the admissibility of evidence since the ECtHR has examined such claims under the right to a fair trial.³⁹ The ECtHR's role is not to determine whether particular evidence was admissible, but whether or not the proceedings as a whole were fair.

4. JUDICIAL REVIEW OF PROCEDURAL ACTS

Judicial review must be considered a significant part of the rule of law principle. The analysis encompasses the following aspects: the discretionary powers of the EPPO, the division of procedural functions in criminal proceedings, the scope of the judicial review, and the rights of the defence with regard to challenging the admissibility of gathered evidence.⁴⁰

Judicial control is a key area for establishing checks and balances and results arising from international human rights standards, the assumption of a democratic society and the rule of law.⁴¹ The right to effective judicial protection is stipulated in Art. 47 of the EU Charter. In accordance with the EPPO Regulation, suspected and accused persons as well as other persons involved in the proceedings of the EPPO will have all 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 the hearing of witnesses, and to request the EPPO to obtain such measures on behalf of the defence.

The need for judicial review over EPPO procedural acts is commonly identified as necessary but there is no accepted model, either regarding the scope of judicial review or regarding the EPPO's autonomous powers.

Although established as an EU body, for the purposes of judicial review, the EPPO acts as a national body. The exclusion of such a review would be a direct attack on the rule of law in the EU, and would challenge the obligation

the European Convention on Human Rights, No. 12; 5 *Ireland v. United Kingdom* (ECtHR, judgement of 18 January 1978) Series A, No. 25; *Hilal v. United Kingdom*, Appl. no. 45276/99 (ECtHR, judgement of 6 March 2001).

³⁹ Council of Europe/European Court of Human Rights, "Relation of Article 8 and Article 6, Guide on Article 8 of the European Convention on Human Rights", Updated on 31 December 2018, https://www.echr.coe.int/documents/guide_art_8_eng.pdf;

⁴⁰ Ante Novokmet, "The European Public Prosecutor's Office and the Judicial Review of Criminal Prosecution" (2017) 8(3) *New Journal of European Criminal Law*, pp 374–402.

⁴¹ Luis de Lemos Triunfante, "Judicial Review of EPPO Procedural Acts and Decisions: A Disruptive and Resilient Architecture?" (2017, 5 June) *UNIO Law Journal*, <https://official-blogofunio.com/2017/06/05/judicial-review-of-eppo-procedural-acts-and-decisions-a-disruptive-and-resilient-architecture/>.

of the EU to uphold fundamental rights as enshrined in the ECHR and the EU Charter.⁴²

The ECtHR does not establish standards for the review of pretrial decisions and leaves this to the national courts to decide.

The Model Rules for the Procedure of the EPPO accepted the bifurcation model: judicial review only for some coercive measures or investigative decisions, but not for the decision to open the investigation. There is a duality related to the competence of national courts to rule on the procedural acts of the EPPO that are intended to produce legal effects *vis-à-vis* third parties (Art. 42(1), on the one hand, and the competence of the Court of Justice to pass preliminary rulings concerning the validity of procedural acts of the EPPO insofar as such a question is raised before any court or tribunal of an MS directly on the basis of Union law (Art. 42(2)(a)), on the other hand.

There are differences between the 2013 Proposal and the final text of the EPPO Regulation regarding judicial review. In the final text of the EPPO Regulation, there is a very limited role for the Court of Justice, since judicial review of the acts of the EPPO will mostly be carried out at national level.⁴³ Since Art. 26(4) of the Proposal contained a provision laying down that part of the investigative measures will be subject to authorisation by the competent judicial authority of the MS, in the final text of Art. 30 there is no such provision, but there is a provision stating that the investigation measures may be subject to conditions in accordance with the applicable national law if the national law contains specific restrictions that apply with regard to certain categories of persons or professionals who are legally bound by an obligation of confidentiality, as well as that part of the investigation measures (points (c), (e) and (f)) may be subject to further conditions, including limitations, provided for in the applicable national law.

The relations among the Court of Justice of the European Union and EU institutions, bodies, offices or agencies cannot be applied to the relations between the Court of Justice and the EPPO. Pursuant to Article 263 TFEU, the Court of Justice has jurisdiction to review the legality of legislative acts of EU institutions that produce legal effects *vis-à-vis* third parties, and of actions brought by an MS, the European Parliament, the Council or the Commission

⁴² Council of Europe, Venice Commission, “Report on the Rule of Law”, no. CDL-AD(2011)003rev; Laurent Pech, “The Rule of Law as a Constitutional Principle of the European Union” 04/2009, <http://jeanmonnetprogram.org/wp-content/uploads/2014/12/090401.pdf>; D. Kochenov, “The EU Rule of Law: Cutting Paths Through Confusion” (2009) 2(1) *Erasmus Law Review*, pp. 5-24, http://www.erasmuslawreview.nl/tijdschrift/ELR/2009/1/ELR_2210-2671_2009_002_001_002.

⁴³ Valsamis Mitsilegas and Fabio Giuffrida, “Raising the Bar? Thoughts on the Establishment of the European Public Prosecutor’s Office (2017, 30 November) *CEPS*, https://www.ceps.eu/system/files/PI%202017-39%20Mitsilegas_Giuffrida_0.pdf.

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.

The Court of Justice does not have such jurisdiction over the acts of the EPPO due to its specific organisational structure and the divided competences between the EU (central) level and the decentralised functions of the European Delegated Prosecutor in the MS. In accordance with Article 47 of the EU 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 EU Court of Justice 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 natural or legal person institutes proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

Having in mind differences in national legislation, the dilemma of whether decisions to open, conduct or close a criminal investigation falls within the discretion of the EPPO or is related to human rights and is subject to judicial review presents a stumbling block. However, there is still a concern that the judicial review of a decision to open an investigation could delay the pretrial procedure.

Determining an acceptable model for judicial review is very difficult because of the EPPO's duty of conducting a mandatory investigation regarding the principle of legality, the EPPO's discretion and types of judicial review (prior to the prosecution decision, after the prosecution decision, the review of only some types of prosecutorial decisions, or a judicial order to implement some measures). Judicial review might be compulsory either if it is a requirement under the law of the State where the investigation is being carried out, or under the law of the European Delegated Prosecutor in charge of opening the investigation.

When analysing the EPPO's discretion to conduct investigative measures, one has to agree that investigative measures have not been subject to real approximation efforts at EU level, thus there are differences regarding the type of competent authority and among different investigative measures.

Judicial review is significant since the defendant has the right to challenge the legality of evidence. According to the ECtHR, the national courts are the ones that should decide on the admissibility of evidence, and every limitation of human rights and freedoms must be subject to judicial review. When focusing on the instruments for mutual legal assistance, there are principles of mutual recognition, but this does not mean that the mutual admissibility of evidence is commonly acceptable, regardless of the differences in national legislations. National legislators have accepted different solutions regarding the defendants' rights during prosecutorial proceeding – in some countries, the

order to open an investigation needs to be delivered to the defendant with an instruction regarding the possibility of lodging an appeal; in other countries, this is not the case and this order is not delivered at all.

A duality also exists in the jurisdiction of national courts of the MSs. The national courts do not have the power to review decisions, acts or measures taken by the EU institutions, but pursuant to Article 42 on judicial review of the EPPO Regulation, national courts have the power of judicial review of the procedural (investigative and prosecutorial) acts and decisions taken by the EPPO, which are intended to produce legal effects *vis-à-vis* third parties, in accordance with the national legislation of the MS. The same system applies to cases where the EPPO fails 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 EPPO Regulation.

Procedural acts of the EPPO that are adopted before the indictment and that are intended to produce legal effects *vis-à-vis* third parties are subject to judicial review by the competent national courts in accordance with the requirements and procedures laid down by national law. Those acts will be carried out by national law enforcement authorities that are going to act under the instructions of the EPPO, but in some cases, due to requirements and procedures laid down by national law, this could be possible only after having obtained the authorisation of a national court. The scope of judicial review and differences between the EPPO Regulation and national legislations is not taken into consideration regarding procedural acts that are not intended to produce legal effects *vis-à-vis* third parties.

5. AMENDMENTS TO, AND ADJUSTMENT OF, NATIONAL LEGISLATION

Taking into consideration the provisions of the EPPO Regulation, it is necessary to introduce changes in the domestic legislation regarding the organisational laws concerning the public prosecutor's office in order to incorporate the competences of delegated European Delegated Prosecutors, to determine the functional competence with regard to the representation of the indictment before higher court instances, the legislation regulating the competences of the courts, codes of criminal procedure, etc.

The EPPO Regulation contains provisions on lodging an appeal against a judgement. The European Delegated Prosecutor is obliged to submit a report regarding the appeal to the Permanent Chamber and await its instructions. There is no deadline in the Regulation for the Permanent Chamber to issue such instructions. Therefore, if the instructions are not received within the deadline set by national law, the European Delegated Prosecutor may lodge an

appeal without prior instructions from the Permanent Chamber. The EPPO is competent for investigating, prosecuting and bringing the case to judgment, so there is no provision in the Regulation about the competences of the European Delegated Prosecutor to participate during the appeals procedure before the national appellate court. In accordance with the principle of applicable law, stating that the national law applies to the extent that a matter is not regulated by the EPPO Regulation, it can be concluded that the national law shall apply when it comes to the competences of the prosecutor regarding the appeals proceedings. In this regard, there is a need to amend the national legislation regulating the structure and competences of the national prosecution offices in the MSs regarding the functional competence of national higher prosecutors in appeals proceedings in cases handled under the indictment of the European Delegated Prosecutor. Provisions are also needed about presenting the cases handled by the European Delegated Prosecutor before supreme courts in the second or third instance of the proceedings, depending on the national law.

Amendments to the laws on the organisation and competences of courts seem to be necessary for determining the competent courts to conduct proceedings handled by the European Delegated Prosecutors – regarding whether this will be left to the regular courts, district courts or specialised courts or specialised court departments before which prosecutors specialising in organised crime appear, etc.

Amendments to the criminal procedure law also seem necessary regarding issues connected with the actions of the European Delegated Prosecutors, which reintroduces the idea of the first Corpus Juris Project, where a model of LCP was offered in order to facilitate the functioning of the EPPO in the national legislations of the MSs.

Before the entry into force of the EPPO Regulation, there are still many issues that deserve attention, both at EU level and at national level. At EU level, the issues are related to the EPPO's relationship with other existing EU bodies that have competences related to administrative investigation or judicial cooperation in criminal matters. The relations of the EPPO with EUROJUST and OLAF deserve attention, given the interlacing of their competence in certain cases, and the need for successful coordination and cooperation. In accordance to Recital 51 of the EPPO Regulation, in order to comply fully with their obligation to inform the EPPO where a suspicion of an offence within its competence is identified, the national authorities of the MSs, as well as all institutions, bodies, offices and agencies of the Union, should follow the existing reporting procedures and have in place efficient mechanisms for a preliminary evaluation of the allegations reported to them.

6. CONCLUDING REMARKS

The harmonisation of criminal law within the EU is a rather challenging issue. The protection of the financial interests of the Union has become a crucial issue, having in mind the amount of beneficiaries and the difficulties related to the investigation, prosecution and the trial of cases. By establishing the EPPO, the fight against crimes affecting the Union's financial interests is expected to be more consistent and more coherent.

We have to agree with the claim that the EPPO Regulation is probably the most ambitious EU instrument, since it creates the first EU body to carry out its own criminal investigations and prosecutions with direct powers regarding individuals in the field of criminal law.

Its hybrid structure and divided powers at EU level and at national level is the consequence of the long and demanding negotiation process in establishing the EPPO. It was obviously unacceptable to the MSs to participate in establishing a supranational body for investigation and prosecution as a hierarchical and vertical model without any link with domestic legislation. Therefore, in accordance with the EPPO Regulation, European Delegated Prosecutors will carry out their work in accordance with national law.

The possibility of requesting preliminary rulings from the European Court of Justice will be used in every case where the provisions provided for by the EPPO Regulation raise uncertainties or dilemmas regarding their interpretation or application.

Having in mind the expected results of the functioning of the EPPO, on the one hand, and the divergences regarding the EPPO's participating MSs and some issues regarding cooperation between the EPPO and existing EU bodies, on the other, it might be useful to reconsider and postpone the timing to initiate enhanced cooperation.

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Sažetak

KRATAK PREGLED NEKIH IZAZOVNIH PITANJA U POGLEDU USPJEŠNOG FUNKCIONIRANJA EJT-a

EJT je vrsta hibridnog tijela s kumulativnim nadležnostima, koje obuhvaća istražne i tužiteljske funkcije. Koncept EJT-a ponovno je aktualizirao princip *locus regit actum*. Primjenjivo nacionalno pravo bit će pravo države članice čiji europski delegirani tužitelj vodi slučaj. Nacionalno pravo primjenjuje se u mjeri u kojoj stvar nije regulirana Uredbom o EJT-u, a u slučaju kada stvar regulira i nacionalno pravo i Uredba o EJT-u Uredba će imati prednost. Način utvrđivanja nacionalnog zakona i mogućnosti primjene jednog nacionalnog zakona tijekom istrage, a drugog tijekom suđenja građanima otežava predviđanje posljedica postupka, pa se to može smatrati nepravednim i u suprotnosti s jednakošću oružja. Što se tiče načela suradnje, izvan EU-a suradnja se temelji na načelima uzajamne pravne pomoći, a unutar EU-a suradnja će se temeljiti na načelu iskrene suradnje, kao ključnom načelu opće primjene u pravni poredak EU-a. Uzimajući u obzir činjenicu da su pravila o prihvatljivosti usko povezana sa zakonitošću prikupljenih dokaza i s pravilima o isključivanju dokaza, to pitanje izaziva zabrinutost jer postoje velike razlike između pravnih sustava država članica koje sudjeluju (MSs), država članica koje ne sudjeluju (NPMSs) i trećih zemalja. Potreba za sudskim preispitivanjem postupovnih akata EJT-a identificira se kao nužna, ali ne postoji prihvaćeni model ni u pogledu opsega sudske revizije ni u pogledu autonomne ovlasti EJT-a. Uzimajući u obzir razlike u nacionalnom zakonodavstvu, kamen spoticanja jest dilema jesu li odluke o otvaranju, provođenju ili zatvaranju kaznene istrage u nadležnosti EJT-a ili su povezane s ljudskim pravima te će biti predmet sudske revizije. Također je nužno izmijeniti i prilagoditi nacionalno zakonodavstvo u pogledu tužiteljstva, sudskih nadležnosti i zakonika o kaznenom postupku kao preduvjeta za uspješnu integraciju EJT-a u nacionalni kaznenopravni sustav.

Ključne riječi: EJT, istražne i tužiteljske nadležnosti, sudska revizija, ljudska prava, Europski sud za ljudska prava, iskrena suradnja, prihvatljivost dokaza, pravila o isključenju dokaza