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Towards a European Public Prosecutor's Office (EPPO)

STUDY FOR THE LIBE COMMITTEE



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS

Towards a European Public Prosecutor's Office (EPPO)

STUDY

Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee, analyses the proposal for a Regulation establishing the EPPO. The evolution of the text is analysed through a comparison between the initial Commission proposal and the current version of the text (dated of 28 October 2016). The paper assesses whether the EPPO, as it is currently envisaged, would fit the objectives assigned to it, whether it will have some added value, and whether it will be able to function efficiently and in full respect of fundamental rights. It focuses on the main issues at stake and controversial points of discussion, namely the EPPO institutional design, some material issues, its procedural framework, and its relations with its partners.

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LIST OF ABBREVIATIONS

AFSJ	Area of Freedom, Security and Justice
Art. / Arts.	Article / Articles
Charter	Charter of Fundamental Rights of the European Union
CISA	Convention Implementing the Schengen Agreement
ECJ	European Court of Justice
EIO	European Investigation Order
EJN	European Judicial Network
ENP	European Neighbourhood Policy
EPPO	European Public Prosecutor's Office
EU	European Union
JHA	Justice and Home Affairs
MLA	Mutual Legal Assistance
MS / MSs	Member State / Member States
OLAF	European Anti-Fraud Office
PIF	Protection of the Union's Financial Interests
PIF Directive	Proposal for a Directive on the fight against fraud to the Union's financial interests by means of criminal law
PIF offences	Offences affecting the Union's financial interests, expression taken from the French acronym for "protecting financial interests" and to be defined by reference to the PIF Directive
SAP	Stabilisation and Association Process
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
VAT	Value Added Tax

EXECUTIVE SUMMARY

Background

The establishment of an EPPO has been regularly debated in European circles for nearly 20 years, without being transformed into concrete action until recently. The EPPO came back to the agenda with the Art. 86 TFEU, inserted by the Lisbon Treaty. A Commission Proposal for a Council Regulation on the establishment of the **European Public Prosecutor's Office** was published on the 17 July 2013. The proposal shall be adopted under a special legislative procedure, providing for unanimity within the Council and submitted to the **European Parliament's consent. It went through** substantial amendments in the course of the negotiations. Several points created friction between MSs in the Council, and controversy between the Parliament, the Council and/or the Commission, as well as among external observers, including other EU agencies/bodies and scholars.

Aim

This research paper provides an overview of the main controversial issues, although it does not claim to be exhaustive. For clarity purposes, the different questions have been grouped in 4 different sections, respectively addressing: the institutional design of the EPPO and main **related issues (section 1), EPPO's material scope of competence (section 2), the EPPO's** procedural framework (section 3) and finally its relations with partners (section 4). In each section, the evolution of the text is analysed through a comparison between the initial Commission proposal and the current version of the text dated of 28 October 2016 (Doc. No. 13459/16). The aim is not to determine whether the latter is an ideal or good text. The question is rather to assess whether the EPPO, as it is currently envisaged, would fit the objectives assigned to it, whether it will have some (even limited) added value, and whether it will be able to function efficiently and in full respect of fundamental rights. Considering the power of the European Parliament to consent or not to the adoption of the final text, the authors highlight the different points for which this institution should continue to closely follow the evolution of negotiations, to express its view and to ask for amendments or reopening of discussions on the most critical points.

Section 1 - The EPPO's institutional design and main related issues

The institutional design deserves to be examined first as it will have important consequences for the efficiency and the added value of the EPPO. The structure of the EPPO, as amended during the negotiations, now consists in a complex multi-layered system, whose contribution to the efficiency of investigations and prosecutions against PIF offences is doubtful. It is crucial to ensure that the most important operational decisions lie in the hands of the most **"European-oriented" layers, i.e. the European Chief Prosecutor and the Permanent Chambers**, to keep a minimal level of verticalisation. Another important issue is to guarantee **the EPPO's independence from MSs and EU institutions, which is done through complex** appointment procedures. It is accompanied by its political accountability to the EU institutions for its general activities. Furthermore, the EPPO must develop close relations with national authorities, especially since the competence over PIF offences is shared between them, and since national authorities are competent to conduct investigative measures in their respective MS. The principle of sincere cooperation applies from the moment a suspected offence is reported to the EPPO until it decides to prosecute or dismiss the case.

Section 2 – EPPO's material scope of competence

The EPPO's material scope of competence has been early restrained to PIF offences. The latter will be defined in a separate instrument, i.e. the PIF directive, which only aims at approximating national laws. The insertion of VAT fraud within the PIF directive has been the subject of a long debate. A compromise, envisaging only the insertion of serious cross-border VAT cases, seems within reach. However, the finalisation of one provision in the EPPO proposal (Art. 20(3)) must be carefully monitored, as it might deprive the EPPO of its competence over VAT cases. The EPPO is also competent for ancillary offences, i.e. those inextricably linked to PIF offences. The new system based on measuring the preponderance of PIF offences may not be sufficient to prevent tensions, and it is regrettable that in case of disagreements, the final decision on the attribution of competence lies in the hands of national judiciary, with a very limited review by the ECJ.

Section 3 - The procedural framework

In terms of procedural law, a first essential question is whether the EPPO is granted sufficient powers to ensure the efficiency of the proceedings, and especially of its investigations. In that regard, one may regret the numerous limits identified, such as the increased reliance on national law or the reduction of the list of measures resulting either from the initial proposal, **or introduced later. Variable geometry of EPPO's investigative powers will be strong, and** further harmonisation might be necessary. A second issue concerns cross-border cases, and particularly the admissibility of evidence. In cross-border cases, European Delegated Prosecutors must be able to request the conduct of investigative measures in another MS, and use at a later stage the evidence collected abroad. However, the procedure currently envisaged - relying upon national law in particular to determine if a judicial authorisation is required-, may compromise the efficiency of the EPPO. Furthermore, whereas the mutual admissibility of evidence clearly supports the efficiency of the EPPO, it also raises concerns for the protection of fundamental rights, especially due to the lack of common standards on collection of evidence. Thirdly, the protection of rights of suspects and accused persons will **be examined, as these are essential to ensure the fairness of EPPO's activities. Procedural** safeguards for suspects and accused persons are now only defined with reference to EU Directives adopted in the field of EU criminal procedural law. This choice can be questioned, since it may submit individuals to variable standards depending on the applicable national law. Further harmonisation may be advisable, especially to better ensure the right to be actively involved in the criminal proceedings, and the access to the materials of the case. Finally, the question of judicial review of the EPPO's activities and measures deserves special attention. It has been extended during the negotiations. However, the provision is not clear enough to know the scope of the review respectively carried out by national judges and by the ECJ. More fundamentally, the text restrains to such an extent the jurisdiction of the ECJ that it raises the question of its compatibility with EU primary law.

Section 4 – The EPPO's relations with its partners

The EPPO, as a new EU judicial body, will have to integrate itself in the landscape of already existing EU agencies also active in the PIF field. Its relations with Eurojust, OLAF and Europol are the object of specific provisions. Their cooperation will be of crucial importance to ensure that the EPPO contributes effectively to the fight against PIF offences. One may nevertheless especially regret the lack of details concerning the EPPO-Eurojust relations. Not only **Eurojust's specific expertise is neglected, but there are also concerns about the transfer of some Eurojust's resources (human or financial) to the EPPO, which would be highly detrimental for the EU area of criminal justice as a whole.** Furthermore, because enhanced

cooperation will most probably be necessary to establish the EPPO, it is necessary to organise under which modalities the national authorities of non-participating MSs will cooperate with the EPPO. Although the text is still subject to changes, it seems to privilege the option of regulating the details of their cooperation in a separate instrument. Close monitoring of this issue is crucial, as the efficiency of the fight against PIF offences will partially depend from the quality of this provision. Finally, its **relations with "ordinary" third countries and international organisations** is also essential. The text envisages a series of legal bases/hypothesis that the EPPO can use to request assistance from authorities located outside the EU territory. It should contribute to the efficiency of the fight against PIF offences.

Conclusion

Generally speaking, if compared to the initial Commission proposal, the current version of the Regulation has improved on a few aspects. Without claiming to be exhaustive, one should mention the criteria for the determination of competence for the European Delegated Prosecutors, **and EPPO's relations with its partners, particularly OLAF, Europol, non-participating MSs and third States**. However, in spite of these positive remarks, the overall analysis of the current version of the text undoubtedly reveals a number of weaknesses and **shortcomings. Most of them are the direct or indirect result of MSs' willingness to renationalise the EPPO as much as possible, and to keep the strongest control possible over its activities**. This is clear when thinking of the complexification and multiplication of layers **in the institutional design of EPPO's central level, as well as of the shared competence between the EPPO and national authorities over PIF offences**. The verticalisation of judicial cooperation in criminal matters, which is part of the **EPPO's DNA, must be preserved in the draft proposal**, at least to a minimum extent. The European Parliament should particularly follow the negotiations in order to guarantee that the most European-oriented entities within **EPPO's central level, i.e. the European Chief Prosecutor and the Permanent Chambers**, obtain as many operational powers as possible. The Parliament should also be careful that the current level of harmonisation is not further diminished, and it should pursue efforts aimed at ensuring a higher level of harmonisation. It already did so with regard to some particular aspects of the rights of the defence for EPPO suspects, but it should pursue and exercise further pressure on the Council to deepen harmonisation on other aspects of the text, regarding both procedural guarantees and European Delegated Prosecutors' investigative powers. These elements are indeed of crucial importance to ensure that the EPPO has the means necessary to fulfil its objectives. In the same perspective, the European Parliament should continue to insist on the importance of clarifying the ambiguity concerning the repartition of competences within the EPPO, and between the EPPO and its partners, particularly Eurojust.

Ultimately, the political choice of whether or not to approve the draft Regulation lies in the hands of the European Parliament only, which must balance the different options available. If it decides **not to give its consent**, the chances that the EPPO is buried for many years are quite high, but it could rise again from its ashes like a Phoenix. Should the establishment of the EPPO be postponed, EU institutions could envisage an alternative option to improve the efficiency of fighting PIF offences, namely strengthening Eurojust by using the possibilities provided for in Art. 85 TFEU. If the European Parliament chooses to **give its consent**, the EPPO will be established in its current form (or an adapted model, hopefully with less weaknesses and shortcomings than identified in this paper). In this hypothesis, and without neglecting the obstacles it will have to overcome, there is still hope that the EPPO will manage to achieve its objectives. One should indeed bear in mind that the construction of the European Union has always been progressive, marked by a step-by-step approach.

INTRODUCTION

Brief historical overview and the importance of the EPPO

The establishment of an EPPO has been regularly debated in European circles for nearly 20 years. In 1997, a group of academics presented - under the leadership of Mireille Delmas Marty - **the Corpus Juris for the protection of the EU's financial interests, which among other things proposed the creation of an EPPO.**¹ At the time, MSs opposed the idea, which seemed premature. In 2001, the Commission re-launched the debate with the presentation of a Green Paper on criminal law protection of the financial interests of the EC and the establishment of an EPPO.² Again, nothing concrete resulted from it. The EPPO came back to the agenda, but this time via EU primary law, with the insertion of Art. 86 TFEU by the Lisbon Treaty, which grants to the EU the competence to set up an EPPO. This is one of the provisions of the Treaty which raises numerous questions and which has been most debated. The Stockholm Programme of 2009 was quite vague with regard to the setting-up of a European Public Prosecutor, speaking about it as a mere possibility that could be considered. The **Commission's action plan**³ was more direct, mentioning the adoption of a Communication on the establishment of an EPPO. A Commission Proposal for a Council Regulation on the **establishment of the European Public Prosecutor's Office** was finally published on the 17 July 2013.⁴

This proposal has attracted a great deal of attention for the 4 following reasons. First, the **EPPO is considered essential to improve the efficiency of the fight against fraud to the EU's financial interests. As has often been highlighted, this area of crime is frequently "neglected"** by national authorities, due to **non-prioritisation of the Union's interests. Yet, according to the Treaties, the EU has among its objectives the prevention and combating of crime (Art. 3 (2) TEU; Art. 67 (3) TFEU) and the EU and the MSs have a more specific duty to counter fraud and any other illegal activities affecting the financial interests of the Union (Art. 325 (1) TFEU).** Second, it represents a highly symbolic achievement for the EU area of criminal justice. Cooperation in criminal matters shall no longer be envisaged from a horizontal perspective, namely between competent national authorities acting in their respective sphere of competences. Indeed, the EPPO embodies a vertical and integrated form of cooperation. Besides, in contrast with the existing agencies - especially Eurojust - it will enjoy binding powers to decide on opening an investigation, launching a prosecution and bringing the defendant to justice. Third, because of the change of nature of the cooperation it implies, the EPPO must be singled out as an extremely sensitive issue, particularly from the point of view of national sovereignty. This explains why the proposal crystallises the resistance towards more integration in the criminal field. Such sensitivity was also witnessed when 14 chambers of 11 national parliaments⁵ sent reasoned opinions to the Commission, thus triggering the **subsidiarity control mechanism, also called 'the yellow card' (Art. 7(2) of Protocol No 2).**⁶

¹ M. Delmas-Marty, *Corpus Juris, Introducing Penal provisions for the purpose of the financial interests of the European Union*, éd. Economica, 1997; M. Delmas-Marty - J.A.E. Vervaele (eds.), *The Implementation of the Corpus Juris in the Member States*, Intersentia, 2000.

² Commission, Green paper on the criminal law protection of the financial interests of the Community and the establishment of an European Prosecutor, COM (2001)715 final, 11 Dec. 2001.

³ Commission, *Delivering an area of freedom, security and justice for EU's citizens, Action plan implementing the Stockholm Programme*, COM (2010) 171 final, 20 April 2010, p. 5.

⁴ COM (2013) 534 final.

⁵ See: <<http://www.ipex.eu/IPEXL-WEB/home/home.do>>.

⁶ The Commission confirmed that its proposal complies with the principle of subsidiarity as enshrined in the EU Treaties and decided to maintain its proposal, explaining the reasoning behind its decision (Commission, Communication 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, 27 Nov. 2011). See in this regard I. Wieczorek, "The EPPO draft regulation passes the first subsidiarity test:

Fourth, the establishment of the EPPO raises extremely complex questions, especially linked to the need to articulate it within national criminal justice systems. These systems being very different, such articulation poses essential issues both in terms of efficiency and added-value of the EPPO and in terms of protecting fundamental rights, **which are also among the EU's general values and objectives** (Art. 2 and 6 TEU and 67 TFEU).

Legislative procedure and the role of the European Parliament

By virtue of its legal basis, i.e. Art. 86 TFEU, the proposed Regulation must be adopted according to a special legislative procedure which requires unanimity in the Council and the consent of the European Parliament.

Negotiations started in the Council under the Greek Presidency, and led very quickly to substantial changes in the proposal. A first revised text was presented by the Greek Presidency in May 2014, and further revisions were presented by the subsequent Italian, Luxemburgish and Dutch Presidencies.⁷ The text is still being negotiated under the on-going Slovak Presidency. The question is whether unanimous agreement on the whole text can be reached by the end of the year.

Although the adoption of the EPPO regulation is not subject to the ordinary legislative procedure, the European Parliament has a crucial role to play. Firstly, the consent of the Parliament is mandatory for adopting the Regulation, which grants MEPs the necessary leverage to be fully involved in the negotiation process, notably through the adoption of Reports⁸ and Resolutions⁹ **detailing the Parliament's position and red lines. Secondly, the Parliament retains its role of co-legislator in two other proposals intrinsically linked to the EPPO proposal: the proposal for a Directive on the protection of the EU's financial interests through criminal law,¹⁰ which will define the material scope of competence of the EPPO, and the proposal for a Regulation on the European Union Agency for Criminal Justice Cooperation (Eurojust).¹¹ Thirdly, from a substantive point of view, and considering its responsibility regarding the EU budget (Art. 319 TFEU), the topic is of essential interest to the European Parliament. The latter has indeed generally supported efforts to efficiently combat fraud **against the EU's budget, playing for instance a crucial role in the establishment of UCLAF/OLAF.** Fourthly, from a more general perspective, one should highlight the **European Parliament's responsibility in ensuring the efficiency of the EPPO's investigations, as well as in protecting the fundamental rights of suspect and accused persons subject to EPPO investigations. Since the reorganisation of the Commission and Council's Directorates,¹² the****

an analysis and interpretation of the Commission's hasty approach to National Parliaments' subsidiarity arguments", *German Law Journal*, 2015, Vol. 16, No. 5, p. 1247-1270.

⁷ For an overview of the evolution of the negotiations, see <http://eur-lex.europa.eu/legal-content/EN/HIS/?qid=1478100398211&uri=CELEX%3A52013PC0534>.

⁸ European Parliament, Interim Report on the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, 24 Feb. 2014, A7-0141/2014 and 19 March 2015, A8-0055/2015, (in both Reports Monica Macovei acted as rapporteur).

⁹ European Parliament, Resolution of 12 March 2014 on the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office (P7_TA(2014)0234); European Parliament, Resolution of 29 April 2015 on the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office (P8_TA(2015)0173); European Parliament, Resolution of 5 Oct. 2016 on the EPPO and Eurojust (P8_TA(2016)0376).

¹⁰ Commission, Proposal for a Directive of the European Parliament and the Council on the fight against fraud to the Union's financial interests by means of criminal law, COM (2012) 363 final, 11 July 2012.

¹¹ Commission, Proposal for a Regulation of the European Parliament and the Council on the European Union Agency for Criminal Justice Cooperation (Eurojust), COM (2013) 535 final, 17 July 2013.

¹² Within the Commission, issues relating to the AFSJ are now dealt to by different Directorates General (DG Home and DG Justice). Similarly, in the General Secretariat of the Council, the ex-Directorate 2 devoted to judicial cooperation in civil and criminal matters, police and customs cooperation has been divided in two separate Directorates (Home Affairs on one side and Justice on the other). This silo approach may impact the coherence and balance between the different dimensions of the AFSJ.

European Parliament is indeed the sole EU institution with capacity to address this issue with a real transversal perspective, and has thus a special responsibility to require a fair balance between the different interests at stake is struck in the text of the Regulation.

Objectives of this research paper and outline

In the course of negotiations several points have created friction between MSs in the Council, and controversy between the Parliament, the Council and/or the Commission, as well as among external observers, including other EU agencies/bodies and scholars. This research paper provides an overview of the main controversial issues, although it does not intend to be exhaustive. For clarity purposes, the different questions have been grouped in 4 different sections, respectively addressing: the institutional design of the EPPO and main related issues (**section 1**), **EPPO's material scope of competence (section 2)**, **the EPPO's procedural framework (section 3)** and its relations with partners (section 4).

Lastly, in terms of methodology, this research paper has mainly been elaborated on the basis of public documents on the negotiation process, limited documents requested to the Council and literature and research projects on the EPPO. A limited number of interviews have also been conducted. References to the current version of the proposal refer to the latest public version of the draft Regulation, dated of 28 October 2016.¹³

¹³ Council, Proposal for a Regulation on the establishment of the European Public Prosecutor's Office – Outstanding questions on the full text, Council doc. No. 13459/16, 28 Oct. 2016.

SECTION 1 – INSTITUTIONAL DESIGN OF THE EPPO AND MAIN RELATED ISSUES

KEY FINDINGS

- The structure of the EPPO, as amended during the negotiations, now consists in a complex multi-layered system, whose contribution to the efficiency of investigations and prosecutions against PIF offences is doubtful. It is crucial to ensure that the most **important operational decisions lie in the hands of the most “European-oriented”** layers to keep a minimal level of verticalisation.
- **The EPPO’s independence from MSs and EU institutions is guaranteed through complex appointment procedures.** It is accompanied by its political accountability to the EU institutions for its general activities.
- The EPPO must develop close relations with national authorities, especially since the competence over PIF offences is shared between them, and since national authorities are competent to conduct investigative measures in their respective MS. The principle of sincere cooperation applies from the moment a suspected offence is reported to the EPPO until it decides to prosecute or dismiss the case.

The institutional design deserves to be examined first as it will have important consequences for the efficiency and the added value of the EPPO. The next paragraphs will address the structure of the EPPO (1.1), its independence and accountability (1.2.) and its relations with national authorities (1.3).

1.1. Structure of the EPPO

In terms of structure¹⁴, the idea of an entirely supranational prosecution service organised at central level and composed of a chief prosecutor and several specialized deputy **prosecutors acting throughout MSs’ territories was quickly abandoned**. Decentralisation was the preferred option, and discussions focused on defining the most appropriate level. Negotiations have evolved towards ever less centralisation and more decentralisation, from a small hierarchical central office towards a collegial body with various layers. This development raises the question as to whether a sufficient degree of Europeanisation / verticalisation remains, or whether MSs have expanded their control over the EPPO to the extent that it has been deprived of any added value.

According to the Commission’s proposal (Art. 6), the EPPO was a hierarchically organised EU body with a central office composed of the European public prosecutor and deputies on the one hand, and a decentralized level composed of European Delegated Prosecutors acting in their respective MS on the other hand (Art. 3(1) and 6(1)). The European Delegated Prosecutors worked directly under the European Public Prosecutor, who could give them **instructions in relation to offences falling within the EPPO’s remit (Art. 6(4) to (6))**. European Delegated Prosecutors would nonetheless remain integrated in the judicial systems of their respective MS (**‘double hat’**).¹⁵ They would work for the EPPO exclusively on PIF cases, and

¹⁴ See K. Ligeti and M. Simonato, “The European Public Prosecutor’s Office: Towards a Truly European Prosecution Service?”, *New Journal of European Criminal Law*, vol. 4, 2013, issue 01-02, p. 7 and f; J.A.E. Vervaele, “Quel statut pour le ministère public?”, in *Quelles perspectives pour un ministère public européen? Protéger les intérêts financiers et fondamentaux de l’Union*, Dalloz, 2010, p. 189 and f.

¹⁵ The ‘double hat’ approach was already advocated in the *Corpus Juris* (see M. Delmas-Marty and J.A.E. Vervaele (Eds.), *op. cit.*, p. 79 and f). It entails that delegated prosecutors maintain their status within their respective criminal justice systems while simultaneously forming part of the EPPO. This had the advantage of ensuring proximity

would continue to perform national investigations in relation to other offences (Art. 6(6)). In its 2014 resolution, the European Parliament did not propose any amendment to the foreseen structure.

During the negotiations in the Council, MSs clearly indicated a preference for a more decentralised and collegial structure. Whereas at the decentralised level the European Delegated Prosecutors have been maintained, new layers have **been added to the "central"** level. The central office now consists of the European Chief Prosecutor, his/her deputies, the College, the Permanent Chambers, and the European Prosecutors.

The College, composed of the European Chief Prosecutor and one European prosecutor per MS, would be responsible for the policy and strategic management of the EPPO (Art. 8), including for the adoption of the Internal Rules of Procedure (Art. 8 (4)). It would not have operational powers, and may only formulate non-binding opinions in certain cases. The Permanent Chambers, composed of a Chair¹⁶ and two permanent members, will be set up by the College. Their number, their composition and the division of competences between them will be determined at a later stage (Art. 9 (1)). The Chambers would take some decisions, i.e. decisions to bring a case to judgment, dismiss a case, refer a case to national authorities and reopen an investigation (Art. 9 (3)). They can also decide to allocate or reallocate a case (Art. 9 (3a) d) and e)) and about the competent jurisdiction (Arts. 22 (4) and (5)). The Chambers would be competent to instruct the European Delegated Prosecutors to initiate an investigation and to exercise the right of evocation (Art. 9 (3a) a) and b)). They would also be responsible for monitoring and directing the investigations and prosecutions conducted by the European Delegated Prosecutors (Art. 9 (2)). Within the permanent Chambers, European Prosecutors will play a decisive role. They would indeed be in charge of the supervision of the investigations and prosecutions allocated to the European Delegated Prosecutor of his/her MS. The supervising European Prosecutor would function as liaison and channel of information between the Permanent Chambers and the European Delegated Prosecutors. He/she would also be able to propose decisions and give instructions to the Delegated Prosecutors (Art. 11).

to the fieldwork of investigations. This approach could however raise concerns as to the independence of the EPPO, since delegated prosecutors would be confronted with the dilemma of serving two masters at the same time.

¹⁶ The chair can be the European Chief Prosecutor or one of his deputies, or a European prosecutor appointed as a chair in accordance with the Internal Rules of Procedure.

Figure 1. Structure in the Commission's proposal (source: the authors)

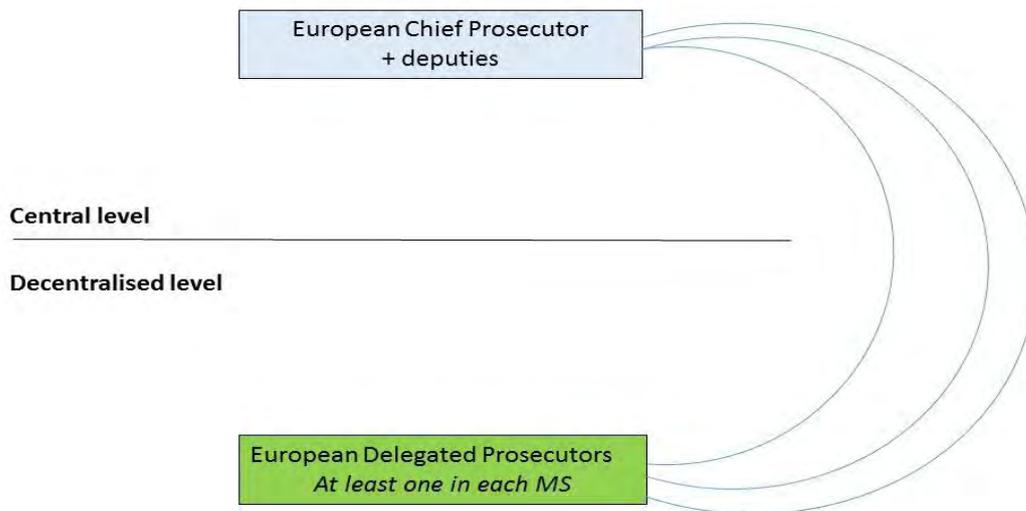
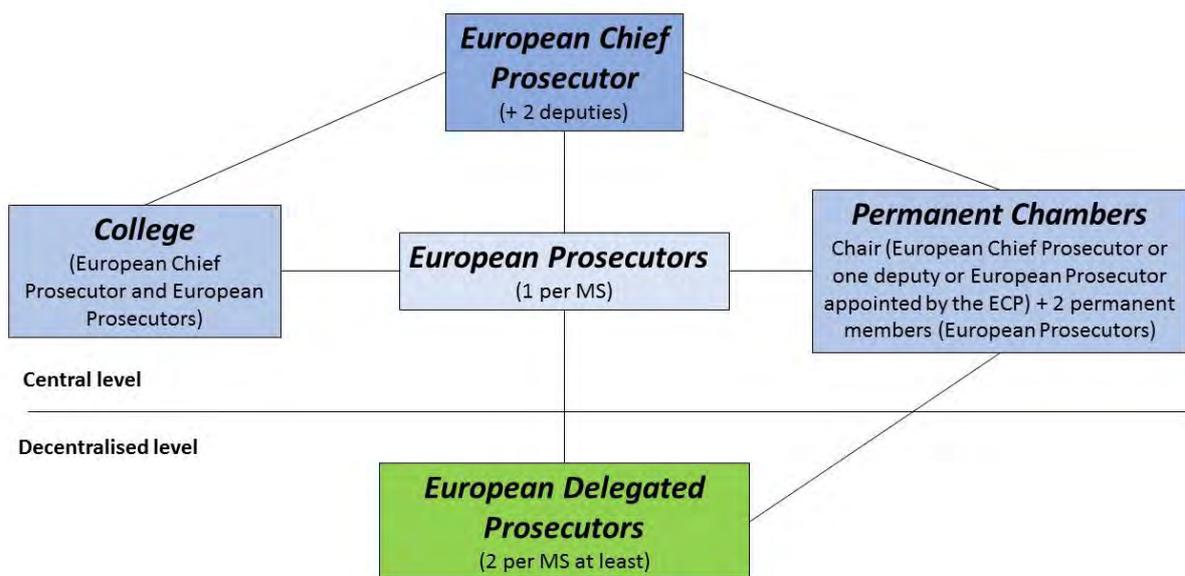


Figure 2. Structure as currently provided (source: the authors)



Although the structure is not yet definitive, as many delegations still expressed reservations and remarks, some elements appear to have been accepted, such as the collegiate structure and the multiplication of layers, and are unlikely to be changed. In this regard and despite its regrets, the European Parliament acknowledged the fact that the structure shall not be amended anymore.¹⁷ Other elements may still be amended, particularly the precise division of competences between the different layers of the Central Office. However, although the negotiations are still on-going,¹⁸ it is possible to make some remarks about the structure as

¹⁷ European Parliament, Resolution of 2015, para. 15.

¹⁸ See for instance the debates with regard to the competences of the Permanent Chamber(s): whereas some delegations consider that the direct powers of the Permanent Chambers should be limited, other delegations have

it is currently envisaged and draw the attention of the Parliament on points deserving particular attention, such as the complexity of the architecture (1.1.1) and the degree of Europeanisation/verticalisation (1.1.2.).

1.1.1. A too complex architecture?

The multiplication of layers at the central level has added great complexity to the EPPO architecture and functioning.¹⁹ It is difficult to perceive how such a complex structure could improve the efficiency of investigations and prosecutions against PIF offences.²⁰

Such complexity is increased by the vagueness of the division of tasks between the different layers. Consequently, **it is not always easy to determine for each aspect of the EPPO's work** who would be *de jure* and *de facto* responsible. Such uncertainty and lack of clarity poses questions both in terms of efficiency and for the protection of fundamental rights. It is indeed likely to create problems with regard to the transparency of the decision-making of the EPPO, and thus complicating the task of defence lawyers, and it might affect the exercise of judicial review.

Because of its complexity, the current structure may generate lengthy procedures, which shall prevent swift action. The conduct of investigations and prosecutions must follow many steps, which creates a risk blocking decision-making and/or unnecessary delays. Delays can for instance be caused by the fact that before taking certain decisions, the European Delegated Prosecutor handling a case may refer to its supervising European Prosecutor, who shall then also report to and wait for the decision of the competent Permanent Chamber. In case of disagreements between the European Delegated Prosecutor handling the case and his/her supervising European Prosecutor, new delays might also appear.²¹ The timeline for making decisions is not either very clear. The text provides for few time limits,²² and merely refers to **the transfer of information or to decisions to be taken "without undue delay",** which is far from precise.

Many of the aforementioned gaps or imprecisions could be addressed by the Internal Rules of Procedure, which are prepared by the European Chief Prosecutor and adopted by the College. The question is however whether it is adequate to leave the fate of these important issues to internal discussions.

Last but not least, the budgetary implications of such complex structure should be carefully scrutinised. **The European Parliament has recently asked the Commission to "come up with adjusted estimations of the budgetary implications of the collegiate structure (...) and to**

underlined their need to guarantee the coherence and consistency of the activities of the EPPO throughout the Member States.

¹⁹ A. Klip, "Internal structure and decentralised decision making", intervention at the conference on the establishment of the EPPO – State of Play and Perspectives, 7 and 8 July 2016, T.M.C. Asser Institute, the Hague. See J.A.E. Vervaele, "Legal and political accountability for criminal investigations and prosecutions by a EPPO in the EU: the dissymetry of shared enforcement", in M. Scholten and M. Luchtman (eds.), *Law Enforcement by EU Authorities. Political and judicial accountability in a shared legal order*, Edward Elgar, Cheltenham, 2017, forthcoming.

²⁰ P. Geelhoed and L. Pantaleo, "The European Public Prosecutor's Office – can the Member States finally accept their own creation?", 1st July 2016, blog post available at: <http://leidenlawblog.nl/articles/the-european-public-prosecutors-office-can-the-member-states-finally-accept>.

²¹ Example in A. Csuri, "The Proposed EPPO – from a Trojan Horse to a White Elephant", *Cambridge Yearbook of European Legal Studies*, May 2016, p. 25: "if the opinions between the delegated and supervising prosecutors differ on essential aspects of the case, the files will have to be translated to enable the Permanent Chamber a clear and independent view over the case – another time-consuming undertaking."

²² Only time limits mentioned for the exercise of the EPPO's right of evocation of cases/investigations launched by national law enforcement and judicial authorities (Art. 22a (1)), or for the EPPO's decision to refer a case to national competent authorities (Art. 28a (2b)).

provide Parliament with results of the “reality check exercise”. It has also recalled that it will take this information into account before taking its final decision.²³

1.1.2. A sufficient Europeanisation/verticalisation?

Special and close attention should be given to the entities (or in other terms the layers), which would take the most important decisions. This issue is indeed key to understand whether the current structure presents a sufficient level of Europeanisation and verticalisation and thus guarantees a real added value to the EPPO. Would the centre of gravity or, in other words, the most important operational decisions (such as the initiation of investigations, **dismissal of a case and bringing a case to judgment**) lie in the hands of the most “European-oriented” entities/layers, namely the European Chief Prosecutor (or his/her deputies) and the Permanent Chambers?

These two entities are indeed the most European-oriented. Contrary to the European Delegated Prosecutors, the European Chief Prosecutor does not have a “double hat” and is thus supposed to be entirely devoted to the European interests. Through their collegial nature, the Chambers, which are a reduced model of the college, are also supposed to go beyond the defence of merely national interests.

The competences of the European Chief Prosecutor have been substantially reduced when comparing with those foreseen in the Commission’s proposal. The European Chief Prosecutor would “organise the work of the Office, direct its activities and take decisions in accordance with this Regulation and the Internal Rules of Procedure” (Art. 10). The function seems to have transformed into one of a general administrator and manager²⁴, in charge of representing the EPPO. The European Chief Prosecutor may still exercise limited operational powers. He/she may chair permanent chambers, but this task can be delegated to his/her deputies or to a European Prosecutor. Besides, the European Chief Prosecutor shall be communicated any decision to refer a case to national authorities and he/she may, within three days, request the Permanent chambers to review its decision if it is required by the interest to ensure the coherence of the referral policy of the Office (Art. 28a (2b)).

Under the current structure, it seems that most of the operational decisions lies in the hands of the Permanent Chambers. This is a positive point, which is especially in line with the position of the European Parliament in its Resolution of 2015.²⁵ However, the permanent Chambers have a possibility to delegate some of their decisional making power to the European prosecutors supervising the case. For the time being such possibility is limited and subject to some sort of control by the Chief European Prosecutor (Art. 9(5a)). However, an eye should be kept on the negotiations within the Council to check whether the Chambers retain their predominant role in operational matters, and whether the possibility to delegate their decision-making powers remains limited.

1.2. Independence and accountability of the EPPO

Since the EPPO was proposed by the *Corpus Juris*, there has been general consensus that the new prosecutorial body should be independent both from national governments and from EU institutions.²⁶ Subordinating the EPPO to either EU institutions or to national governments

²³ European Parliament, Resolution of 2016, para. 8.

²⁴ J.A.E. Vervaele, in M. Scholten and M. Luchtman (eds.), *op. cit.*, forthcoming.

²⁵ European Parliament, Resolution of 2015, paras. 15 and 16.

²⁶ The independence was foreseen both in the *Corpus Juris* (Art. 18) and in the Green Paper on criminal law protection of the financial interests of the Community and the establishment of a European Prosecutor, COM (2001) 715 (para.

has always been considered a threat to its legitimacy.²⁷ The European Parliament has repeatedly stressed the importance of its independence from national governments and EU institutions²⁸ (1.2.1).

Yet in order to accompany the independence of the EPPO, it has also been accepted that it will be necessary to provide for an effective mechanism of accountability. The term encompasses two dimensions, namely legal and political accountability. Legal accountability **is based on judicial oversight and judicial review, here of the EPPO's activities**, and will be dealt in another section. In contrast political accountability can be understood as the "relationship between an agency and a representative forum in which the supervisor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass **judgment, and the actor may face consequences**"²⁹ (1.2.2.).

1.2.1. Independence of the EPPO

Both the Commission's proposal (Art. 5(2)) and the current version of the regulation (Art. 6(1)) contain a general provision stressing the independence of the EPPO. Its members shall act in the interest of the Union as a whole and shall neither seek nor take instructions from any person external to the EPPO. MSs and EU institutions, bodies and agencies shall respect its independence and shall not seek to influence it in the exercise of its tasks.

In addition to this general provision, rules regarding the appointment for the different positions within the EPPO are also worth examining. In all versions of the proposal, the independence beyond doubt of the candidates is continuously stressed. However, the respective roles of the Council and the Parliament, and of the Member States, in the appointment procedure varies.

Both in the Commission's proposal (Art. 8(2)) and in the current version of the proposal (Art. 13(2)), the procedure for the appointment of the (Chief) European Public Prosecutor insisted on his/her independence beyond doubt as a condition of its eligibility for the position. **According to the Commission's proposal, the European Public Prosecutor ought to be appointed "by the Council with the consent of the European Parliament for a term of eight years, not renewable" (Art. 8 (1)). Under the current version of the proposal, the Council and the European Parliament shall appoint by "common accord" the European Chief Prosecutor** for a non-renewable term of 7 years (Art. 13 (1)), after receiving a short-list of candidates elaborated by a selection panel.³⁰ The European Parliament called for the appointment following a hearing before Parliament,³¹ without success for the moment. In both versions of the proposal, the (Chief) European Public Prosecutor may be dismissed by the ECJ, on application by the European Parliament, the Council or the Commission (respectively Art. 8(4) and Art. 13(4)).

Concerning the appointment of his/her deputies, whereas in the Commission's proposal, they were appointed by the Council with the consent of the European Parliament (Art. 9(1)), under

4.1.1). See M. Delmas-Marty and J.A.E. Vervaele (eds.), *The Implementation of the Corpus Juris in the Member States*, *op. cit.*, p. 314 and f.

²⁷ C. Van den Wyngaert, *Eurojust and the European Public Prosecutor in the Corpus Juris Model: Water and Fire?*, in N. Walker (ed.), *Europe's Area of Freedom, Security and Justice*, Oxford University Press, 2004, p. 231 and f.

²⁸ See European Parliament, Resolution of 2014, para. 5 (2) and Resolution of 2015, para. 7.

²⁹ P. Craig, *EU Administrative Law*, Oxford University Press 2012, p. 160, quoted in J.A.E. Vervaele, in M. Scholten and M. Luchtman (eds.), *op. cit.*, forthcoming.

³⁰ Some delegations would prefer that the European Chief Prosecutor was chosen from among the members of the College. About the selection panel, see Art. 13(3).

³¹ European Parliament, Resolution of 2015, para. 8.

the current version of text, the two deputies are European Prosecutors appointed by the College (Art. 13a (1)).

For the European Prosecutors, each MS should propose 3 candidates among which one would be appointed by the Council, after it had received the reasoned opinion of a Selection Panel (Art. 14 (1)).

In the Commission's proposal, the European Delegated Prosecutors were to be appointed by the European Public Prosecutor, for a 5-years term renewable, from a list of at least three candidates, submitted by the Member State(s) concerned (Art. 10 (1)). In the current version of the proposal, the College shall, upon a proposal by the European Chief Prosecutor, appoint for a term of 5 years the European Delegated Prosecutors nominated by the MSs. It may reject the nominated persons in case of non-fulfilment of the eligibility criteria (Art. 15 (1)). Their appointment is much more in the hands of the national authorities than before. Although the College still has a possibility to reject the nominated candidates, the power to appointment has shifted from the European Public Prosecutor to the College, and the possibility to choose the most suited candidate among those pre-selected by the Member States has disappeared. Their appointment is thus marked by a reinforced national control.

According to the Commission's proposal (Art. 6(5 et 6)) and the current version of the proposal (Art. 12 (1)), the appointed European Delegated Prosecutors shall at the same time act on behalf of the EPPO in their respective Member States and shall have the same powers as national prosecutors in respect of investigations, prosecutions and bringing cases to **judgment. This "double hat" model is the best guarantee of** integration of the delegates into the national systems of criminal justice. However, conflicting assignments should be avoided and the prevalence/pre-eminence of the European identity on their national quality should be ensured.

In the Commission's proposal, when the European Delegated Prosecutors act within their 'regulation mandate', they shall be fully independent from the national prosecution bodies and have no obligations towards them (Art. 6(5)). In the event of conflicting assignments, the European Delegated Prosecutors shall notify the European Public Prosecutor, who may, after consultation with the competent national prosecution authorities, instruct them in the interest of the investigations and prosecutions of the EPPO to give priority to their functions deriving from the Regulation. In such cases, the European Public Prosecutor shall immediately inform the competent national prosecution authorities thereof (Art. 6(6)). Under the current proposal, in the event of conflicting assignments, the European Delegated Prosecutors shall notify their supervising European Prosecutor, which shall consult the competent national prosecution authorities in order to determine whether priority should be given to their functions under this Regulation (Art. 12 (3)).

The wording has thus changed substantially. In the initial proposal, the decision of the European Public Prosecutor was somehow already directed towards the instruction to give priority to the **European Delegated Prosecutors' functions under the Regulation after consultation with the national authorities;** the current version of the text does not hint in **favour of giving priority to their "EPPO function" and the outcome of the consultation with the national authorities** is more open. This softening might be explained by the possibility to reallocate the case to another EDP or for the European Prosecutor to conduct the investigations himself/herself (Art. 12(3)). Yet one could regret that the prevalence of their European identity over their national capacity is not as clearly stated as before. In the same line, another change must be mentioned: the deletion of the reference that European Delegated Prosecutors shall have no obligations towards national authorities.

1.2.2. Political accountability

According to the Commission's proposal (Art. 5(3)) and the current version (Art. 6 (2)), the EPPO shall be accountable to the European Parliament, the Council and the Commission for its general activities. Annual reports shall be published each year (Art. 70 Commission's proposal and Art. 6a (1) current text). Their public character has been added during the negotiations. Furthermore, the European (Chief) Public Prosecutor shall appear once a year before the European Parliament and the Council, and before national parliaments at their request/invitation, to give account of the EPPO's general activities (Art. 70 (2 & 3) Commission's proposal and Art. 6a (2) current text).³²

The European Parliament welcomed this provision, which may help "to guarantee a continuous assessment of the activities carried out by the new body" and it called upon the Council "to ensure that the annual report contains, inter alia, details on the willingness of national authorities to cooperate with the EPPO".³³ This last element does not seem to have been included yet in the proposal.

1.3. Relations with national authorities

The relations between the EPPO and national authorities are essential, particularly since they are called to establish close cooperation. This is more so given the two following elements. Firstly, the competence of the EPPO to investigate and prosecute PIF offences is now shared with national authorities, what requires articulating their respective competences (1.3.1). Secondly, the Treaties do not allow for the setting up of a completely supranational criminal justice system covering all stages of criminal procedure, i.e. detection, investigation, prosecution, judgment and execution of the judgment³⁴. As a consequence, the EPPO will always have to rely on national authorities, particularly for bringing a case to judgment before the national courts. This is evidenced by the wording of Art. 86(2) TFEU (1.3.2.).

1.3.1. The articulation of shared competences between the EPPO and national authorities

The Commission's proposal enshrined the principle of EPPO's exclusive competence (Art. 11 (4)).³⁵ This was certainly one of the most far-reaching features of the proposal, which went beyond what was suggested in the *Corpus Juris*³⁶ and in the 2001 Green paper³⁷. Exclusive competence meant the EPPO held a monopoly to investigate and prosecute cases falling within its substantive scope of competence, that is, over 'PIF crimes' as defined in the PIF Directive. If enacted, this would have had the consequence that national authorities would have lost their competence in relation to PIF offences.

Such approach was too sensitive in terms of national sovereignty. The negotiations quickly shifted towards shared competence between the EPPO and MSs. The current version of the text enshrines the principle of shared competence, while providing a right of evocation for the EPPO (see e.g. Preamble recital 7). Previous versions of the text foresaw a priority

³² This provision foresees a mechanism close to those contained in the Europol Regulation (Art. 11 (1) c) read together with preamble recital 60) and the Eurojust Council Decision (Art. 32, see also Art. 14 (1) c) of the proposal for a Regulation), providing that Europol's Director and Eurojust's President shall appear annually before the European Parliament and the Council to present the annual report of their respective agencies.

³³ European Parliament, Resolution of 2015, para. 11.

³⁴ In spite of some proposals made earlier by the Minister of Justice of the Netherlands. On this question, see also see Daniel Flore, *Droit pénal européen, les enjeux d'une justice pénale européenne*, Larcier, 2014.

³⁵ See also Art. 14 and recitals 5 and 26 of the preamble of the EPPO proposal.

³⁶ M. Delmas-Marty, op. cit.

³⁷ Commission, 2001 Green paper, p. 47.

principle for the EPPO³⁸, which was in a way stressed by the European Parliament in its 2015 Resolution.³⁹ **The deletion of such reference to the EPPO's priority** can be interpreted as a way to further reduce the sensitiveness of the text.

Under the current system, the EPPO shall exercise its competence either by initiating investigations on its own initiative or by using its right of evocation (Art. 20 (1)). Indeed, where the national authorities have initiated an investigation about a criminal conduct that may constitute an **offence falling within the EPPO's competence, and inform the EPPO thereof** (Art. 19), the latter can decide to exercise its right of evocation. This decision shall however be taken as soon as possible, and not later than 5 days from the notification (Art. 22a (1)). The EPPO may also refer a case back to the competent national authorities (Art. 28a). Such decision is to be taken by the competent Permanent Chamber without undue delay, and is particularly relevant when the investigation reveals that the facts do not constitute a criminal offence for which the EPPO is competent (which evidently does not mean that they do not constitute a criminal offence for which national authorities may be competent). The articulation of shared competence between the EPPO and national authorities thus functions like an elevator going in both directions (up and down) in order to ensure that the case is handled at the most appropriate level, be it European or national.

As a consequence of the changes introduced, the principle of legality of prosecutions, which **was one of the cornerstones of the Commission's proposal, will see its scope of application considerably reduced. Although it has been preserved with regard to EPPO's investigation and prosecution activities** (Preamble recital 56), the application of the legality principle will depend on the applicable national law, when cases are referred back by the EPPO to the national competent authorities which may enjoy a wider discretion. This might lead to a lack of follow-up of the PIF offence at national level following the referral of a case, what negatively impacts the efficiency of the fight against PIF offences. It might also create discrepancies regarding the position of the defendant.⁴⁰

Some observers have also denounced the absence of clear and precise criteria to determine when the EPPO should evoke a case.⁴¹

1.3.2. The need for effective cooperation between the EPPO and national authorities

Once the EPPO has established its competence over a case and decided to exercise it, its relations with national competent authorities are of crucial relevance to ensure the efficiency of the whole system.

In this regard, European Delegated Prosecutors, which constitute the decentralised level of the EPPO in the MSs, are in the front line. Their **"double hat" guarantees their integration in their respective criminal justice systems.** They shall have the same powers as national prosecutors in respect of investigations, prosecutions and bringing cases to judgment (Art. 12 (1)). As a consequence, in their capacity as national prosecutors, European Delegated Prosecutors can either undertake the investigative measures and other measures on their own, or instruct the competent authorities of their MS to undertake them (Art. 23 (1)). The competent national authorities shall ensure, in accordance with national law, that all

³⁸ See for instance Recital 7, in Council Doc. No. 12687/16, 18 October 2016.

³⁹ European Parliament, Resolution of 2015, para. 12.

⁴⁰ A. Csuri, *op. cit.*, p. 27.

⁴¹ See especially I. Sacristan Sanchez, "Cooperation between the EPPO and OLAF", intervention at the conference on the establishment of the EPPO – State of Play and Perspectives, 7 and 8 July 2016, T.M.C. Asser Institute, the Hague.

instructions assigned to them are effectively implemented.

In exceptional cases, i.e. if it appears indispensable in the interest of the efficiency of the investigation or prosecution⁴², the supervising European Prosecutor can handle the case directly, in which case it can either execute the investigative measure(s) himself/herself, or instruct the competent national authorities to carry them out.

National authorities shall thus implement requests coming from either the European Delegated Prosecutors or European Prosecutors. This constitutes a concrete implementation of the principle of sincere cooperation, enshrined in EU primary law (Art. 4 (3)). The Preamble of the draft Regulation provides more details,⁴³ specifying that national authorities include **“police authorities, in particular for the execution of coercive measures”** and **recalling that the principle of sincere cooperation applies “from the moment a suspected offence is reported to the EPPO until it determines whether to prosecute or otherwise dispose of the case”** (Preamble, recital 59).

One of the crucial aspects of the cooperation between the EPPO and national authorities rests on the exchange of information (Art. 19(1)). Transmission of information to the EPPO is key to its functioning, and this is true at all levels of intervention, including the very beginning of a case. A careful parallel may be drawn with the transmission of information to Europol, Eurojust or OLAF. In this regard, one should not overlook the difficulties that these agencies have encountered when attempting to convince national authorities of the opportunity and necessity of informing them. Although its status is different, the EPPO might encounter similar resistances. It goes without saying that smooth flow of information is also necessary in the opposite direction (from the EPPO to national authorities (Art. 19(4)), especially when a case is referred back to the national level. In that regard, one must note the provision suggested by Germany, yet never discussed in depth (Art. 58b), which would detail the conditions in which the EPPO may provide the competent authorities of Member States with information or evidence which is already in its possession. This transfer would be envisaged for the purpose of investigations or use as evidence in criminal investigations, and after consulting the Permanent Chamber, the European Delegated Prosecutor handling the case shall decide on any such transfer in accordance with his/her national and the Regulation. It is unclear whether this provision would only apply to situations where the EPPO refers a case back to national authorities, or whether it would apply more broadly. Should this provision be inserted, it would certainly improve the exchange of information between the EPPO and national authorities, but it could also raise concerns, as for instance with regard to the rights of defence.

One should note that the European Parliament insisted, for the moment without success, that **EPPO’s annual reports contain information about the cooperation of national authorities, as this issue would be essential for ensuring the good functioning of the EPPO.**

⁴² These criteria listed in Art. 23(4) are the following: (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 servants of the European Union or members of the Institutions; and (c) in case of failure of the reallocation mechanism provided for in para. 3.

⁴³ Document No. 12687/16 of 18 Oct. 2016.

SECTION 2 – EPPO'S MATERIAL SCOPE OF COMPETENCE

KEY FINDINGS

- The EPPO's material scope of competence has been early restrained to PIF offences. The latter will be defined in a separate instrument, i.e. the PIF directive, which only aims at approximating national laws.
- The insertion of VAT fraud within the PIF directive has been the subject of a long debate. A compromise, envisaging only the insertion of serious cross-border VAT cases, seems within reach. However, the finalisation of one provision in the EPPO proposal (Art. 20(3)) must be carefully monitored, as it might deprive the EPPO of its competence over VAT cases.
- The EPPO is also competent for ancillary offences, i.e. those inextricably linked to PIF offences. The new system based on measuring the preponderance of PIF offences may not be sufficient to prevent tensions, and it is regrettable that in case of disagreements, the final decision on the attribution of competence lies in the hands of national judiciary, with a very limited review by the ECJ.

A first question in relation to the EPPO's material scope of competence is whether it should be limited to PIF offences or rather extended to serious transnational crime. According to Art. 86(1) TFEU, the EPPO shall be established '[i]n order to combat crimes affecting the financial interests of the Union'. However Art. 86(4) TFEU provides for the possibility to extend the EPPO's competence 'to include serious crimes having a cross-border dimension' – what requires a unanimous decision of the European Council, after obtaining the consent of the European Parliament and after consulting the Commission. The choice between a narrower or a broader scope of competence for the EPPO does not seem to have given rise to much discussion in the course of negotiations. This is understandable, as it avoids projecting the **image of an almighty supranational "parquet" which could further fuel resistance and controversy**.⁴⁴ However, the lack of debate is also surprising, particularly given the current security and migration crises, and the importance of European cooperation to combat serious crime such as terrorism, human trafficking and smuggling⁴⁵. It must nevertheless be noticed that the EPPO's competence has been extended in the course of negotiations to offences relating to participation in a criminal organisation, if the focus of the criminal activity of such criminal organisations is to commit **the any of the offences against the Union's** financial interests (Art. 17 (1a)).

Three other topics merit attention in this context. These are firstly, the means by which PIF offences are defined - whether via uniform provisions in a Regulation based on Art. 86 or 325 TFEU, or through a Directive based on Art. 83(1) TFEU (2.1); secondly, the issue of whether **VAT fraud should fall under the EPPO's scope of competence (2.2.)**; and thirdly questions relating to EPPO's competence over ancillary offences (2.3.).

⁴⁴ K. Ligeti, « Approximation of substantive criminal law and the establishment of the EPPO », in F. Galli and A. Weyembergh (eds), *Approximation of substantive criminal law in the EU. The way forward*, Brussels, éd. De l'Université de Bruxelles, 2013, p. 76.

⁴⁵ It must be noticed that some have defended the broader version of the EPPO competence: see especially D. Flore, "La perspective d'un procureur européen", *ERA Forum* 9/2, 2008, p. 237. See also Conseil d'Etat (France), *Réflexions sur l'institution d'un parquet européen*, 24 Febr. 2011, p. 58 and f; and see also *Quelles perspectives pour un ministère public européen ? Protéger les intérêts financiers et fondamentaux de l'Union*, Dalloz, 2010.

2.1. How to define PIF offences?

The definition of PIF offences, i.e. the offences affecting the Union's financial interests, is crucial to determine the EPPO's material scope of competence. The instrument used to that end is also key, determining whether this scope is uniformly defined throughout the EU area through a Regulation, or whether it is merely approximated by a Directive, and thus subject to variations from one MS to another.

In its EPPO proposal, the Commission made a clear choice in favour of the second option. Indeed, in the text the EPPO's material competence is defined by reference to the draft PIF Directive (Art. 12). It thus refrained from providing uniform definitions of PIF offences. This choice does not seem to have been challenged during the negotiations, and an identical reference to the Directive can still be found in the latest draft (Art. 17(1)). However, many authors have criticised this choice severely,⁴⁶ especially because the EPPO will operate with as many definitions of its competence as the number of MSs participating in its establishment. Whether the EPPO can investigate and prosecute a certain offence will thus to a certain degree depend on the applicable national law.

The definition of the EPPO's material scope of competence through national law is understandable in light of the requirement imposed by Art. 4(2) TEU and Art. 67(1) TFEU to respect national diversity. It is however doubtful whether the proposed system will be able to respect other constitutional objectives, i.e. endeavouring a high level of security (Art. 67(3) TFEU) and ensuring effective protection of the Union's financial interests (Art. 325 TFEU). This system may also fail to answer the practical concern underlying the devising of an EPPO, namely overcoming the current fragmentation of national proceedings.⁴⁷

Furthermore, the lack of a uniform definition of the EPPO's material scope of competence raises concerns as to its compatibility with basic EU principles, particularly the legality principle and the principle of legal certainty as provided for in the EU Charter. It is thus also problematic from the perspective of EU citizens' and economic operators' rights. These concerns are increased in the light of the latest version of the PIF Directive,⁴⁸ in which PIF offences are defined in a way that leaves even more leeway to MSs.⁴⁹

2.2. Will VAT fraud fall within the EPPO's competence?

Negotiations on the PIF Directive have been quite difficult, with different points giving rise to tensions.⁵⁰ The text is subject to the ordinary legislative procedure, under which the Council and the European Parliament are on an equal footing in the legislative roles. The inclusion or not of VAT fraud within its scope has been particularly controversial, with the Council rather

⁴⁶ K. Ligeti, "Approximation of substantive criminal law and the establishment of the EPPO", in F. Galli and A. Weyembergh (eds), *op. cit.*, p. 82 ; A. Weyembergh and K. Ligeti, "The European Public Prosecutors Office: certain constitutional issues", in L.H. Erkelens, A.W.H. Meij and M. Pawlik (eds), *The European Public Prosecutor's Office, An Extended Arm or a Two-Headed Dragon?*, Springer, T.M.C. Asser Press, 2015, p. 65 – 67; J.A.E. Vervaele, "The material scope of competence of the EPPO: Lex incerta and unpraevia?", in C. Brière and A. Weyembergh, *The needed balances in EU criminal law, the past, present and future*, Hart, forthcoming.

⁴⁷ A. Weyembergh and K. Ligeti, "The European Public Prosecutors Office: certain constitutional issues", *op. cit.*, p. 65 – 67.

⁴⁸ Council Doc. No. 12686/1/16 REV 1.

⁴⁹ J.A.E Vervaele, "The material scope of competence of the EPPO: Lex incerta and unpraevia?", *op. cit.*

⁵⁰ Starting with the question of the appropriate legal basis for the text: Art. 325 (4) TFEU as proposed by the commission or Art. 83 (2) TFEU as proposed by the Council. Such choice impacts the possibility of certain MSs to not participate in the future Directive (see special regime for DK, IE and UK). For more details, see A. Csuri, *op. cit.*, p. 13 – 14.

opposing its inclusion on the one side, and the European Parliament and the Commission being in favour of it, on the other.

The initial proposal for a PIF Directive⁵¹ explicitly referred to the fact that fraud affecting VAT impacts the Union budget, since any lacuna in the collection of VAT revenue in compliance with EU law potentially causes a reduction of the EU's budget. The Commission's proposal thus "covers revenue resulting from VAT receipts in the Member States".⁵² This is in line with ECJ jurisprudence, which has repeatedly stressed that VAT fraud forms part of fraud affecting the Union's financial interests.⁵³

In its Resolution of 16 April 2014 on the draft PIF Directive, the European Parliament "welcomes the Commission's proposal, which *naturally* includes VAT fraud in the directive". The position has since been restated, for instance in March 2016.⁵⁴

Within the Council, the situation was more complex: certain MSs opposed the inclusion of VAT fraud in the scope of the PIF Directive. Their concerns were linked to a potential indirect harmonisation in the field of taxation, to a potential loss of VAT revenue as well as to the fact that the inclusion of VAT fraud would interfere with their competence as regard the structure, organisation and functioning of their tax administration.⁵⁵ This question was one "(...) on which Council and Parliament could not agree at (their) trilogue meeting in June 2015".⁵⁶ However, over the last months, a positive move seems to have occurred towards a compromise solution that could reconcile the diverging positions by integrating at least certain forms of VAT fraud in the scope of the PIF Directive⁵⁷. A look at the press release of the JHA Council meeting of 13 and 14 October 2016 seems to confirm this positive evolution: "a majority of ministers agreed that at least certain serious forms of cross-border VAT fraud (e.g. VAT carousels) should be included in the directive."⁵⁸

The aforementioned compromise within the Council is reflected in the draft version of the PIF Directive dated 11th of Oct. 2016.⁵⁹ Besides an additional paragraph in the Preamble, which enumerates examples of most serious forms of VAT fraud⁶⁰, the draft Directive contains an additional sub-paragraph defining in respect of revenue arising from VAT own resources, what serious abuse of the common VAT system constitute fraud affecting the Union's financial interests (Art. 3 (1))⁶¹. It is worth stressing that VAT fraud requires a cross-border element

⁵¹ Commission, Proposal for a Directive on the fight against fraud to the Union's financial interests by means of criminal law, COM (2012) 363 final, 11 July 2012.

⁵² PIF Directive (Commission's proposal), Preamble, Recital 4.

⁵³ ECJ, Case C-359/09, 15 November 2011, *European Commission vs Federal Republic of Germany*, para. 72; ECJ, C-617/10, 26 February 2013, *Åklagaren v Hans Åkerberg Fransson*, para. 27; and ECJ, C-105/14, 8 September 2015, *Taricco*, para. 21.

⁵⁴ EP Resolution on the Annual Report 2014 on the Protection of the EU's Financial Interests – Fight against fraud, § 52: "reiterates its view that there is an urgent need to adopt the PIF directive, which should include VAT in its scope (... and) recalls the *Taricco* case, in which the Court of Justice draws attention to the fact that VAT fraud is indeed included in the 1995 PIF Convention's definition of PIF fraud; (...)"

⁵⁵ Council, 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 (first reading) - Policy debate/Progress report, 11 October 2016, Council Doc. No. 12686/1/16 REV 1.

⁵⁶ Council JHA of 13 and 14 October, Press release.

⁵⁷ For an account of the most recent meetings at technical level, see Council Doc. of 30 Sept. 2016 No. 12686/16. See also the debates during the meeting of the JHA Council in Oct. 2016, during which several MSs reiterated their opposition to the inclusion of VAT fraud in the scope of the PIF directive.

⁵⁸ Council JHA of 13 and 14 October 2016, Press release.

⁵⁹ The most recent version of the text, as agreed within the Council, can be found in Annex of the Council Doc. No. 12686/1/16 REV 1. The European Parliament has not expressed its opinion on it yet.

⁶⁰ Proposal for a PIF Directive (doc. 12686/1/16 REV 1), Preamble, Recital 4.

⁶¹ Art. 3 (1) d), Proposal for a PIF Directive (doc. 12686/1/16 REV 1). The provision reads as follows: "any act or omission committed through serious abuse of the common VAT system, where the offences are connected with the territory of two or more Member States and relating to:

(i) the use or presentation of false, incorrect or incomplete VAT-related statements or documents, which has as an effect the serious diminution of the resources of the Union budget;

in order to fall within the EPPO's sphere of competence, the draft PIF Directive requiring that the offences be connected with the territory of two or more MSs. Purely internal cases will escape the scope of PIF offences as described in the PIF Directive, thus falling outside the **EPPO's sphere of competence. It must be noted that the transnational requirement will not lack in cases of simple carousel fraud and of fraud through missing intra community traders (MTIC fraud) since such "transnationality" is part of their DNA**⁶². The Preamble also contains a paragraph stressing that the Directive does not affect the structure, organisation, functioning or the effective application of VAT legislation by national tax administrations.⁶³ Such paragraph appears as a direct answer to the concerns of certain MSs.⁶⁴

This compromise reached in the Council **is to be welcome. However, its "effective" impact on EPPO's material scope of competence might be jeopardised by Art. 20 (3) of the current version of the EPPO Regulation.** Art. 20 provides a series of situations where the EPPO may be incompetent (minor cases) (Art. 20(2)) or should refrain from exercising its competence (Art. 20(3)). In the latter case, the EPPO shall refer the case to the competent national authorities without undue delay, following consultations with them. One of the situations listed in Art. 20 (3) is problematic with regard to EPPO's investigation and prosecution into VAT fraud: it provides that the EPPO shall refrain from exercising its competence if *"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 Article 17 does not exceed the damage caused, or likely to be caused to another victim"* (Art. 20 (3) b)). Such provision might *de facto* result in VAT fraud always falling outside the competence of the EPPO, since MSs will always suffer far greater damages than the Union for such offences. Should the text keep its current wording, the compromise found within the Council in the context of the PIF Directive will be deprived of its *effet utile*. In this regard, one cannot but welcome the European Parliament's position in its Resolution of 5 Oct. 2016, calling on the Council to *"abandon the rule depriving the EPPO of the possibility of exercising competence for all PIF offences where the damage to the Union budget is equal to or less than damage to another victim."*⁶⁵

2.3. The EPPO's competence for ancillary offences

Ancillary offences can be defined as offences which are inextricably linked to an offence affecting the financial interests of the EU, such as offences strictly aimed at ensuring the material or legal means to commit a PIF offence or to ensure the profit or product thereof (Preamble, recital 49). Granting competence to the EPPO for ancillary offences is sensitive since it allows the EPPO to investigate and prosecute offences that are not within the scope of PIF offences.

Such EPPO's competence for ancillary offences was already provided for in the 2013 Commission proposal, under the condition that their joint investigation and prosecution is in the interest of a good administration of justice (Art. 13). In its 2014 resolution, the European

(ii) non-disclosure of VAT-related information in violation of a specific obligation, with the same effect.

(iii) the presentation of correct VAT-related statements for the purposes of disguising non-payment."

The provision shall be read together with recital 16, Preamble of the text, which provides that **"Serious abuse of the common VAT system as referred to in Art. 3(1)(d) is presumed when the total damage caused by the offence exceeds the threshold of EUR [1/3/10 million]. In relation to the latter type of fraud the notion of total damage is used to express that this is the total of the estimated damage, both, for the financial interests of the Member States concerned and for the Union"**.

⁶² About MTIC Frauds, see *Eurojust News*, issue No 11, March 2014.

⁶³ Proposal for a PIF Directive (doc. 12686/1/16 REV 1), Preamble, Recital 25b.

⁶⁴ Council, Doc. No. 12686/16, 30 Sept. 2016.

⁶⁵ European Parliament, Resolution of 5 Oct. 2016, para. 2.

parliament paid particular attention to the issue and proposed a few amendments, which have been repeated in 2015.⁶⁶

The current version of the text corresponds neither to the version of the Commission proposal nor to the amendments proposed by the European Parliament. The text still grants competence to the EPPO on any other criminal offence which is inextricably linked to a PIF offence (Art. 17 (2)). However, the condition based on the interest of a good administration of justice has disappeared and has been replaced by new conditions defined in the abovementioned Art. 20(3), which lists the situations in which the EPPO shall refrain from exercising its competence. From these new conditions it results that, in order to establish its competence over ancillary offences, the EPPO will have to determine which offence is preponderant. To measure such preponderance, the EPPO must compare the respective gravity of the PIF offence and ancillary offence on the basis of the maximum sanctions provided for under national law (see Preamble, recital 49 and Art. 20(3) a) and aa)). The EPPO will also have to compare the level of damage caused to the Union with the one caused to other victims (Art. 20(3) b)).

The system imposing the EPPO to measure the preponderance of PIF offences before claiming competence over ancillary offences is not only complex and obscure, but moreover illustrates the trend in favour of reducing the EPPO's material scope of competence through indirect means. The replacement of a condition based on the good administration of justice by more **"mathematical" conditions intended to verify the preponderance of the PIF offences results** in less flexibility and margin of manoeuvre for the EPPO. Although this would help to guarantee more legal certainty, it will not necessarily correspond to the interest of justice.

The practical implementation of the EPPO's competence over ancillary offences will certainly not be easy and will likely lead to tensions between the EPPO and national authorities. That is why in the Commission proposal, the EPPO and national prosecution authorities were invited to consult each other, and eventually consult Eurojust, in order to determine which of them shall be competent (Art. 13(2)). In case of disagreement, it was up to the competent national authority to decide on the attribution of competence (Art. 13(3)), and such decision was not subject to review (Art. 13 (4)). This system relying on national decisions without providing for any review could be questioned. The European Parliament indicated its preference for another settlement procedure, consider that *in case of disagreement, "the EPPO should decide, at central level, who will investigate and prosecute; (...) the determination of competence, in accordance with those criteria, should always be subject to judicial review"*.⁶⁷

Under the new version of the text, tensions between the EPPO and national authorities are still likely (or even more likely) to arise. References to mutual consultations and to the involvement of Eurojust have disappeared, and it cannot be considered that they have been replaced by a general reference to sincere cooperation (Art. 6 (6)). In *case of disagreement between the EPPO and national authorities, it is still up to the national authorities to decide (Art. 20(5)). The possibility of judicial review has been introduced. The ECJ shall have jurisdiction to give preliminary rulings concerning the interpretation of Arts. 17 and 20 in relation to any conflict of competence (Art. 36 (2) c)). Whereas some MSs (Finland, Sweden, Poland and the Netherlands) would prefer to see this possibility deleted, other actors consider that the ECJ should be directly competent to decide in case of disagreement.*⁶⁸ *The European Parliament deeply regretted that "the final decision will not be taken by an independent court,*

⁶⁶ European Parliament, Resolution of 2015, para. 14.

⁶⁷ European Resolution, Resolution of 2015, para. 14.

⁶⁸ European Parliament, Resolution of 2016, para. 3.

*such as the ECJ". It emphasised that the clarification of competences between the EPPO and national authorities is essential for the efficiency of the EPPO, and without it, the text would cross one of its red lines.*⁶⁹

⁶⁹ Ibid.

SECTION 3 – THE PROCEDURAL FRAMEWORK

KEY FINDINGS

- **With regard to EPPO's investigative powers, which are key to ensure its efficiency, one may regret the numerous limits identified, resulting either from the initial proposal, or introduced later. Variable geometry of EPPO's investigative powers will be strong, and further harmonisation might be necessary.**
- In cross-border cases, European Delegated Prosecutors must be able to request the conduct of investigative measures in another MS, and use at a later stage the evidence collected abroad. However, the procedure currently envisaged - relying upon national law in particular to determine if a judicial authorisation is required-, may compromise the efficiency of the EPPO. Furthermore, whereas the mutual admissibility of evidence clearly supports the efficiency of the EPPO, it also raises concerns for the protection of fundamental rights, especially due to the lack of common standards on collection of evidence.
- Procedural safeguards for suspects and accused persons are now only defined with reference to EU Directives adopted in the field of EU criminal procedural law. This choice can be questioned, since it may submit individuals to variable standards depending on the applicable national law. Further harmonisation may be advisable, especially to better ensure the right to be actively involved in the criminal proceedings, and the access to the materials of the case.
- Judicial review has been extended during the negotiations. However, the provision is not clear enough to know the scope of the review respectively carried out by national judges and by the ECJ. More fundamentally, the text restrains to such an extent the jurisdiction of the ECJ that it raises the question of its compatibility with EU primary law.

In terms of procedural law, a first essential question is whether the EPPO is granted sufficient powers to ensure the efficiency of the proceedings, and especially of its investigations (3.1.). A second issue concerns cross-border cases, and particularly the admissibility of evidence (3.2.). Thirdly, the protection of rights of suspects and accused persons will be examined, as **these are essential to ensure the fairness of EPPO's activities (3.3.).** Finally, the question of judicial review of the EPPO's activities and measures deserves special attention (3.4).

3.1. EPPO's investigative powers

Before considering EPPO's powers in detail, a formal remark must be made. Unlike the *Corpus Juris*⁷⁰ or the Model Rules⁷¹, the Commission's proposal did not explicitly refer to "EU or European territory or territoriality". However, the proposal stated that the EPPO should operate on the territory of the Union's Member States as within "a single legal area" (Art. 25(1)). In the course of negotiations, this passage has disappeared. Symbolically, this is to be considered a serious step backwards.⁷²

⁷⁰ See M. Delmas Marty and J.A.E. Vervaele (eds), *Corpus Juris, op. cit.*, p. 37 and p. 190.

⁷¹ Rule 2 of the Model rules is entitled "European territoriality" (Model Rules available at: <http://www.eppo-project.eu/index.php/EU-model-rules/english>). The 2001 Commission's Green Book did not establish the EU territoriality principle as such but mentioned several times the "Community territory" (see for instance p. 23).

⁷² A. Weyembergh, « L'espace pénal européen : entre coopération judiciaire et territoire européen », in P. Magnette (ed.), *La grande Europe*, Ed. de l'Université de Bruxelles, 2004, p. 246 – 262.

Beyond this formal observation, the question arises as to whether the EPPO benefits from the possibility to conduct its investigations in an efficient manner.

The Commission proposal was criticised for not defining with sufficient precision the investigative powers of the EPPO⁷³. Although the Preamble referred to uniform investigation powers throughout the Union,⁷⁴ it became clear from the reading of Arts. 11 and 26 that these powers largely depended upon national laws. The Commission proposal set up a mixed model consisting of minimum European rules to be complemented by national criminal procedural laws.⁷⁵ MSs had to ensure that the EPPO had the power to request or to order a long list of investigative measures (Art. 26(1) a) to u)), some of which were subject to judicial authorization (Art. 26(4)). Art. 11(3) stipulated that "National law shall apply to the extent that a matter is not regulated by this Regulation." As a consequence, the law applying to investigations and prosecutions was the law of the MS "where the investigation or prosecution is conducted". This wording left unclear the applicable law, especially in case of cross-border measures such as the interception of telecommunications⁷⁶. *The combination of Arts. 11 and 26 resulted in a situation where the EPPO would have as many sets of powers as Member States participated in it.*

In view of the lack of common rules and the diversity of applicable national laws, a real risk of forum shopping was denounced.⁷⁷ In cases where several MSs are concerned, forum shopping could arise both with regard to the investigation and with regard to the prosecution and bringing the case to judgement. The EPPO could indeed be tempted to investigate or execute investigative measures in the MS granting more flexibility to the investigator, or to prosecute where the definition of the offence was broadest or punished more severely. To nuance the risk of forum shopping, one should keep in mind that the most favourable national rules would not be the only element that the EPPO would take into consideration. Other important criteria, such as the location of the suspect, of the evidence, etc. would play also a major role in its choice of forum.⁷⁸ The lack of clarity was nonetheless problematic from the point of view of the rights of the defendants in the pre-trial investigations, as the suspects and accused have a right to know the applicable law. The initial proposal was indeed far from ensuring 'predictability'.

The European Parliament stressed in its 2015 Resolution that "the investigative tools and investigation measures available to the EPPO should be uniform, precisely identified and compatible with the legal systems of the Member States where they are implemented; (...)

⁷³ A. Weyembergh and K. Ligeti, "The European Public Prosecutors Office: certain constitutional issues", *op. cit.*, p. 65.

⁷⁴ The preamble of the Proposal proclaims in recital 7 that the EPPO 'requires *autonomous powers of investigation and prosecution*, including the ability to carry out investigations in cross-border or complex cases' (emphasis added). The notion of autonomous powers points into the direction of a set of uniform powers for investigation and prosecution, independent from those of the national authorities of the Member States.

⁷⁵ As explained in recital 19 of the Preamble: 'As it would be disproportionate to provide detailed provisions on the conduct of its investigations and prosecutions, this Regulation should only list the measures of investigation that the European Public Prosecutor's Office may need to use and leave the other matters, in particular rules related to their execution, to national law.'

⁷⁶ It was unclear whether the law applicable is the one of the MS where the measure was ordered, or the law of the MS where the measure is executed. This may also mean, that for the ordering and the execution of the very same measure, different national laws would apply. The phrase 'is conducted' is not specific enough to give guidance for such situations.

⁷⁷ A. Weyembergh and K. Ligeti, "The European Public Prosecutors Office: certain constitutional issues", *op. cit.*, p. 68.

⁷⁸ One should also be aware of the fact that it is not easy in practice to transfer the file several times. Getting acquainted with a file – especially when it is a complex file – takes time. Therefore, transferring/'delocalising' implies also a loss of time and energy.

the criteria for the use of investigative measures should be spelled out in more detail in order **to ensure that 'forum shopping' is excluded**".⁷⁹

The changes brought during the negotiations have not improved the text. The basic principle is largely maintained, namely that national law applies to the extent that a matter is not regulated by the Regulation. Unless otherwise specified, the applicable law is the law of the MS of the European Delegated Prosecutor handling the case (Art. 5). A few changes to the list of investigative measures must however be noted. Firstly, whereas the Commission proposal provided that the EPPO was entitled to order or request these measures, in the current text, these powers have shifted to European Delegated Prosecutors. In exceptional circumstances, however, the European Prosecutor shall have the same powers for ordering and requesting investigative measures (Art. 23(4)). Secondly, a new limit to exercise the minimum powers of the EPPO has been introduced. The current text stipulates that MSs shall **ensure the power to order or request the concerned investigative measures "at least in cases where the offence subject to the investigation is punishable by a maximum penalty of at least four years of imprisonment" (Art. 25(1))**. Thirdly, **the list of investigative measures has constantly shrunk in the course of negotiations, with the result that EPPO's investigations will increasingly rely on national law (Art. 25)**. Variable geometry of EPPO's investigative powers will be stronger than before, which will be prejudicial both for its efficiency and for **individuals' rights**.

What about the risk of forum shopping? While the risk remains, it has been reduced through the introduction of a new mechanism in Art. 22(4). As a principle, the case shall be initiated and handled by the European Delegated Prosecutor from the MS where the focus of the criminal activity is or, in case of connected offences, by the European Delegated Prosecutor from the MS where the bulk of the offences was committed. Departure from this principle is envisaged, but is defined in very strict terms: it should be duly justified, and must take into account the criteria listed in order of priority, i.e. residence and nationality of the suspect/accused and place where the main financial damage occurred.

3.2. Cross-border cases, including the admissibility of evidence

The EPPO is competent to investigate and prosecute offences against the Union's financial interests throughout the Union. The constituent elements of these offences and other **elements (damages, victims, evidence...)** might be located in a single jurisdiction; the European Delegated Prosecutor handling the case can then order the different investigative measures, necessary for the collection of evidence, and bring the case before his/her competent national court. A case might however present cross-border elements located in two or more MSs; these cases will thus require cooperation between the different competent European Delegated Prosecutors.

Such cross-border cases raise two major questions. A first question relates to the mechanisms through which cross-border investigations and prosecutions will take place. A main issue here is to check whether these mechanisms present an added value compared to the current horizontal cooperation mechanisms implementing the principle of mutual recognition (3.2.1.). A second question concerns the admissibility of evidence obtained abroad (3.2.2.).

3.2.1. The conduct of cross-border investigations and prosecutions

⁷⁹ European Parliament, Resolution of 2015, para. 5, v).

The Commission proposal envisaged an EPPO operating in a single legal area, which meant that cross-border investigations and prosecutions were conducted with very little formalities. The European Delegated Prosecutor in charge – either because he/she initiated the case or because the European Public Prosecutor assigned it to him/her – would act in close consultation with the European Delegated Prosecutors located in the other relevant MSs (Art. 18 (2)). At first glance, it thus seemed there would be no need for a procedure to request the conduct of certain measures or the collection of certain types of evidence in other MSs. Simple consultation and informal coordination would suffice. However, a closer look at the initial proposal raises questions in terms of efficiency. *Indeed, the set of powers determined by the combination of the list provided for in the Regulation and national laws seem to have been confined to the territory of the MS in which the EPPO investigates. In other terms, when a judicial authorisation was required either by the Regulation or national law, the text did not specify the scope of that authorisation and did not provide for its mutual recognition. Accordingly, if an investigative measure requiring judicial authorisation needed to be undertaken in various MSs (e.g. telephone tapping, surveillance, etc.), the EPPO needed to request authorisation for the same measure in each MS where the measure was to be carried out*⁸⁰.

Negotiations introduced an important change to the conduct of cross-border investigations and prosecutions. The current text introduces a cooperation mechanism for requesting measures in a MS **other than the one where the European Delegated Prosecutor “handling the case” is located (Art. 26)**. The European Delegated Prosecutor will assign the investigative measure in question to the relevant **“assisting” European Delegated Prosecutor(s)**. Concerning the issue of judicial authorisation, Art. 26 (3) is particularly interesting. On the basis of this provision, three different scenarios may be envisaged in practice. According to a first one, no judicial authorization is required at all (neither by the law of the European Delegated Prosecutor handling the case nor by the law of the assisting European Delegated Prosecutor). Under a second scenario, a judicial authorization is required under the law of the **assisting** European Delegated Prosecutor, who should obtain it in accordance with his/her national law. If such authorisation is refused, the European Delegated Prosecutor handling the case shall withdraw the assignment to the assisting one. Finally, in the last scenario, a judicial authorization is required by the law of the European Delegated Prosecutor handling the case, he/she shall then obtain it and submit it together with the assignment to the assisting European Delegated Prosecutor.

The question is whether this cooperation mechanism answers the concerns identified earlier **regarding the efficiency of the system devised in the Commission’s proposal**.

A first concern relates to the role of national law in regulating whether or not a judicial authorisation is necessary, and the elements that must be presented before the judicial authority to obtain the warrant if need be. In this regard, we refer back to the observations made in subsection 3.1.

A second concern emerges when comparing this mechanism with the European Investigation Order Directive⁸¹. The text in the Regulation uses a different terminology than the one used in mutual recognition instruments (e.g. handling and assisting, rather than issuing and executing), what most probably symbolizes a qualitative change with respect to mutual recognition. An alignment of the EPPO provision with those of the EIO was indeed rejected in favour of a **sui generis** regime for the EPPO. Relying on mutual recognition was rightly

⁸⁰ A. Weyembergh and K. Ligeti, The European Public Prosecutors Office: certain constitutional issues, *op. cit.*, p. 66.

⁸¹ Directive 2014/41/EU of 3 April 2014, *OJ L 130*, 01.05.2014, p. 1.

considered as completely deviating from the idea that the EPPO is a single European body acting across EU MSs. However, the question remains as to whether the new *sui generis* mechanism is more efficient than the EIO. Given the structural ambiguity of the current wording, the answer is far from clear.

Under the EIO, an instrument which is much less ambitious in terms of mutual recognition than the EAW, national law may be invoked to a certain extent to refuse the recognition and the execution of an EIO,⁸² or to have recourse to an alternative investigative measure.⁸³ Furthermore, the EIO Directive provides time limits for the recognition or execution of the requested investigative measure (Art. 12 (3) and (4)), which tends to ensure a certain celerity.

In contrast, under the current version of the EPPO Regulation, national law will regulate whether and under which modalities a judicial authorization is necessary for the conduct of an investigative measure in another MS. When national law requires a judicial authorisation, this might be refused on grounds depending on national law. When national law requires a **thorough analysis of the criminal file before granting judicial authorisation, it "could lead to situations where the court of the assisting MS would ask for the translation of the whole file to conduct its own analysis (rather than rubber stamping the authorisation)"**⁸⁴. The question thus remains whether or not the judicial control, which may be performed in the assisting MS, will be more extensive than the judicial control carried out by the executing authority of an EIO, and whether the judicial authority in the assisting MS will be able to deny the authorisation of the measure on broader grounds than those foreseen in the EIO Directive.⁸⁵

Besides, in the absence of any precise time limit in the EPPO regulation, the process may take months and result in important delays, even if the current draft envisages recourse to the Permanent Chambers to address potential delays (Art. 26 (6) and (7)). Consequently, in cross-border investigations conducted by the EPPO, investigative measures could be executed with longer delays than measures subject to an EIO.

Under the Slovak Presidency, the insertion of a new recital was suggested. It envisaged that the assisting court should only take its decision on the basis of a translated summary of the case, and that this court could only refuse granting its authorisation in limited cases, including lack of proportionality. This suggestion was not followed and the lack of clarity remains. It is not yet possible to know what will be the exact extent of the review performed by the assisting court, and whether for example it may review the proportionality of the investigative measure, the opportunity of which will not be analysed here.

As a final remark, it is curious to see that the negotiators have designed a specific regime for the EPPO, which is applicable to European Delegated Prosecutors ordering or requesting a cross-border investigative measure; when in contrast they have opted for a reference to the EAW Framework Decision for situations where the European Delegated Prosecutor seek the arrest or the surrender of a person located in another MS. One may wonder why a consistent

⁸² See in this regard Art. 11 (1) a), c), e), g) and h). Note also that the special investigative measures regulated in Arts. 22-31 provide for additional grounds for refusal, basically allowing to refuse cooperation where the measure would not be available in a similar domestic case – thus, for executing such measures, both the law of the issuing and executing State must be respected.

⁸³ See in this regard Art. 10.

⁸⁴ Council, Doc. No. 12344/16, 20 Sept. 2016.

⁸⁵ Other formulation can be found in the Council Doc. No. 12344/16, p. 6: situations where under the EIO the national prosecutor will receive evidence much faster than the EPPO under the EPPO provisions, due to application of national rules on judicial authorisation leading to the translations and study of the whole criminal file by the court in the assisting MS.

regime does not apply, and why the negotiators have not design an EPPO specific mechanism for both situations. The logic of the current situation is difficult to grasp.

3.2.2. Admissibility of evidence

The submission of evidence to the relevant court will be a major challenge for the EPPO. Its effectiveness will especially depend of its ability to present at trial the evidence collected, including evidence collected in another MS, and to ensure its admissibility before the competent national court.⁸⁶

The Commission proposal relied on Art. 86(3) TFEU to envisage an ambitious system of admissibility of evidence. Evidence gathered by the EPPO was to be admitted by the trial court unless it considered that its admission would adversely affect the fairness of the procedure or the rights of defence as enshrined in Art. 47 and 48 of the Charter of Fundamental Rights (Art. 30 (1)). Even if the national law of the MS of the trial court provides for different rules on the collection or presentation of evidence, the evidence collected and presented by the EPPO should be admitted. This provision thus resulted in some sort of free movement of evidence within the EU. Such choice was similar to the approach of the 2001 Commission Green Paper on the criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor.⁸⁷ In this respect, the EPPO proposal constituted a qualitative step forward if one thinks about the difficulties to implement a system of mutual admissibility of evidence across the EU. Indeed, in spite of the Conclusions of Tampere⁸⁸ and the wording of Art. 82(2) TFEU,⁸⁹ no concrete proposal addressing admissibility of evidence has ever been put forward.⁹⁰

In the current version of the text, the system is slightly different. The basic idea is still the same: evidence presented by the EPPO shall not be denied admission on the mere ground that it was gathered in another MS or in accordance with the law of another MS. Nevertheless, when the trial court is required by its national law to examine the admissibility of evidence, it shall ensure that its admission would not be incompatible with Member States obligation to respect the fairness of the procedure, the rights of the defence or other rights enshrined in the Charter, in accordance with Art. 6 TEU (Art. 31(1)). Generally speaking, such system confirms mutual admissibility of evidence. It still provides for a limited check on the basis of fundamental rights. **However, two differences are to be noted with the Commission's proposal.** On the one hand, the evidence submitted will be checked against fundamental rights standards, which are formulated more broadly. On the other hand, the possibility to conduct such check is subordinated to the condition that it is provided for in the relevant national law. Again, the increasing reliance on national law poses questions, as it could lead to a variable geometry affecting both the efficiency of EPPO's prosecutions and the effective protection of defendants' fundamental rights⁹¹. It is up to the European Parliament to assess

⁸⁶ See the 2001 Commission's Green Paper, *op. cit.*, point 6.3.4., and L. Hamran and E. Szabova, "European public prosecutor's Office – cui bono?", in *New Journal of European Criminal Law*, Vol. 4, 2013, Issue 1–2, p. 54 and f.

⁸⁷ 2001 Commission's Green Paper, *op. cit.*, point 6.3.4. p. 58 : 'Neither unification in the form of a complete code on the admissibility of evidence, nor a simple reference to national law but mutual admissibility of evidence is the most realistic and satisfactory solution here'.

⁸⁸ Para 36: (...) evidence lawfully gathered by one Member State's authorities should be admissible before the courts of other Member States, taking into account the standards that apply there.

⁸⁹ It states that 'the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. They shall concern: a) mutual admissibility of evidence between Member States...'

⁹⁰ A. Weyembergh and K. Ligeti, "The European Public Prosecutors Office: certain constitutional issues", *op. cit.*, p. 66.

⁹¹ E. de Busser, "Applicable law and admissibility of evidence", intervention at the conference on the establishment of the EPPO – State of Play and Perspectives, 7 and 8 July 2016, T.M.C. Asser Institute, the Hague.

whether this provision meets its 2014 recommendation, in which it underlined the importance of admissibility and particularly the assessment of the evidence on the basis of procedural safeguards.⁹²

Finally, a general question must be raised regarding the principle of mutual admissibility of evidence: one may wonder whether establishing such a principle should not have been preceded by the adoption of common minimum rules in the field of the collection of evidence.⁹³ The absence of harmonisation and the resulting mosaic of national rules in the field have so far constituted one of the main obstacles to the development of instruments on the admissibility of evidence at EU level. Such fragmentation was among the arguments put forward by many respondents to the 2001 Green Paper to oppose a system of mutual admissibility of evidence.⁹⁴

3.3. The procedural rights of suspects and accused persons

The efficiency of the EPPO is one of the main objectives pursued by the Regulation. One should however not neglect the importance of ensuring respect for the suspects and accused persons' procedural rights. The European Parliament has for instance repeatedly highlighted the importance of respecting such rights⁹⁵. This issue has been partly tackled in previous sections, mainly in relation to the variable geometry and the lack of legal certainty. Without repeating those remarks, this section will examine whether the suspect or accused person subject to an EPPO investigation will enjoy a satisfactory degree of protection of his/her procedural rights.

3.3.1. Ensuring an adequate level of protection of procedural rights

In the Commission proposal a whole chapter was devoted to procedural safeguards. The text referred both to the Charter and to Union secondary legislation⁹⁶ (Art. 32). It also provided an autonomous definition of other rights which were not yet harmonised at EU level (right to remain silent and to be presumed innocent, right to legal aid, and rights concerning evidence – Arts. 33 to 35). As such, these rules provided an additional layer of protection deriving from EU law.⁹⁷ Persons involved in EPPO proceedings would still benefit from all the procedural rights available to them under the applicable national law (Art. 35(3)).

In the current version of the proposal, a chapter is still devoted to procedural safeguards. Reference is made to the need for the EPPO to carry out its activities in full compliance with the rights enshrined in the Charter (Art. 35(1)). Mention is still made to EU secondary law, with an update inserting references to the procedural rights instruments adopted since 2013⁹⁸. The provision guaranteeing respect for the procedural rights available to suspects

⁹² European Parliament, Resolution of 2014, para. 5 (vii).

⁹³ A. Weyembergh and K. Ligeti, "The European Public Prosecutors Office: certain constitutional issues", *op. cit.*, p. 67.

⁹⁴ Commission, Follow-up report on the Green Paper on the criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, Brussels, 19 March 2003, COM(2003) 128 final, s. 18.

⁹⁵ See for instance European Parliament, Resolutions of 2014 (para 6), of 2015 (para 26) and of 2016 (para 7).

⁹⁶ Namely Directive DIR/2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings (*OJ L* 280, 26.10.2010, p. 1) and Directive DIR/2012/13/EU of 22 May 2012 on the right to information in criminal proceedings (*OJ L* 142, 1.06.2012, p. 1).

⁹⁷ **Commission's proposal** – presentation of the regulation, p. 7.

⁹⁸ The instruments adopted since July 2013 are the following : Directive DIR/2013/48/EU of 22 October 2013 on the right to access to a lawyer in criminal proceedings and in EAW proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate to third persons and with consular authorities while deprived of liberty (*OJ L* 294, 06.11.2013, p. 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 (*OJ L* 65, 11.3.2016, p. 1) ; Directive (EU) 2016/800 of the European

and accused under applicable national law has also been maintained (Art 35(3)). However, the provisions referring to precise rights have been deleted. This is – at least at first sight – understandable, as most of them have been enshrined in the new EU directives on procedural rights.

The resulting system has nonetheless given rise to many comments. Harmonisation efforts at EU level must of course be welcomed, and their impact should not be underestimated, especially because of their potential direct effect and likely favourable interpretation by both national courts and the ECJ⁹⁹. However, the question remains as to whether they are sufficient. In contrast to the Model Rules, which provided for a much more uniformed procedural framework¹⁰⁰, the degree of approximation attained by EU Directives remains limited, and so suspects and accused will continue to be subject to different standards depending on the applicable national law.

Besides this general remark, two other criticisms have been voiced, especially from the perspective of defence lawyers.

The first concerns the importance of actively involving the suspect and accused persons in criminal proceedings, notably through the presentation of exculpatory evidence. The Commission proposal enshrined their right to request the EPPO the gathering of any evidence relevant to the investigation, including appointing experts and hearing witnesses (Art. 35 (2)). This provision was already considered insufficient in the light of the principle of equality of arms.¹⁰¹ It has now been deleted, although the current text continues to refer to the evidence presented by the defendant (Art. 31 (1) and (2)).¹⁰²

Another criticism concerns defendants' access to the materials of the case¹⁰³, notably in order to challenge them.¹⁰⁴ This possibility is mentioned both in the Commission proposal (Art. 32 (2) b)) and in the current version of the text (Art. 35 (2) b)), both of which refer to Directive 2012/13/EU¹⁰⁵. Art. 7 of that Directive consecrates the right to access the materials of the case. However, this provision is not strong enough, and its harmonising impact is attenuated by the derogations it authorises (Art.7 (4)). Furthermore, the draft EPPO Regulation does not **remedy this "lack of harmonisation". On the contrary, it again refers to national law, providing that "access to the file by suspects and accused persons, as well as other persons involved in the proceedings, shall be granted by the handling European Delegated Prosecutor *in accordance with his/her national law*" (Art. 36c (2)). This leads once**

Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (*OJ* L 132, 21.5.2016, p. 1) and Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 Oct. 2016 on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings (*OJ* L 297, 04.11.2016, p. 1).

⁹⁹ In this regard, see V. Mitsilegas, "Main human rights principles entailed in the legislative framework", intervention at the conference on the establishment of the EPPO – State of Play and Perspectives, 7 and 8 July 2016, T.M.C. Asser Institute, The Hague. intervention at Asser Institute, July 2016.

¹⁰⁰ See section 2 of the Model Rules.

¹⁰¹ Meijers Committee, Note on the proposed Council Regulation on the establishment of the EPPO, 25 Sept. 2013, p. 5

¹⁰² This contrasts with the EIO Directive, which provides in Art. 1 (3): The issuing of an EIO may be requested by a suspected or accused person, or by a lawyer on his behalf, within the framework of applicable defence rights in conformity with national criminal procedure

¹⁰³ On the importance of this right in terms of equality of arms, see especially ECBA Cornerstones on the EPPO, February 2013, point 9, available at: http://www.ecba.org/extdocserv/20130020_7_ECBA CORNERSTONES ON EPPO.pdf.

¹⁰⁴ See contribution by Holger Matt "EU constitutional principles and certain procedural safeguards as part of the rules of procedure for EPPO", intervention at the conference on the establishment of the EPPO – State of Play and Perspectives, 7 and 8 July 2016, T.M.C. Asser Institute, the Hague. intervention at Asser Institute, July 2016.

¹⁰⁵ Directive 2012/13 of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (*OJ* L 142, 1.6.2012, p. 1).

more to variable geometry with regard to access to the file by defendants, especially in cross-border investigations.¹⁰⁶

As a concluding remark on these criticisms, it is worth referring to the European Parliament which, in its Resolution of 5 Oct. 2016, deemed that the Regulation should provide for **"additional rights of the defence for EPPO suspects, in particular the rights to legal aid, the right to information and access to the case materials and the right to present evidence and to ask the EPPO to collect evidence on behalf of the suspect"**¹⁰⁷.

3.3.2. About the *ne bis in idem* principle

The *ne bis in idem* principle prohibiting double prosecution/judgement of the same person for the same criminal behaviour is of course crucial. Enshrined both in Art. 54 CISA and Art. 50 of the Charter it has received an interpretation by the ECJ which is often broad, and thus favourable to the defendants¹⁰⁸.

The correct application of the *ne bis in idem* principle is of course relevant for the EPPO as well. The Commission proposal gave rise to some concern in this respect. Indeed, Art. 28 (concerning dismissal of a case by the EPPO) did not foresee the situation where the case had been disposed of, for instance, through a transaction, as a ground for the EPPO to dismiss a case. Commentators voiced concerns about such silence¹⁰⁹. The current version of the text has corrected this point: Art. 33 (1) e) now reads that the case may be dismissed on the ground that a person's case has already been disposed of in relation to the same acts.

3.4. Judicial review

Judicial review of EPPO's activities is essential to ensure respect of its normative framework, including the Regulation itself. As I. Patrone reminded, **"access to a competent court to obtain the judicial review of the acts of a public authority is, in a democratic society, a pillar of the Rule of Law"** (¹¹⁰). It is inconceivable that the activity of a European Body or Agency, especially in the field of criminal law, does not provide an efficient remedy before an independent and impartial tribunal, because this could cause a serious breach of both the Charter and the **European Human Rights Convention (...)** the issue is not *if* there should be a judicial review of investigation and prosecution acts adopted by the EPPO, but ***what kind of review and before which judge, European or national, the review must be provided"*** ¹¹¹.

The Commission proposal was strongly criticised for its vagueness and timidity on the issue of judicial review. Some provisions were unclear, as for instance Art. 13(4) about ancillary competence, which stated that **"The determination of competence pursuant to this Article shall not be subject to review."** One could wonder whether it meant **"not subject to any**

¹⁰⁶ Meijers Committee, CM1612 Note on the proposal for a regulation on the establishment of the EPPO, Oct. 2016, p. 2.

¹⁰⁷ European Parliament, Resolution of 2016, para 7.

¹⁰⁸ I. Armada and A. Weyembergh, "The principle of *ne bis in idem* in Europe's Area of Freedom, Security and Justice", in Valsamis Mitsilegas, Maria Bergström, Theodore Konstadinides (eds), *Research Handbook on EU Criminal Law*, Edward Elgar, 2016, p. 189 and f.

¹⁰⁹ Meijers Committee, Note on the proposed Council Regulation on the establishment of the EPPO, 25 Sept. 2013, p. 4.

¹¹⁰ According to Art. 47 of the Charter of Fundamental Rights of the EU - Right to an effective remedy and to a fair trial, **"Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article"**.

¹¹¹ I. Patrone, Deputy Prosecutor General at the Italian Supreme Court, before the European Parliament: Public Hearing on "The European Public Prosecutor's Office (EPPO) and the European Union's Judicial cooperation Unit (EUROJUST)", Session 3. EPPO: judicial review, 24 May 2016.

review¹¹² or rather “not subject to review at EU level”. Besides, and more fundamentally, Art. 36, which was the main provision on judicial review, provided that when adopting procedural measures in the performance of its functions, the EPPO was to be considered as a national authority for the purpose of judicial review (1) and that where provisions of national law were rendered applicable by the Regulation, such provisions could not be considered as provisions of Union law for the purpose of Art. 267 of the Treaty (2). It gave the impression of being essentially aimed at reducing as much as possible control by the ECJ¹¹³. **It meant for example that there would have been no “direct” judicial control at European level of the EPPO’s decision on the choice of forum, because such decision would have been considered a national one, subject to judicial review at national level. But at national level, no specific duty was provided for in the proposal. Nonetheless, although individuals would not have had the possibility to directly challenge the EPPO’s decision, and although the national competent authorities would not have been allowed to introduce a preliminary ruling to the ECJ regarding the validity of the EPPO’s decision, national authorities would have still been allowed to introduce a preliminary ruling concerning the interpretation or validity of the provisions of the Regulation (for example concerning the interpretation of the criteria listed in Art. 27 (4) of the proposal)**¹¹⁴.

The contradiction between the insistence on the status of the EPPO as a European body on the one hand, and the fact of considering its acts as acts of a national authority on the other hand was striking, especially because it intended to exclude direct control by the ECJ. Such system departed from the classic approach to the coherence of EU law,¹¹⁵ under which the ECJ acts as a guardian of consistency. This was at the least difficult to reconcile with EU primary law, which, since the Lisbon Treaty, provides for the ECJ’s jurisdiction over acts of EU bodies (see particularly Art. 263 and 267 TFEU)¹¹⁶.

The European Parliament also expressed its concern in its 2014 and 2015 Resolutions. In its 2014 Resolution, it insisted on the role of the Union Court¹¹⁷, and asked for a redrafting of Art. 36.¹¹⁸ In its 2015 Resolution, taking into account the evolution of the proposal, the Parliament again stressed the importance of judicial review, and asked to grant the ECJ jurisdiction to review the decisions taken by the Permanent Chambers.¹¹⁹

The current version of the text now grants the ECJ jurisdiction over certain EPPO-related matters¹²⁰, what can - at first sight - be considered an improvement compared to the initial text. Many criticisms can however still be made.

¹¹² This would mean in some cases exclusion of an existing national judicial review (as in Belgium where the decision of the *Chambre des mises en accusation* can in principle be subject to a *pourvoi en cassation*).

¹¹³ Along the same lines, see also recital 38 of the preamble.

¹¹⁴ A. Weyembergh and K. Ligeti, “The European Public Prosecutors Office: certain constitutional issues”, *op. cit.*, p. 69.

¹¹⁵ A. Meij, Some explorations into the EPPO’s Administrative Structure and Judicial Review, in L.H. Erkelens, A.W.H. Meij and M. Pawlik (eds), *The European Public Prosecutor’s Office, An Extended Arm or a Two-Headed Dragon?*, Springer, T.M.C. Asser Press, 2015, p. 118.

¹¹⁶ *Ibid.*

¹¹⁷ European Parliament, Resolution of 2014, para. 5 (vii).

¹¹⁸ Art. 36, as amended by the Parliament, read as follows: “**For the purposes of judicial review**, the European Public Prosecutor’s Office shall be considered to be a national authority **in respect of all procedural measures which it adopts in the course of its prosecution function before the competent trial court. For all other acts or omissions of the European Public Prosecutor’s Office, it shall be regarded as a Union body.**”

¹¹⁹ European Parliament, Resolution of 2015, para. 24. The following paragraph provides that “Believes that for the purposes of the judicial review of all investigative and other procedural measures adopted in its prosecution function, the EPPO should be considered to be a national authority before the competent courts of the Member States;” (para. 25).

¹²⁰ In addition to the matters exposed below, the ECJ would also have jurisdiction in accordance with Arts. 268, 272 and 270 TFEU (compensation for damage caused by the EPPO, disputes concerning arbitration clauses in contracts concluded by the EPPO, and staff-related matters) (see Arts. 36 (4 to 6)).

A first one relates to the lack of clarity and uncertainty it creates for the EPPO itself, its national counterparts, the judiciary (national courts and the ECJ), and all concerned parties.¹²¹ The provision has indeed reached a record level of abstraction, preventing understanding as to who exactly is competent to review what precise acts.

A second criticism relates to the compatibility of the text with EU primary law. According to the new text, procedural acts of the EPPO which are intended to produce legal effects *vis-à-vis* third parties are subject to judicial review by national courts. The same applies to failures of the EPPO to adopt procedural acts (Art. 36 (1)). Should the idea be to exclude an equivalent review by the ECJ, the question is, how to reconcile this provision with Art. 263 and 265 TFEU. Indeed, the EPPO is presented as “an indivisible Union body” (Art. 7 (1)). The ECJ is competent to review the legality of acts adopted by Union bodies and intended to produce legal effects *vis-à-vis* third parties. Any natural or legal person may institute proceedings against an act addressed to them, or which is of direct and individual concern to them. Although Art. 263 TFEU provides a possibility to lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of EU bodies, it remains to be seen whether reducing the legality control by the ECJ to such an extent is compatible with Art. 263 TFEU. The remaining situation in which natural or legal persons may bring an action before the ECJ against an act of the EPPO concerns its decision to dismiss a case, in so far as they are contested directly on the basis of Union law (Art. 36 (3)). The ECJ is also competent to decide on an action brought by a natural or legal person complaining that an EU body has failed to address them an act other than a recommendation or an opinion (Art. 265 TFEU). It is thus difficult to conclude that the current text, granting jurisdiction to national courts only, is compliant with EU primary law.

The new text additionally provides that the ECJ has jurisdiction, under Art. 267 TFEU, to give preliminary rulings concerning:

- the validity of EPPO’s procedural acts, in so far as such a question of validity is raised before any court or tribunal of a MS directly on the basis of Union law (Art. 36 (2) a));
- the interpretation or validity of provisions of Union law, including this Regulation (Art. 36(2) b)), and
- the interpretation of Arts. 17 and 20 in relation to any conflict of competence between the EPPO and the competent national authorities (Art. 36 (2) c)).

We will not come back to Art. 36 (2) c), since this provision was addressed earlier. Art. 36 (2) a) and b) clearly restrict the ECJ’s jurisdiction to give preliminary rulings, and thus raise concerns as to its compatibility with Art. 267 TFEU. The ECJ is indeed supposed to have jurisdiction to give preliminary rulings concerning the validity and interpretation of all acts of the Union bodies.

Applying Arts. 263, 265 and 267 TFEU to their full extent might of course lead to a high number of disputes being submitted to the ECJ, and lengthy proceedings. One issue is thus to know whether the Court would have the necessary means and resources to handle all such potential cases in a reasonable time. However, going against primary law is difficult to understand and constitutes a dangerous precedent.

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¹²¹ Meijers Committee, CM1612 Note on the proposal for a regulation on the establishment of the EPPO, Oct. 2016, p. 2.

The table below aims to summarise the types of acts subject to judicial review, and the competent courts to carry it out under the current version of the Regulation:

Court	Types of acts
National courts	EPPO procedural acts intended to produce legal effects <i>vis-à-vis</i> third parties, in accordance with the requirements and procedures laid down by national law. The same applies to EPPO's failures to adopt procedural acts.
European Court of Justice	<p>Preliminary rulings regarding:</p> <ul style="list-style-type: none"> - the validity of EPPO's procedural acts, in so far as such a question of validity is raised before any court or tribunal of a MS directly on the basis of Union law - the interpretation or validity of provisions of Union law, including the Regulation, - the interpretation of Arts. 17 and 20 in relation to any conflict of competence between the EPPO and the competent national authorities
	Review of EPPO's decisions to dismiss a case, in so far as they are contested directly on the basis of Union law
	Competent for compensation for damage caused by the EPPO, for arbitration clauses contained in contracts concluded by the EPPO, and for disputes concerning staff-related matters

SECTION 4 - THE EPPO'S RELATIONS WITH ITS PARTNERS

KEY FINDINGS

- The EPPO, as a new EU judicial body, will have to integrate itself in the landscape of already existing EU agencies also active in the PIF field. Its relations with Eurojust, OLAF and Europol are the object of specific provisions. Their cooperation will be of crucial importance to ensure that the EPPO contributes effectively to the fight against PIF offences. One may nevertheless especially regret the lack of details concerning the **EPPO-Eurojust relations, and the neglect of Eurojust's specific expertise.**
- Not all EU MSs will participate in the establishment of the EPPO. It is thus necessary to organise under which modalities their national authorities will cooperate with the EPPO. Although the text is still subject to changes, it seems to privilege the option of regulating the details of their cooperation in a separate instrument. Close monitoring of this issue is crucial, as the efficiency of the fight against PIF offences will partially depend from the quality of this provision.
- **The EPPO's cooperation with third countries and international organisations is also essential.** The text envisages a series of legal bases and hypothesis that the EPPO can use to request assistance from authorities located outside the EU territory. It should contribute to the efficiency of the fight against PIF offences

Several EU agencies and bodies coexist within the AFSJ, and some are already active in the **protection of the Union's financial interests**. The EPPO will have to integrate itself in this landscape. If the purpose is to ensure efficient fight against PIF offences, complementarity, consistency, smooth and close cooperation between all EU agencies/bodies will be crucial. **EPPO's relations with other EU agencies and bodies can be considered through** concentric circles, starting with those with whom the EPPO is supposed to collaborate more narrowly. First on the row is thus Eurojust (4.1.) not only because of its judicial nature, but because of its specific link to the EPPO, provided by Art. 86 TFEU stating that the EPPO will be established **"from Eurojust" (Art. 86(1))**. As is well known, the exact meaning of such expression is far from clear and its concretisation has been particularly debated.¹²² The EPPO is also meant to **establish close relations with OLAF considering the latter's mandate, which is of an administrative nature but mostly devoted to the protection of the EU financial interests (4.2.)**. **Although less essential, EPPO's relations with Europol will also be examined (4.3.)**. Because enhanced cooperation will most probably be necessary to establish the EPPO, its relations with **non-participating MSs will be tackled (4.4)**. Finally, its relations with **"ordinary" third countries and international organisations will be discussed (4.5.)**

4.1. EPPO's relations with Eurojust

EPPO-Eurojust relations are explicitly addressed in the proposals for Regulations on both the EPPO and Eurojust.¹²³ In each of the drafts, a specific provision is devoted to their bilateral relations, namely Art. 57 of the EPPO Regulation, and Art. 41 of the Eurojust Regulation.

¹²² See among others, Conclusions of the Strategic seminar organised by Eurojust and the Belgian Presidency (Bruges, 20-22 Sept. 2010), 'Eurojust and the Lisbon Treaty, towards more effective action?', Council Doc. No.17625/10 REV 1, 9 Dec. 2010; Eurojust/ERA conference "10 years of Eurojust. Operational achievements and future challenges", The Hague, 12 and 13 Nov. 2012, Council document 8862/13, 26 April 2013, pp. 15 and 16; L. Hamran and E. Szabova, "European Public Prosecutors Office – *Cui Bono?*", *op. cit.*, p. 46 and ff.

¹²³ Their cooperation will be addressed in more details in Weyembergh A. and Brière C., "Cooperative relations between EPPO and Eurojust in investigative actions" (provisional title), in Geelhoed P., Meij A., and Erkelens L. (eds), *Shifting Perspectives on the European Public Prosecutor's Office. Proceedings of the Hague Conference, July 2016*, T.M.C. Asser Press, forthcoming.

The Commission EPPO proposal was particularly representative of the privileged EPPO-Eurojust link. **In contrast with EPPO's relationship with Europol and OLAF, it dealt with EPPO's cooperation with Eurojust rather extensively, as evidenced by the number of references to each other in their respective proposals.**

According to Art. 57 (1) of the Commission proposal for an EPPO Regulation, "the EPPO shall establish and maintain a special relationship with Eurojust based on close cooperation and the development of operational, administrative and management links between them as defined below". Negotiations have modified this paragraph, which now reads: "The European Public Prosecutor's Office shall establish and maintain a close relationship with Eurojust based on mutual cooperation *within their respective mandates* and the development of operational, administrative and management links between them as defined below" (emphasis added). The reference to their respective mandates, inserted by the Council in the course of negotiations must be particularly welcome. This precision is indeed essential in order to prevent and avoid overlaps and potential competition and tensions between the two bodies. Another addition is the provision foreseeing that the European Chief Prosecutor and the President of Eurojust shall meet on a regular basis to discuss issues of common concern (Art. 57 (1)). This mirrors what already happens between for instance the Director of Europol and the President of Eurojust, and these meetings are perceived as a way to facilitate cooperation between EU agencies.¹²⁴

According to both versions of the proposal, the special EPPO-Eurojust links should cover administration and management on the one hand, (4.1.1.) and operational activities on the other (4.1.2.). Each aspect will be examined in turn.

4.1.1. Administrative and management links

The administrative and management links are covered in the last paragraph of Art. 57. The initial version of the provision listed the services to be provided by Eurojust to the EPPO (which included technical support, security, Information Technology, financial management, and 'any other services of common interest'), leaving the details to an agreement to be concluded between the two bodies. The text, which has been considerably shortened, now reads as follows: "The EPPO *may* rely on the support and resources of the administration of Eurojust. To this end, Eurojust may provide services of common interest to the EPPO. The details shall be regulated in an Arrangement" (emphasis added).¹²⁵ This solution, not explicitly listing the services, was suggested by France, and supported by Germany and Luxembourg. The arrangement to be concluded thus becomes more important.

These changes illustrate the sensitivity of the issues at stake. These are linked to two very politically delicate points, namely the localisation of the EPPO and its financial aspects. Concerning the localisation of the EPPO, the Commission proposal referred to the decision adopted by the Head of State or Government representatives meeting of 13th Dec. 2003, in which they had decided that the seat of the EPPO would be Luxembourg (Preamble, recital 112)¹²⁶. For the time being, the decision of 2003 still applies. However, establishing the EPPO

¹²⁴ See A. Weyembergh, I. Armada and C. Brière, "The interagency cooperation and future architecture of the EU criminal justice and law enforcement area", Research paper for the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament, June/Nov. 2014, available on the EP website [http://www.europarl.europa.eu/thinktank/fr/document.html?reference=IPOL_STU\(2014\)510000](http://www.europarl.europa.eu/thinktank/fr/document.html?reference=IPOL_STU(2014)510000).

¹²⁵ Art. 57 (5) EPPO regulation (version of October 2016).

¹²⁶ On this issue see also the Presidency Conclusions, European Council of Laeken, 14 and 15 December 2001, para. 57, referring to the Decision 67/446/EEC of 8 April 1965 of the representatives of the Governments of the Member States on the provisional location of certain institutions and departments of the European Communities (notably art.

in Luxembourg would have important consequences, particularly endangering the idea of the EPPO being supported by Eurojust in its daily functioning¹²⁷. If this is true for their cooperation in administrative and management matters, it is equally true for their operational cooperation. In this regard, the European Parliament stated in its 2016 Resolution that it **"believes that it would best for the EPPO and Eurojust to operate in the same location if the cooperation and information exchange between them is to operate efficiently"**.¹²⁸ Concerning the costs of establishing the EPPO, and after announcing that it would come at zero cost, the idea is now to limit the expenses as much as possible and to rationalise available resources.¹²⁹ This search for savings will necessarily impact interagency relations in the field of PIF, particularly those between the EPPO and Eurojust. Concerns have been raised in this regard, including by Eurojust itself. Indeed, the more restraints are placed on the EU budget, the **more important reliance on Eurojust's resources becomes**. One may fear that **Eurojust's** other tasks will suffer if no extra money is devoted to its supporting missions to the EPPO. M. Coninx, president of Eurojust, underlined in May 2016 before the LIBE committee that there is a need to join forces, and that Eurojust is keen on cooperating with the EPPO. However, as she stated, in the event that new tasks are assigned to Eurojust, then corresponding **resources must also be allocated in order to avoid prejudice to the rest of Eurojust's work**.¹³⁰ In this regard, it must be noted that non-participating MSs have already opposed the idea of a detrimental effect to the other EU agencies and bodies as a consequence of the establishment of the EPPO.¹³¹

4.1.2. Operational cooperation

Concerning Eurojust-EPPO's cooperation in operational matters, the text has also changed substantially in the course of negotiations. The Commission proposal provided no less than 6 situations in which the EPPO could associate Eurojust in its activities concerning cross-border or complex cases: sharing information in its investigations; requesting Eurojust to participate in the coordination of specific acts of investigation; facilitating the agreement between the EPPO and MSs regarding ancillary competence; requesting Eurojust to use its powers regarding certain acts of investigations falling outside the competence of the EPPO; sharing information with Eurojust on prosecution decisions and requesting Eurojust the transmission of its decision or requests for mutual legal assistance to non-participating MSs or third countries (Art. 57 (2)). The current version of the text envisages only two of these situations: sharing information in its investigations and inviting Eurojust to provide support in the transmission of its decision or requests for mutual legal assistance to non-participating MSs or third countries.

As currently drafted, the provision presents these 2 options as non-exhaustive,¹³² nonetheless the shortening of the list raises concerns. On the one hand, the provision is significantly less developed and less detailed than the provision relating to the cooperation between the EPPO and OLAF (Art. 57a - cf. infra). This is regrettable, since the idea that

3). The basis advanced for this choice is [the 'Decision of 8 April 1965'](#), which stated that 'judicial and quasi-judicial bodies are also located in Luxembourg'

¹²⁷ M. Coninx 'The European Commission's legislative proposal: an overview of its main characteristics', in L.H. Erkelens, A.W.H. Meij and M. Pawlik (eds), *The European Public Prosecutor's Office, An Extended Arm or a Two-Headed Dragon?*, Springer, T.M.C. Asser Press, p. 38.

¹²⁸ European Parliament, Resolution of 2016, para. 10.

¹²⁹ See for an updated costs/benefits analysis the presentation by the Commissioner Jourova at the JHA Council meeting of mid-October 2016.

¹³⁰ As Michèle Coninx mentioned before the European Parliament: Public Hearing on "The European Public Prosecutor's Office (EPPO) and the European Union's Judicial Cooperation Unit (EUROJUST)", 24 May 2016..

¹³¹ House of Lords, *The impact of the EPPO's on the United Kingdom*, 4th Report of session 2014 – 2015, p. 26, para. 76.

¹³² The wording "including by" indicates this.

Eurojust would become a privileged partner for the EPPO is not reflected in the provision detailing their bilateral cooperation. On the other hand, the provision does not reflect Eurojust's scope of competence in operational matters, ignoring for instance the possibility to set up coordination centres or to offer analysis of cases in order to identify issues requiring special attention, such as conflicts of jurisdiction. It must however be noted that coordination of investigative measures in respect of cases handled by Eurojust has been added to the Preamble (recital 97). Another criticism may be raised concerning the second form of cooperation envisaged, that is, assistance in the transmission of MLA requests to non-participating States. This task also falls within the mandate of the European Judicial Network, which could offer such assistance to the EPPO. The insertion in the Regulation of a reference **to EJM's assistance could thus be considered**, illustrating how the EPPO integrates itself in the AFSJ becoming part of a multilevel interaction and cooperation system.

EPPO's collegial structure has become similar to Eurojust's structure, although both will be clearly independent from each other¹³³. The question is whether the current version of the proposal sufficiently incorporates the idea that the EPPO should be established from Eurojust. Although bilateral cooperation is envisaged, it is done in very vague terms, and with a wording that does not take into consideration Eurojust's valuable expertise and experience.

Lastly, as was stated above, the provision organising cooperation between EPPO and Eurojust is less detailed than the one organising cooperation between the EPPO and OLAF (see infra. Section 4.2.). Although the provision on EPPO-Eurojust relations refers to the conclusion of an arrangement for the administrative and management aspects of their cooperation, the provision on EPPO-OLAF relationship seems to take better into consideration the specific expertise of OLAF. Such imbalance is surprising, especially considering that Eurojust was **primarily envisaged as the EPPO's privileged partner. A better clarification of their bilateral relations, taking into due consideration their respective expertise, has been advocated by the European Parliament in its 2015 and 2016 Resolutions, "in order to differentiate between their respective roles in the protection of the EU's financial interests"**.¹³⁴

4.2. EPPO'S relations with OLAF

Besides Eurojust, OLAF will also be especially affected by the setting up of the EPPO. The Commission proposal did not really clarify what will happen with OLAF once the EPPO is established. Whereas the possibility of eliminating OLAF was mentioned,¹³⁵ the EPPO proposal and its follow up clearly exclude this possibility¹³⁶.

Although the 2001 Green Paper called for a clear definition of the relationship between OLAF and EPPO¹³⁷, the Commission proposal failed to clarify this important issue. It did not contain a dedicated provision mirroring the one on EPPO-Eurojust relations. The text referred instead to the objective of avoiding duplication of administrative and criminal investigations¹³⁸, and

¹³³ This independence between the two has been clearly confirmed by Commissioner Jourova at the JHA Council meeting of mid-October 2016.

¹³⁴ European Parliament, Resolution of 2015, para. 29 and European Parliament, Resolution of 2016, para. 9.

¹³⁵ V. Covolo, "From Europol to Eurojust – towards a European Public Prosecutor. Where does OLAF fit in?", *EUCRIM*, 2012/2, p. 86.

¹³⁶ See for instance Commission, EPPO's Proposal, p. 8 (partial and gradual transfer of OLAF's staff to the EPPO) and p. 53 – 54 (transfer of staff as a measure ensuring OLAF's expertise and networks are duly exploited). See also Art. 58 (3) of the proposal which provided that the EPPO "shall cooperate with the Commission, including OLAF, for the purpose of implementing the obligations under Art. 325 (3) of the Treaty. To this end, they shall conclude an agreement setting out the modalities of their cooperation"

¹³⁷ See Commission, 2001 Green Paper, *op. cit.*, p. 679.

¹³⁸ Commission, EPPO's Proposal, p. 53 – 54.

seemed to entrust OLAF a special role in ensuring suspicions of PIF offences were transmitted to the EPPO via a preliminary evaluation of reported allegations (Preamble, recital 27). It thus seemed national authorities would still have a double obligation to report PIF cases to OLAF and the EPPO¹³⁹, OLAF becoming a sort of centralised service ensuring all relevant information reached the EPPO. Moreover, the proposal set out an obligation for OLAF (and **other EU actors and national authorities**) to **actively support EPPO's investigations and prosecutions** (Preamble, recital 13)¹⁴⁰. The text also envisaged the conclusion of an agreement setting out the modalities of the cooperation between the EPPO and the Commission, including OLAF, for the purpose of implementing the obligations under Art. 325(3) TFEU (Art. 58(3)), without providing further details.

Some hints were nevertheless offered as to the precise form in which OLAF could assist **EPPO's investigations**. Reference was made to the **"specialised support to facilitate forensic analysis and technical and operational support to investigations and for the establishment of evidence in criminal cases affecting the Union's financial interests"**¹⁴¹, or to the need to **"enable the EPPO to obtain the relevant information at their [Europol and OLAF's] disposal** as well as to draw on their **analysis in specific investigations"**. Unfortunately, the later reference was made in the Preamble (recital 41) and found no equivalent in the body of the Regulation. This was rather inexplicable given that OLAF is for the time being the most important EU body in relation to information and analysis in the field of PIF. Finally, Art. 28 of the proposal allowed the EPPO to refer dismissed cases to OLAF (or to the competent national administrative or judicial authorities) for recovery, other administrative follow-up or monitoring.

The current version of the text has the merit of containing a new provision especially devoted to EPPO-OLAF's relations (Art. 57a).

Firstly, in general terms, the two actors should establish and maintain a close relationship based on mutual cooperation within their respective mandates, and on information exchange. Their relationship shall aim at ensuring the use of all available means for the protection of **the Union's financial interests through the complementarity and support of OLAF** to the EPPO (Art. 57a (1)). **Where the EPPO conducts a criminal investigation, OLAF "shall not open any parallel administrative investigation into the same facts"** (Art. 57a (2)). This provision stresses the attention given to avoiding duplication of efforts and the complementarity of the work of the EPPO and OLAF.

The EPPO may also request OLAF to support or complement its activities, in particular by providing information, analyses, expertise and operational support; facilitating coordination of specific actions of the competent national administrative authorities and EU bodies, and conducting administrative investigations (Art. 57a (3)). Finally, the EPPO may provide relevant information to OLAF on cases where it decides not to conduct an investigation or **where it dismisses a case (Art. 57a (4))**, and it shall in turn have indirect access to OLAF's databases on the basis of a hit/no hit system (Art. 57a (5)).

¹³⁹ See on this point the Commission, 2001 Green Paper, op. cit., p. 67.

¹⁴⁰ The recital read as follows: "Recalling the EPPO's exclusive competence over PIF offences, recital 26 specifies that the facilitation of the EPPO's investigations should take place 'from the moment a suspected offence is reported to the European Public Prosecutor's Office until it determines whether to prosecute or otherwise dispose of the case'."

¹⁴¹ Commission, EPPO's Proposal, p. 53 – 54. The reference to OLAF's support in relation to the establishment of evidence in criminal cases is paradoxical in view of the constant allusions to the admissibility problems of OLAF's investigations and reports, see for instance the impact assessment accompanying the proposal, p. 5.

Several elements explain the evolution of the relations between EPPO and OLAF, and of OLAF's position among EU JHA actors. Firstly, it is important to recall that when the EPPO proposal was presented, the future of OLAF was uncertain and the idea of the EPPO absorbing many of its resources was envisaged¹⁴². Changes introduced during the negotiations have **led to a new setting, where OLAF seems to have "re-gained" an important role. This is partly** due to EPPO's more limited scope of competence (e.g. shared competences and situations where the EPPO should refrain from exercising its competence). Such limitation means that the involvement of OLAF will remain crucial to investigate – through administrative investigations – cases which the EPPO does not cover. This is especially true for cases falling below the *de minimis* threshold provided for in the Regulation, i.e. when the damage caused (or likely to be caused) is worth less than 10.000 EUR (Art. 20 (2)).¹⁴³ Besides, OLAF will, like Eurojust, play a crucial role with regard to non-participating MSs.¹⁴⁴

The European Parliament addressed several requests to the Council, focusing on the future regime applicable to OLAF and insisting on the need for a reinforcement of the procedural safeguards applicable to OLAF's activities.¹⁴⁵

Although the insertion of a specific provision on EPPO-OLAF relations is to be welcomed, some have regretted that it is still not precise enough. Indeed, one of the underlying issues of the EPPO-OLAF relationship is linked to the complex articulation between administrative and criminal investigations at EU level. It is doubtful whether the current text provides a clear answer in this respect¹⁴⁶.

4.3. EPPO's relations with Europol

Relations between the EPPO and Europol have not received as much attention. This is understandable considering that **the EPPO is a judicial body, whereas Europol's mandate is** to support law enforcement's investigations. Moreover, Europol's mandate covers many other serious cross-border crimes. The two actors would thus have fewer occasions to collaborate. This is reflected in both the Europol Regulation and the EPPO draft Regulation.

There is indeed no explicit mention to the EPPO in the Europol Regulation,¹⁴⁷ which only **contains provisions relating to Europol's cooperation with Eurojust and OLAF.**¹⁴⁸

The draft Regulation on the EPPO is also vague concerning cooperation with Europol, although **the text has become more detailed during the negotiations. The Commission's proposal** indicated that the EPPO shall develop a special relationship with Europol, and that their cooperation shall entail exchange of information, including personal data, to be used for the purposes for which it was provided (Art. 58 (1 and 2)).

The current version of the text has become more precise, and a specific article has been inserted on EPPO-Europol relations. It provides that the two actors shall establish and maintain a close relationship and that they shall conclude a working arrangement setting out

¹⁴² See Commission Proposal, p. 53.

¹⁴³ **Cases falling outside the EPPO's competence could be** for instance customs cases, as often the value of the excise is not very big, or cases in which the EU required its partners to provide a certain level of co-financing. Intervention by Irene Sacristan Sanchez, "Cooperation between the EPPO and OLAF", *op. cit.*

¹⁴⁴ See in this regard, European Parliament, Resolution of 2015, paras. 15 – 17.

¹⁴⁵ European Parliament, Resolution of 2014, paras. 15 – 17.

¹⁴⁶ See Intervention by Irene Sacristan Sanchez, "Cooperation between the EPPO and OLAF", *op. cit.*

¹⁴⁷ Regulation (EU) 2016/794 of the European Parliament and the Council of 11 May 2016 on the EU Agency for Law Enforcement Cooperation (Europol), *OJ L* 135, 24.05.2016, p. 53.

¹⁴⁸ Europol Regulation: on Eurojust see preamble paras. 9 and 11, Art. 4 (1) c) ii) and 6 (4); and on access to databases by OLAF and Eurojust Art. 21.

the modalities of their cooperation (Art. 58 (1)). The text also envisages that **“where necessary for the purpose of its investigations, the EPPO shall be able to obtain *at its request* any relevant information held by Europol concerning an offence within its competence, and may also ask Europol to provide analytical support” (Art. 58 (2))**. This confirms the hypothesis that Europol may possess information relevant for the investigation and prosecution of an offence falling within the EPPO’s competence. Besides, the possibility to benefit from Europol’s analytical support is also a positive development, given the expertise acquired by Europol in this regard.¹⁴⁹ These elements should help avoiding duplication of efforts between both actors, a concern that is explicitly mentioned in the Preamble of the draft EPPO Regulation (recital 95).

A study comparing the access regime of each EU JHA actor, i.e. Europol, Eurojust, OLAF and EPPO to the information held by the other actors would be particularly interesting. It might be representative of the respective importance granted to their mutual cooperation. In this regard, **EPPO’s access to Europol information is more limited than the access granted to Eurojust and OLAF**.¹⁵⁰ This arguably reflects that the EPPO is not envisaged as one of **Europol’s closest partners. It contrasts with the EPPO’s broader** access to information held by Eurojust and OLAF, what in turn might reflect the envisaged closer cooperation between them.¹⁵¹

4.4. EPPO’s relations with non-participating EU MSs

The issue of the relations between the EPPO and the MSs that will not participate in the Regulation is a particularly sensitive one. Art. 86 TFEU being in Title V of Part III of the TFEU, it is covered by the opt-out regime granted to the United Kingdom, Ireland and Denmark (Protocols No. 21 and 22). According to these regimes, Denmark does not participate in the Regulation, and the United Kingdom¹⁵² and Ireland have already expressed their intention not to opt-in.¹⁵³ It therefore becomes necessary to define and organise the modalities of cooperation between the EPPO and these non-participating MSs. Such necessity is stronger considering that other EU MSs might decide not to participate in the establishment of the EPPO. Although it is still too early to know *if* and *which* MSs will make such choice, one should remember that recourse to enhanced cooperation is facilitated by Art. 86 (1) TFEU, as the Council’s consent is deemed granted. Although this is an aspect that we will not develop here, it is worth highlighting that envisaging enhanced cooperation for an issue that concerns the interests of the EU as a whole appears rather paradoxical.¹⁵⁴

Organising the cooperation between the EPPO and non-participating MSs is crucial, since despite this status, the concerned countries remain EU MSs and are as such bound not only by the principle of sincere cooperation (Art. 4 TEU), but also by their obligation to combat **fraud against the Union’s financial interests (Art. 325 TFEU)**.

The Commission proposal had been criticised because it failed to address this issue.¹⁵⁵

¹⁴⁹ A. Weyembergh, I. Armada and C. Brière, *The interagency cooperation and future architecture of the EU criminal justice and law enforcement area*, *op. cit.*, p. 25 – 26.

¹⁵⁰ Art. 21 (1) of the Europol Regulation: **“Europol shall take all appropriate measures to enable Eurojust and OLAF, within their respective mandates, to have indirect access on the basis of a hit/no hit system to information (...)”**.

¹⁵¹ For OLAF see Art. 57a (5) and for Eurojust Art. 57 (3).

¹⁵² The United Kingdom is still to be considered as a MS of the EU, however should Art. 50 TEU be invoked, the UK would then become a third State, and thus its cooperation with the EPPO would be covered by the regime discussed in section 4.5.

¹⁵³ Regulation, Preamble, recitals 110 – 111.

¹⁵⁴ I. Wiezoreck, *op. cit.*, p. 1260.

¹⁵⁵ A. Csuri, *op. cit.*, p. 17 – 18):

Following discussions at technical level, a provision organising the relations between the EPPO and non-participating MSs was finally inserted in the text in October 2016 (Art. 59a).

The newly inserted provision only stipulates that the EPPO may conclude working arrangements with the authorities of non-participating MSs (Art. 59a (1)). These arrangements can concern the exchange of strategic information and the secondment of liaison officers to the EPPO. Such arrangements would be similar to those concluded with the authorities of third countries and international organisations (cf. infra section 4.5.). The EPPO **may also "designate, in agreement with the competent authorities concerned, contact points (...) in order to facilitate cooperation in line with the EPPO's needs" (Art. 59a (2)).** Eurojust may also provide support in the transmission of EPPO decisions and MLA requests to, and execution in, non-participating MSs (Art. 57 (2) b)). Given the binding obligations resting on all EU MSs and the need to limit as much as possible variable geometry in the field of PIF, the text is particularly disappointing. For instance, one can regret that the working arrangements that would be concluded cannot form the basis for allowing the exchange of personal data. This might considerably diminish their relevance to operational cooperation between the EPPO and these countries (Art. 56 (2a)).

Some delegations (Belgium, Spain, Finland, and Italy)¹⁵⁶ would like to add a third paragraph to this provision, thereby increasing its level of ambitions: MSs participating in the EPPO would recognise the EPPO as a competent authority for the purpose of implementing applicable Union acts on judicial cooperation in criminal matters to their relations with non-participating MSs. A literal interpretation of this paragraph would mean that once recognised as a competent authority by the participating MSs the EPPO would autonomously rely on EU instruments to cooperate with non-participating MSs. Such possibility would definitely strengthen the effectiveness of the cooperation between the EPPO and non-participating MSs. The four MSs mentioned above additionally support the insertion of a clear and precise **definition of MSs obligations on loyal cooperation and the protection of the Union's financial interests** as set out in the Treaty.

Even if unanimity is reached on the insertion of such a paragraph, it would still be advisable to complement it with the adoption of a separate Regulation. Such adoption, based on Art. 325 (4), has already been considered by the Commission.¹⁵⁷ A recital has been added to the Preamble (recital 102aa), inviting the Commission to submit **if appropriate** proposals which would ensure effective judicial cooperation in criminal matters between the EPPO and non-participating MSs, in particular concerning MLA and surrender procedures, while fully **respecting the Union "acquis" in the field.**¹⁵⁸

The detailed relations between the EPPO and non-participating MSs are thus not yet defined. In this regard, negotiations should be closely monitored. It is of fundamental importance to **ensure the quality of this provision, considering that the efficiency of EPPO's investigations** depend of it when cases are connected to non-participating MSs.

¹⁵⁶ Current version of the EPPO proposal, p. 122, Footnote 102.

¹⁵⁷ See Council, Discussion paper on cooperation between EPPO and non-participating MSs, Council doc. 12341/16, 19 Sept. 2016, p. 2.

¹⁵⁸ Current version of the EPPO proposal, p. 122, Footnote 101.

4.5. EPPO's relations with third countries and international organisations

Combating fraud against the Union's financial interests requires the cooperation of third countries and international organisations, especially Interpol. For instance, fraud may occur outside EU territory when the EU grants funds to projects carried out within a third country and/or with the assistance of an international organisation. The proceeds of crime, i.e. the money collected by criminals, could also be transferred to a third country for laundering purposes. Finally, a suspect or accused person may leave the EU trying to escape justice.

The Commission proposal contained a specific provision envisaging several modalities for **EPPO's cooperation with third countries and international organisations (Art. 59): conclusion of working arrangements, which may concern the exchange of strategic information and the secondment of liaison officers to the EPPO; designation of EPPO's contact points in third countries; the adoption of MLA/extradition agreements with one or more third countries in cases falling under the EPPO's competence (under Art. 218 TFEU); and finally the possibility for MSs to recognise the EPPO as a competent authority for the purpose of implementing relevant international MLA/extradition agreements, or, where necessary, altering those international agreements to ensure the EPPO can exercise equivalent functions on their basis (Art. 59 (1)).** In its 2014 Resolution, **the European Parliament only stressed that "particular attention should be paid to the rights of the data subject where personal data are transferred to third countries or international organisations".**¹⁵⁹

The current version of the text has conserved several elements of the initial proposal. Firstly, the EPPO may still conclude working arrangements with third countries and international organisations, which may concern the exchange of strategic information and the secondment of liaison officers (Art. 59 (1)). According to the legal regime defined in Art. 56 (2a), these arrangements appear as a basis for establishing a general context favourable to cooperation. Secondly, the EPPO may still designate contact points in third countries, but a new and logical **restriction has been added: their designation shall be in line with the EPPO's operational needs (Art. 59 (2)).** Thirdly, MSs may still appoint the EPPO as a competent authority for the purpose of implementing multilateral agreements on MLA (Art. 59 (4)). This procedure could for instance apply to the 1959 European Convention on mutual assistance in criminal matters and its Protocols. This possibility is to be welcomed, as it would allow the EPPO to investigate effectively cases presenting links with States parties to the Council of Europe (some of which are recipients of EU funding in the framework of the SAA and the ENP), and a few other third countries¹⁶⁰.

The current version of the text introduces new modalities for EPPO's cooperation with third countries and international organisations. The EPPO is bound by the international agreements to which the EU is party, such as the UN Convention against Corruption. This means that the EPPO could be considered a competent authority under these agreements for matters falling within its competence. The EPPO could also rely on these agreements to request assistance from competent national authorities located in other State parties (Art. 59 (3)). Secondly, if the EPPO cannot benefit from those international conventions, European Delegated Prosecutors may have recourse to their national powers to request legal assistance from authorities in third countries, on the basis of international agreements concluded by their MS, or of applicable national law. European Delegated Prosecutors will have to inform the requested authorities that the final recipient of the requested material will be the EPPO. They

¹⁵⁹ European Parliament, Resolution of 2014, para. 6 (iv).

¹⁶⁰ Parties to the 1959 MLA Convention that are not members of the Council of Europe are Chili, Israel and Korea.

shall, where necessary, obtain the consent of the requested authorities to allow the EPPO to use the collected evidence (Art. 59 (5)). While this new possibility will contribute to effective investigations, the question arises as to whether it leads to a risk of forum shopping by assigning the case to the European Delegated Prosecutor whose country has concluded bilateral agreements with the third country concerned by the case (cf. supra section 3.1.). Concerning extradition, the European Delegated Prosecutor handling the case may request the competent authority of his/her MS to issue an extradition request in accordance with applicable treaties and/or national law (Art. 59 (7)). Finally, the EPPO may, upon request from the competent authorities of third countries or international organisations, provide them with information or evidence which is already in its possession. After consulting the Permanent Chamber, the European Delegated Prosecutor handling the case shall decide on such transfer in accordance with the national law of his/her MS and this Regulation (Art. 59 (6)). The provisions on data protection may be relevant in this regard.

EPPO's cooperation with third countries and international organisations is thus organised in a rather detailed and technical manner, which is to be welcome. The provision not only helps legal certainty, but gives the EPPO the possibility to rely on efficient mechanisms to cooperate with external partners.

CONCLUSION

The aim of this study was not to determine whether the draft EPPO Regulation analysed in this paper is an ideal or good text. Because of its sensitivity, mainly in terms of national sovereignty and the need for unanimity, it is particularly difficult to negotiate and to find balanced compromises. It will anyway be target of criticisms, coming either from the **supporters of deeper EU integration in criminal matters, or from those more attached to MSs' prerogatives in criminal law.**

The question is in a way less ambitious: it is rather to assess whether the EPPO fits the objectives assigned to it, whether it will have some (even limited) added value, and whether it will be able to function efficiently and in full respect of fundamental rights. Despite the initial difficulties, the EPPO should indeed have the possibility to develop into an integrated EU system of prosecution, bringing the added value needed to fight first EU fraud, and other serious cross-border crimes in the longer term.¹⁶¹

On some elements, negotiations seem to have reached a final compromise within the Council; as a consequence, the provisions concerned will be difficult to amend. On other points, the text is still open to further discussion. This has been confirmed at the JHA Council of Oct. 2016: according to the press release, "some delegations still raised some concerns that will **have to be further discussed during the finalisation of the text**", and ministers "have invited experts to continue negotiations with a view of finding a definitive agreement on this **regulation**".¹⁶² Considering the power of the European Parliament to consent or not to the adoption of the final text, this institution should continue to closely follow the evolution of negotiations, to express its view and to ask for amendments or reopening of discussions on the most critical points.

Generally speaking, if compared to the initial Commission proposal, the current version of the Regulation has improved on a few aspects. Without claiming to be exhaustive, one should mention the criteria for the determination of competence for the European Delegated Prosecutors (**section 3.1.**), and **EPPO's relations with its partners, particularly OLAF, Europol, non-participating MSs and third States (sections 4.2. to 4.5).** Besides, on some aspects, there is hope that the EPPO will benefit from a positive evolution, although the fate of such evolution is still far from certain. In this category, we would like to mention the insertion of the most serious cross-border VAT fraud cases in the scope of the PIF Directive, and thus in EPPO's material competence (section 2.2). The European Parliament should continue to insist on this point, and in particular on the deletion of Art. 20(3) that may deprive of its *effet utile* **the inclusion of VAT fraud in the EPPO's competence. Concerning EPPO's relations with non-participating MSs, the European Parliament could consider asking for the insertion of a provision requiring MSs to designate the EPPO as a competent judicial authority for the purposes of implementing the EU "acquis" in judicial matters. It should also insist on the need to complement the provision on non-participating MSs with an additional EU instrument (section 4.4.).**

In spite of these positive remarks, the overall analysis of the current version of the text undoubtedly reveals a number of weaknesses and shortcomings. Without claiming to be

¹⁶¹ See speech by the Belgian Minister of Justice K. Geens at the occasion of the ECLAN 10th Anniversary Conference, held in Brussels on 25 and 26 April 2016. The video of his intervention is available at: http://eclan.eu/en/annual_conference/10th-anniversary.

¹⁶² JHA Council of October 2016, Press release, p. 9.

exhaustive, and referring back to the relevant section for details, we would like to come back on the most important flaws identified in this study.

Most of them are the direct or indirect result of MSs' willingness to renationalise the EPPO as much as possible, and to keep the strongest control possible over its activities. This is clear when thinking of the complexification and multiplication of layers in the institutional design of EPPO's central level (section 1.1), as well as of the shared competence between the EPPO and national authorities over PIF offences (section 1.3.1). It is also evident when thinking of the multiplication of situations where reference is made to national law. The prevalence of national law was already present in the initial Commission proposal, both in terms of substantive and procedural law. Negotiations have however aggravated this trend, particularly with regard to procedural aspects. New references to national procedural law have been introduced, for instance concerning the conduct of cross-border investigative measures (section 3.2.1), or the examination of the admissibility of evidence (section 3.2.2.). This trend is regrettable, particularly because it is not accompanied by a minimum level of harmonisation in this area. Where the Commission proposal provided for limited harmonisation and referred then to national law, for instance regarding EPPO's investigative powers and suspects and accused's procedural guarantees, the current text has even reduced the degree of harmonisation (sections 3.1 and 3.3.1.). This situation increases variable geometry, decreases legal certainty and will negatively impact both the efficiency of EPPO's investigations and the protection of suspect and accused's fundamental rights.

The **verticalisation of judicial cooperation in criminal matters, which is part of the EPPO's DNA**, must be preserved in the draft proposal, at least to a minimum extent. The European Parliament should particularly follow the negotiations in order to guarantee that the most **European-oriented entities within EPPO's central level, i.e. the European Chief Prosecutor and the Permanent Chambers**, obtain as many operational powers as possible (section 1.1.2.). The Parliament should also be careful that the current level of harmonisation is not further diminished, and it should pursue efforts aimed at ensuring a higher level of harmonisation. It already did so with regard to some particular aspects of the rights of the defence for EPPO suspects (section 3.3.1.), but it should pursue and exercise further pressure on the Council to deepen harmonisation on other aspects of the text, regarding both procedural guarantees (section 3.3.) and European Delegated Prosecutors' investigative powers (section 3.1.). These elements are indeed of crucial importance to ensure that the EPPO has the means necessary to fulfil its objectives.

In the same perspective, i.e. ensuring the fulfilment of EPPO's objectives, the European Parliament should continue to insist on the importance of clarifying the ambiguity concerning the repartition of competences within the EPPO, and between the EPPO and its partners. The level of ambiguity is indeed particularly high. Firstly, it concerns the allocation of competences between the different layers of EPPO's central level, as many crucial points are left vague and their clarification is postponed to the adoption of EPPO's internal rules of procedure (section 1.1.1.). Secondly, the allocation of competences between the EPPO and national authorities shall also be further clarified. This is especially true concerning the issue of judicial review, as under the current version of the text, it is difficult to understand what falls under the review of national judicial authorities, and what falls under the review of the ECJ (sections 3.4. and 2.3.). Thirdly, special attention should be paid to the clarification of the division of competences between the EPPO and the other EU JHA actors. Some experts have underlined this point regarding EPPO's relations with OLAF (section 4.2.) but it is even **more crucial with regard to EPPO's relations with Eurojust. The provision dedicated to the later relationship should be further detailed, not only to better organise their mutual**

cooperation, but also to better acknowledge/clarify their respective mandates and/or fields of expertise (sections 4.1.).

Further clarification of the distribution of competences is furthermore essential to ensure that the costs generated by the establishment of the EPPO do not exceed the benefits expected **from EPPO's actions. According to the Commission, these benefits include the dissuasive effect of establishing an EPPO, which is expected to significantly reduce impunity of EU fraudsters, and in terms of recovery of defrauded EU money that would come back to the EU budget.**¹⁶³ In that regard, and more fundamentally, one should pay particular attention to **the enlarged structure and multiplication of layers at EPPO's central level. This will indeed cost more than the initially envisaged model, and will imply important fixed costs. Despite the Commission's belief, one may doubt whether such increase of costs will be compensated by the decreased number of cases with which it will deal given EPPO's shared competence with national authorities.** The idea of covering these costs by drawing from Eurojust and/or OLAF's resources should be handled very carefully, as it may generate unnecessary tensions. Indeed, this can hardly be considered a good starting point for sound and smooth cooperation between EU bodies/agencies.

Furthermore, should Eurojust's resources (human or financial) be transferred to the EPPO, this would be highly detrimental for the EU area of criminal justice as a whole. Eurojust's expertise does not only cover PIF crimes, but includes other forms of serious crime (including other forms of financial crime)¹⁶⁴, for which its services will continue to be required in cross-border cases. Moreover, the involvement of Eurojust in PIF cases will continue to be relevant in cases concerning non-participating MSs. The costs linked to these activities will still have to be covered. More generally, the multiplication of agencies/bodies in the field of judicial cooperation, without ensuring good relations among them, might lead to a dangerous fragmentation and consequent weakening of EU judicial actors within the AFSJ. This will further deepen the already worrying imbalance between judicial and police actors at EU level, since one powerful agency already benefits from larger resources in the police field, i.e. Europol¹⁶⁵. **Establishing a complex and costly new EU judicial body, which would "undo" pre-existing actors and/or have bad relations with them,** would not only be detrimental to the AFSJ and the fight against crime (including PIF crime) but would also give relevant and concrete arguments to Eurosceptics.

In conclusion, the choice of whether or not to approve the draft Regulation lies in the hands of the European Parliament.

If it decides *not* to give its consent, the chances that the EPPO is buried for many years are quite high. It could however rise again from its ashes like a Phoenix.¹⁶⁶ Should the establishment of the EPPO be postponed, EU institutions could envisage an alternative option to improve the efficiency of fighting PIF offences, namely strengthening Eurojust by using the possibilities provided for in Art. 85 TFEU. Eurojust could in particular be granted some limited binding powers *vis-à-vis* national authorities, e.g. the powers to initiate criminal

¹⁶³ See intervention of Commissioner Jourova at the JHA Council meeting of mid-October 2016.

¹⁶⁴ As an example, see Eurojust, Annual Report, 2015, p. 28: Eurojust registered in 2014 around 1850 cases. Whereas the agency registered 69 PIF cases, it also registered 647 fraud cases (including excise fraud and VAT fraud) and 90 corruption cases.

¹⁶⁵ About such imbalance, see A. Weyembergh, I. Armada and C. Brière, "The interagency cooperation and future architecture of the EU criminal justice and law enforcement area" *op. cit.* p. 60.

¹⁶⁶ For a comparison of the EPPO with a Phoenix, see presentation of S. Gless about "European Public Prosecutor, Eurojust & OLAF – Current State of Affairs & Constitutional Issues" at the Expert Meeting on The European Prosecution Service, Maastricht University, 23rd April 2008.

investigations (Art. 85 (1) a) TFEU)¹⁶⁷, at least regarding PIF offences. As is well known, the 2013 Commission proposal for a Eurojust Regulation did not make use of the full potential of Art. 85 TFEU. Should the EPPO establishment be postponed to a more distant (and uncertain) future, exploiting those possibilities could indeed constitute an interesting alternative. This provision presents the advantage of providing for the adoption of a Regulation via ordinary legislative procedure, with European Parliament co-decision.

If the European Parliament chooses to *give* its consent, the EPPO will be established in its current form or an adapted model, hopefully with less weaknesses and shortcomings than identified in this paper. In this hypothesis, and without neglecting the obstacles it will have to overcome, there is still hope that the EPPO will manage to achieve its objectives. One should indeed bear in mind that the construction of the European Union has always been progressive, marked by a step-by-step approach. It is thus highly probable that the text will be amended and improved in the course of its existence. The example of Europol and Eurojust indeed evidence that improvements can be achieved after setting up a new body. Qualitative steps towards further integration often lie in a unique momentum, when factors align to overcome national resistance, particularly those based on national sovereignty. A very recent illustration of such trend can be witnessed in the evolution of the mandate and powers of the EU agency in charge of migration management. Frontex has indeed now taken the form of a European Border and Coast Guard Agency, notably due to the weaknesses and gaps exposed by the migration crisis of summer 2015.¹⁶⁸ Even if the reformed agency is still not as integrated as some would have hoped, the new Regulation clearly represents a step forward¹⁶⁹. It is thus possible that, in a more or less distant future, a similar momentum will take place and favour the development of an EPPO worthy of the name, with a real verticalisation and, even a broader mandate encompassing also serious cross-border crimes.

¹⁶⁷ About Art. 85 TFEU and its potentialities, see for instance A. Weyembergh, "Coordination and initiation of investigations and prosecutions through Eurojust", *ERA Forum*, Volume 14, Issue 2 (2013), p. 177-186; Ibid. « The Development of Eurojust: potential and limitations of Art. 85 TFEU », *New Journal of European Criminal Law*, 2011, vol. 2, p. 75-99.

¹⁶⁸ Proposal presented in December 2015 (COM (2015) 0671), and negotiations concluded in July 2016. The text now adopted is Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 Sept. 2016 on the European Border and Coast Guard (...), *OJ L* 251, 16 Sept. 2016, p. 1.

¹⁶⁹ See P. De Bruycker, "The European Border and Coast Guard: A New Model Built on an Old Logic", *European Papers*, Vol. 1, 2016, No 2, pp. 559-569.

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