



The European Public Prosecutor's Office: King without kingdom?

Fabio Giuffrida

Abstract

Pursuant to Article 86 TFEU, in July 2013 the Commission issued a Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office (EPPO), i.e. the European body that shall be empowered to investigate and prosecute crimes affecting the financial interests of the EU. This contribution analyses the most relevant features of the (probably) forthcoming Office, as it is envisaged in the text currently under negotiation in the Council.

The EPPO will extensively depend upon national law, not only because the defendants will be tried before domestic courts, but also because the final text is expected to include only a limited number of rules regulating the investigations and the prosecutions of the Office. This contribution looks at the EPPO mainly from this perspective of the problematic intersection of EU law and national law, evaluating whether such a mixed regulation is functional to the aim of guaranteeing a better protection of EU financial interests.

Being the first European body competent to adopt decisions *vis-à-vis* the individuals in the sensitive field of criminal law, the EPPO could represent a Copernican revolution in the history of EU (criminal) law. However, the analysis shows that this potentially revolutionary leap forward has turned out to be quite complicated. It is contentious that the Office – with the currently envisaged structure and powers – will enhance the fight against crimes affecting the financial interests of the Union, so that the need of establishing such a new body should be carefully assessed.



Fabio Giuffrida is a postgraduate research student at Queen Mary University of London. Research for this paper was carried out in the context of the [Source](#) project, funded by the European Union's FP7 programme. He thanks Prof. Valsamis Mitsilegas and Dr Saskia Hufnagel, under whose supervision this contribution was written, as well as Dr Sergio Carrera and the anonymous reviewer for valuable comments on a previous draft of the work. He is also grateful to Lee Gillette for the language revision of the text.

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978-94-6138-581-9

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CEPS Research Report No 2017/03, February 2017

1. Introduction

The rationale behind the idea of a European Public Prosecutor's Office (EPPO or the 'Office') is straightforward yet ground-breaking. Since a relevant part of the financial resources of the European Union are annually lost because of fraud committed throughout the member states, a European body competent to investigate such illegal conduct is assumed to be needed. Should the EPPO be set up, a Copernican revolution in the history of EU (criminal) law will take place: for the first time, **an EU body could adopt decisions *vis-à-vis* the individuals in the field of criminal law**. However, the practical realisation of this potentially revolutionary leap forward has turned out to be quite complicated.

At the time of publishing this paper, the Office does not yet exist. **Article 86** of the Treaty on the Functioning of the European Union (TFEU) allows the Council – with the previous consent of the European Parliament – to set up the EPPO by means of regulations. Pursuant to this Article, the Commission tabled a proposal for a Council Regulation in July 2013 ('Commission's proposal')¹ and negotiations are ongoing. At the end of September 2016, the Presidency of the Council made clear that the compromise reached on some provisions would not have been substantially altered.² In this contribution, only the most sensitive issues of the text currently under negotiation ('draft Regulation')³ are addressed.

Before embarking on the analysis of the draft Regulation, however, it needs to be underlined that the (probably) forthcoming EPPO has kept the basic structure that has always been conceived as the most politically suitable for such an Office: it will be empowered to investigate and prosecute crimes affecting financial interests of the EU ('PIF offences'),⁴ but **the trial is not supposed to take place at the supranational level**. Investigations shall be carried out under the direction of an EU body, but the ensuing trial is held before national courts. This peculiar embedding of the EPPO in national systems is likely to pose several problems, because "the rules relating to the investigations and prosecutions on the one hand and trials on the other

¹ Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM(2013) 534 final, 17 July 2013.

² Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office – Policy debate/Partial general approach, Council doc. 12775/16, 30 September 2016, p. 2.

³ The last version publicly available of the draft Regulation at the time of writing is: Proposal for a Regulation on the establishment of the European Public Prosecutor's Office – Draft Regulation, Council doc. 5766/17, 31 January 2017.

⁴ PIF stands for "*protection des intérêts financiers*".

cannot be separated any more than eggs can be extracted from omelettes”.⁵ Moreover, national law remains applicable during the investigations to the extent that a matter is not regulated by the Regulation:⁶ since a very limited part of the activities of the EPPO is dealt with by the text under negotiation, the role that national laws will play in the frame of the functioning of the Office is relevant.

Therefore, this contribution looks at the EPPO mainly from the perspective of the **problematic balance and intersection of EU law and national law**, evaluating whether such a mixed regulation of the activities of the forthcoming Office is functional to the aim of guaranteeing a better protection of EU financial interests.⁷

After a brief history of the path that has led to the current scenario (section 2), this paper focuses on the reasons why the EPPO is perceived as a necessary instrument to fight PIF offences (section 3) and on some peculiarities of the procedures set out in Article 86 TFEU (section 4). The analysis then shifts to the material competence of the EPPO (section 5). Section 6 deals with the structure and status of the forthcoming Office, whereas the main rules concerning EPPO investigations and prosecutions are respectively discussed in sections 7 and 8. The sensitive issue of the procedural safeguards is also addressed, under the perspective both of the procedural rights of persons involved in the proceedings of the EPPO (section 9.1) and of the judicial review of acts and decisions of the Office (section 9.2). Section 10 is devoted to the expected relations of the EPPO with its partners. Some conclusions are finally drawn in section 11, where the expected limited impact of the draft Regulation on the existing scenario is highlighted.

2. A brief history of the EPPO

“Protecting taxpayers’ money against fraud”.⁸ This was the title of the Commission’s press release of 17 July 2013, when the proposal for a Council Regulation on the EPPO was issued. The **symbolic meaning** behind the establishment of the EPPO is self-evident: the Commission wants to reassure European citizens that, bluntly put, the EU will take care of their money. Moreover, it is plain that the EU budget “represents the ‘common interest’ *par excellence*, an interest that is *ipsa natura* supranational and whose need for the protection transcends national frontiers”.⁹ The protection of the budget comes first among the priorities of the EU: once it is protected, the EU can carry out its tasks; if this is not the case, the organisation is

⁵ Peers (2011), p. 860.

⁶ Article 5(3) draft Regulation.

⁷ In light of the chosen perspective, this contribution does not address other relevant topics concerning the functioning of the EPPO, such as the data protection regime.

⁸ http://europa.eu/rapid/press-release_IP-13-709_en.htm.

⁹ De Angelis (1999), p. 9. On the EU financial interests as legal interests directly linked with the very existence of the EU, see also, among the many, Grasso (2008), p. 4.

sentenced to an unacceptable stasis, or even to death. In other words, the budget represents a “quintessential”¹⁰ interest of the Union and PIF offences are “genuine European crimes”.¹¹

Nevertheless, until the Treaty of Lisbon, Commission efforts to introduce an *ad hoc* legal basis in the Treaties for the establishment of the EPPO were in vain. For example, at the beginning of the 2000s, the Commission proposed introducing in the Treaties such a legal basis to the Intergovernmental Conference on institutional reforms, which was responsible for the draft of the Treaty of Nice (2001).¹² The Commission tabled this proposal also on the basis of the *Corpus Juris*, i.e. the ‘European micro-code’ drafted by a group of eight experts of national criminal law and Community law, in the frame of a project launched in 1995 by the Director of the twentieth General Directorate of the Commission.¹³ However, the Commission’s proposal was not accepted and the Treaty on European Union (TEU) remained silent on the matter, but it was amended to take into account the establishment of the judicial cooperation unit (Eurojust), which was set up – in its embryonic form – in 2000.¹⁴

The Commission did not give up and at the end of 2001 it issued a Green Paper on criminal law protection of the financial interests of the Community and the establishment of a European prosecutor, with the aim of launching a public debate on the issue.¹⁵ Eventually, the perseverance of the Commission was rewarded during the negotiations that led to the Constitutional Treaty, signed in Rome in 2004. In its Article III-274, the Constitution for Europe provided a legal basis to establish the EPPO and this proviso became Article 86 TFEU.

The clear opposition between the enthusiasm of the Commission and the cold reactions of the member states is underpinned by the traditional reluctance of the latter to give up their sovereignty in the sensitive field of criminal law; in addition, it seems that the **real need to establish the EPPO** is not unanimously perceived by politicians, practitioners and academics.

¹⁰ Mitsilegas (2009), p. 67.

¹¹ European Commission, Staff Working Document, Impact Assessment Accompanying the Proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office, SWD (2013) 274 final, 17 July 2013 (‘EPPO Impact Assessment’), p. 12.

¹² Commission of the European Communities, Additional contribution to the Intergovernmental Conference on institutional reforms. The criminal protection of the Community’s financial interests: a European Prosecutor, COM(2000) 608 final, 29 September 2000.

¹³ See Delmas-Marty (under the direction of) (1997); Delmas-Marty and Vervaele (eds) (2000). Unlike the current draft Regulation, the *Corpus Juris* laid down both provisions of substantive criminal law concerning PIF offences and procedural rules concerning the functioning and the powers of a possible European Public Prosecutor.

¹⁴ See Article 31 TEU as replaced by the Treaty of Nice. An embryonic version of Eurojust (‘pro-Eurojust’) was established with the Council Decision of 14 December 2000 setting up a Provisional Judicial Cooperation Unit, OJ L324/2, 21.12.2000. Eurojust was then officially set up with Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L63/1, 6.3.2002. See more below, section 3.

¹⁵ Commission of the European Communities, Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, COM(2001) 715 final, 11 December 2001 (‘Green Paper’). The results of this consultation can be found in the Follow-up Report on the Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, COM(2003) 128 final, 19 March 2003 (‘Follow-up Report’).

3. The EPPO as a necessary instrument to fight PIF offences: Highlights of a long-standing postulate

The question of whether the EU really needs the EPPO to guarantee stronger protection of its financial interests cannot be dealt with in depth in this contribution; however, two points need to be made.

First, the **numbers**. In the Impact Assessment accompanying the proposal, the Commission argues that a huge amount of EU money is annually lost or diverted because of fraud. However, the quantification of similar losses is not – and can never – be precise: “one would be foolish if one demanded an exact sum for the level of fraud in the EU today: *by definition* fraudulent activities are meant to remain in the shadows”.¹⁶ The estimates occasionally presented are only the “tip of the iceberg”¹⁷ of the real phenomenon: they range from €500 million (at least)¹⁸ to €3 billion per year, the latter being the EPPO Impact Assessment’s estimate.¹⁹

For the supporters of the EPPO, this lack of precise data suggests that the real scale of the problem could be much bigger than the available information shows and that the EU should be better equipped to fight these crimes. On the other hand, the uncertainty could have suggested other ways to solve the problem, rather than opting for the establishment of a brand new body. For instance, fraud could be first prevented through *prevention* measures; whereas “prosecution is secondary, the establishment of a European Public Prosecutor’s Office is at best *tertiary*”.²⁰

In the Commission’s view, moreover, the risks to the EU budget are even greater in light of the growing involvement of criminal organisations. However, it has been rebutted that a significant part of the financial losses of the EU is actually due to the (minor) fraud committed by *national* or *local* groups, within the national borders and for limited amounts of money.²¹ Such minor fraud usually falls even below the threshold of reporting duties of the member states.²² In a sort of vicious circle, not even the amount of the ‘local dimension’ of EU fraud is easy to assess, and reliable data are still lacking.

Second, **relevant changes have occurred in the field of EU criminal law** in recent years; nevertheless, the existing instruments to which national authorities can resort have not been

¹⁶ Xanthaki (2010), p. 133 (emphasis added).

¹⁷ White (1998), p. 223; Spencer (2000), p. 79.

¹⁸ Asselineau (2014), p. 7.

¹⁹ Commission, EPPO Impact Assessment, cit., p. 7.

²⁰ German Federal Bar and German Bar Association (2012), p. 1 (emphasis added).

²¹ Tupman (2010), p. 155. See also Fijnaut and Groenhuijsen (2002).

²² EU legislation requires the member states to report to the Commission all the detected irregularities concerning EU resources. For an extensive list of instruments which provide this duty see: European Commission, Methodology regarding the statistical evaluation of reported irregularities for 2011, Accompanying the Report from the Commission to the European Parliament and to the Council on the Protection of the European Union’s financial interests – Fight against frauds 2011 – Annual Report (Staff Working Document), SWD(2012) 230 final, 19 July 2012, p. 4

deemed appropriate to tackle PIF offences. As it stated in 2003, the Commission still believes that the other EU bodies “are essential but serve other purposes”.²³ This goes for Eurojust, Europol and OLAF (the European Anti-Fraud Office).

In a nutshell, the mission of **Eurojust** is to support and coordinate national *prosecuting* authorities when they deal with investigations and prosecutions of cross-border crimes. Eurojust was established some years after **Europol**, i.e. the EU agency with the similar objective of supporting and strengthening action by the competent *police* authorities of the member states and their mutual cooperation in preventing and combating serious cross-border crime.²⁴ Europol has also an important role concerning intelligence, since its main task is represented by the analysis of (personal) data relevant for the ongoing investigations at the national level.²⁵ Eurojust and Europol are therefore **supporting bodies**, which aim to facilitate the activities of national authorities coping with transnational criminality. The EPPO will instead have the power to **prosecute persons suspected to have committed PIF offences**.

OLAF was formally set up by the Commission in 1999 to replace UCLAF (*Unité de coordination de la lutte anti-fraude*) and it is not a prosecution body but rather an office of the European Commission.²⁶ It only carries out administrative investigations of ‘internal’ fraud, i.e. occurring within the EU institutions, and ‘external’ fraud, i.e. committed in the member states. When criminal conduct is detected, OLAF refers the case to national competent authorities, even though the rate of successful prosecutions based on the investigations of OLAF is currently regarded as unsatisfactory.²⁷

Moreover, in comparison with the times of the *Corpus Juris*, many legal instruments have also been adopted in order to enhance judicial and police cooperation among national authorities.²⁸ One could think, for instance, of the Framework Decision regarding the Joint Investigations Teams (JITs)²⁹ or the whole raft of Framework Decisions and Directives concerning **mutual**

²³ Commission, Follow-up Report, cit., p. 9.

²⁴ Article 3(1) Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, OJ L135/53, 24.5.2016 (‘Europol Regulation’).

²⁵ According to Article 4(1) Europol Regulation, the first of Europol’s tasks is “to collect, store, process, analyse and exchange information, including criminal intelligence”.

²⁶ Commission of the European Communities, Decision of 28 April 1999 establishing the European Anti-fraud Office (OLAF), OJ L316/20, 31.5.1999.

²⁷ Explanatory Memorandum to the Commission’s proposal, p. 2.

²⁸ For a broader analysis of the developments occurred in the Area of Freedom, Security and Justice from the times of the *Corpus Juris* see Ligeti (2011), pp. 134-144.

²⁹ Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams, OJ L162/1, 20.6.2002, which was adopted after the 2001 attacks in New York to compensate for the slow ratification of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (OJ C197/1, 12.7.2000), whose Article 13 already provided the legal basis for the setting up of JITs at the EU level.

recognition instruments, from the European Arrest Warrant to the recent European Investigation Order.³⁰

In light of the foregoing, it is not surprising that the Commission's proposal has been opposed by national parliaments, which triggered the so-called '**yellow card procedure**': some of them objected that the text issued by the Commission did not comply with the principle of subsidiarity. However, the Commission decided to maintain the proposal, restating what had been already argued in the Impact Assessment accompanying the Proposal of July 2013 and rejecting all the objections raised by national parliaments.³¹

4. Article 86 TFEU and the procedure of enhanced cooperation

Article 86 TFEU requires that the Regulation on the EPPO is adopted with a special legislative procedure in which **the Council acts unanimously after obtaining the consent of the European Parliament**.³² As in all the circumstances where the consent of the latter is necessary for an act to be adopted, the "two institutions invariably negotiate to agree a common text";³³ in the case of the EPPO, the Parliament has issued three resolutions in order to direct the negotiations of the Council, calling on it to implement some modifications of the text. Moreover, the Parliament is involved in other procedures that directly concern the EPPO, namely the adoption of the EU budget, which will finance the Office,³⁴ and the adoption of the so-called 'PIF Directive', which will draw the boundaries of the material competence of the EPPO.³⁵

As far as **unanimity** in the Council is concerned, **it refers to all EU member states with the exception of Denmark, the United Kingdom and Ireland**.³⁶ However, **there are very little chance for the Regulation to be adopted by unanimity**. Some countries have taken a very critical stance during the negotiations (e.g. the Netherlands) and Sweden has already mentioned that it will

³⁰ Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), OJ L190/1, 18.7.2002; Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L130/1, 1.5.2014. On the European Investigation Order see more in section 7.

³¹ Communication from the Commission to the European Parliament, the Council and the national parliaments on the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office with regard to the principle of subsidiarity, in accordance with Protocol No 2, COM(2013) 851 final, 27 November 2013. For further reflections on the relations between the EPPO and the principle of subsidiarity see Fromage (2015), pp. 1-23; Sørensen and Elholm (2015), pp. 31-50; Wieczorek (2015), pp. 1247-1270; Mitsilegas (2016), pp. 40ff.

³² Article 86(1) TFEU.

³³ Chalmers et al. (2014), p. 127.

³⁴ See Article 49(3)(a) draft Regulation.

³⁵ Weyembergh and Brière (2016), pp. 10-11. On the PIF Directive see more in the next section.

³⁶ At the time of writing, the UK has not yet notified its intention to withdraw from the Union pursuant to Article 50 TEU.

not take part in the establishment of the EPPO.³⁷ In the General Affairs Council meeting of 7 February 2017, therefore, the Council formally registered the absence of unanimity.³⁸

Nevertheless, the same Article 86 TFEU provides leeway, which incidentally represents the only substantial difference between this provision and Article III-274 of the Constitution for Europe.

According to Article 86(1) TFEU, if there is no unanimity within the Council, the draft Regulation can be referred to the European Council, if at least nine member states wish to proceed, and the procedure in the Council shall be suspended. Within four months of the suspension, if there is consensus in the European Council, the latter shall refer the draft back to the Council for adoption. Negotiations are currently at this stage, since the formal acknowledgment of the absence of unanimity in the Council “opens the way for a group of at least nine member states to refer the text for discussion to the European Council for a final attempt at securing consensus on the proposal”.³⁹

Otherwise, in case of disagreement, a group of at least **nine member states** may decide to establish **enhanced cooperation** to set up the EPPO: in light of the foregoing, this seems the only realistic way to establish the EPPO for the time being. After the Justice and Home Affairs Council meeting of December 2016, the French and German Ministries of Justice therefore issued a joint declaration calling for the creation of the EPPO even without the required unanimity and by means of enhanced cooperation.⁴⁰

Since the entry into force of the Treaty of Lisbon (2009), the procedure of enhanced cooperation has been used three times,⁴¹ but in the case of the EPPO a delicate political issue is brought to the fore. As underlined by Labayle, **it seems contentious to establish an EU body aimed at protecting the EU interest par excellence but composed only by some EU member states**.⁴² The need for as many member states as possible to take part in setting up the body was debated during the meeting of European Parliament's Committee on Civil Liberties, Justice

³⁷ See the General approach of 31 January 2017 (Council doc. 5445/17, 31 January 2017). On the critical position of the Dutch Parliament and Government see Van der Hulst (2016), pp. 99-104. Also Poland and Hungary seem to be contrary to the adoption of the text: see www.politico.eu/article/france-and-germany-make-new-push-for-eu-prosecutor/.

³⁸ See the press release of the General Affairs Council meeting of 7 February 2017, no. 48/17 (www.consilium.europa.eu/press-releases-pdf/2017/2/47244654495_en.pdf). Already in the Justice and Home Affairs Council meeting of 8 and 9 December 2016, it was confirmed that not all of the 25 EU member states would have supported the establishment of the EPPO (see the outcome of the meeting, Council doc. 15391/16).

³⁹ Press release of the General Affairs Council meeting of 7 February 2017, cit.

⁴⁰ www.euractiv.fr/section/justice-affaires-interieures/news/le-couple-franco-allemand-tente-de-relancer-le-parquet-europeen/?nl_ref=26727695. The above-mentioned press release of the General Affairs Council meeting of 7 February 2017 is indeed titled: “European Public Prosecutor's Office: Council takes first step towards a possible enhanced cooperation”.

⁴¹ See, among the others, Armstrong (2013); Drew (2015), pp. 21ff.

⁴² Labayle (2010), pp. 59-60. For further reflections on the creation of the EPPO by means of enhanced cooperation, and on the pressing need to resort to such a procedure, see Fidelbo (2016), pp. 1-50.

and Home Affairs (LIBE) of 29 November 2016, where a representative of the Council made it clear that enhanced cooperation with fewer than 20 member states will hardly be accepted.⁴³

However, on a more practical level, the setting up of the Office by only some member states raises the question of how the relations of the EPPO with the non-participating states have to be regulated. The issue is dealt with in section 10 of this work, but at this stage it is to be noted that the likely non-participation of the Netherlands poses the further problem of the **location of the EPPO**. Because of the close relationship that the draft Regulation envisages between the EPPO and Eurojust,⁴⁴ it would be logical that the EPPO shared the seat with Eurojust in The Hague. Also, the European Parliament has submitted that “it would be best for the EPPO and Eurojust to operate in the same location”.⁴⁵ Nevertheless, a recital of the Commission’s proposal and of a previous version of the draft Regulation recalled the meeting of the Heads of State or Government held in Brussels on 13 December 2003. In that meeting, it was decided that, should the EPPO be established, its headquarters would be in Luxembourg. In the last version of the draft Regulation this recital has been removed from the text, since the matter has not been agreed yet. However, should the Netherlands not take part in the EPPO, it seems unlikely that the Office’s seat could be within the premises of Eurojust.

5. Material competence of the EPPO

Always conceived as a body aimed at the protection of the EU budget, the EPPO will be competent with regard to “criminal offences affecting the financial interests of the Union”.⁴⁶ However, some argued and still argue that the Office should be given other competences beyond the limited sphere of PIF offences. This has been sometimes envisaged also in the political debate, especially after the terrorist attacks in France in 2015 and in Belgium in 2016.⁴⁷ Article 86(4) TFEU states that the material competence of the EPPO could be broadened to include other forms of “serious crime having a cross-border dimension”, but this requires the unanimous decision of the European Council. For the moment, however, there is a clear will to **limit the future powers of the EPPO to its traditional field of PIF offences**, although the European Parliament has already shown its support for an EPPO dealing also with organised crime.⁴⁸

⁴³ The recording of the debate is available at www.europarl.europa.eu/ep-live/en/committees/video?event=20161129-0900-COMMITTEE-LIBE.

⁴⁴ See below, section 10.

⁴⁵ European Parliament, Resolution of 5 October 2016 on the European Public Prosecutor’s Office and Eurojust (2016/2750(RSP)), para. 10. See Weyembergh and Brière (2016), pp. 41-42.

⁴⁶ Article 4 draft Regulation.

⁴⁷ See for example the opinion expressed in April 2015 by the Leader of the ALDE group in the European Parliament and former Prime Minister of Belgium Verhofstadt (www.huffingtonpost.co.uk/guy-verhofstadt/terrorism-data-surveillance_b_6654258.html), as well as the interview of November 2015 with the Italian Minister of Justice Orlando (www.repubblica.it/politica/2015/11/28/news/orlando_contro_i_terroristi_ma_senza_uno_stato_di_polizia_niente_intercettazioni_per_tutti_cosi_si_tutela_la_nostra_libert-128324071/).

⁴⁸ European Parliament resolution of 25 October 2016 on the fight against corruption and follow-up of the CRIM resolution (2015/2110(INI)), para. 54. Klip argues that “it would be rather unwise to give the EPPO more competences than after the evaluation of its functioning during a significant certain period of time” (Klip, 2012,

However, the boundaries of the material competence of the EPPO will be set out by national laws. **The draft Regulation does not define PIF offences but refers to a Directive to be adopted by the Council and the European Parliament, the so-called 'PIF Directive'**. The Commission tabled the proposal in July 2012⁴⁹ and eventually, after more than four years of negotiations, an agreement has been found. **The formal adoption of the Directive should therefore be close.**⁵⁰ The aim of the Directive is to harmonise national legislation concerning PIF offences, in order to overcome the existing differences which hamper an effective fight against these crimes. The PIF Directive and EPPO Regulation are therefore strictly intertwined, and the former has been considered the necessary prerequisite for the latter;⁵¹ as a consequence, the agreement on the Directive could facilitate the conclusion of the negotiations on the Regulation.

However, the draft Directive has been criticised because it is expected to introduce a “very minimalistic degree of minimum harmonisation”,⁵² so that the European panorama of substantive criminal law will remain fragmented. This could seriously hamper the effectiveness of EPPO investigations and prosecutions.⁵³ There could be cases, for instance, where a given behaviour is regarded as criminal only in some of the member states participating in the EPPO. Moreover, it has been long discussed whether **VAT frauds** should be included in the text of the Directive and, therefore, whether they should fall within the competence of the EPPO. The compromise found in the Council is that the most serious forms of such fraud have to be included in the Directive, namely **VAT frauds which are connected with the territory of two or more member states and involve total damages of at least €10 million.**⁵⁴ The threshold was believed to be too high by the Commission and the Parliament,⁵⁵ which would have preferred to lower it to €5 million, but the agreed text will probably not be altered.

pp. 370-371); after all, at the beginning Europol was competent only for drug crimes, whereas now its mandate covers many different areas of cross-border criminality (ibid.).

⁴⁹ Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law, COM(2012) 363 final, 11 July 2012.

⁵⁰ “The Council confirmed a *political agreement* on a directive strengthening the protection of the EU's financial interests, confirming a deal reached in December 2016 with the European Parliament. Political agreement means that the directive, in all official languages and resulting from the negotiations with the Parliament, has been *endorsed at political level*. It will now undergo legal-linguistic revision before formal adoption by the Council at first reading. This will be followed by final approval by the European Parliament at second reading” (Outcome of the Council meeting, General Affairs, 7 February 2017, p. 5, emphasis added).

⁵¹ See the debate of the LIBE Committee of 29 November 2016, where this link between the EPPO Regulation and the Directive has been repeatedly underlined.

⁵² Vervaele (2014), p. 97. For similar critical views on the PIF Directive see Sicurella (2016), pp. 109-137.

⁵³ See also Ligeti (2013), p. 82.

⁵⁴ Article 2(2) of the last version publicly available of the draft PIF Directive (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 – political agreement, Council doc. 5478/17, 1 February 2017). Recital no. 4 of the Preamble to the draft PIF Directive clarifies that the notion of “total damage” refers “to the estimated damage, both for the financial interests of the Member States concerned and for the Union, which results from the entire fraud scheme”.

⁵⁵ See the debate of the LIBE Committee of 29 November 2016.

Moreover, the Office shall also be competent for the offence of **participating in a criminal organisation**, when the focus of such a criminal organisation is to commit any of the crimes affecting the financial interests of the EU provided in the aforementioned Directive. However, not only the concept of the ‘focus’ of the criminal activity is quite difficult to grasp; the draft Regulation also states that the participation in a criminal organisation has to be understood “as defined in Framework Decision 2008/841/JHA, as implemented in national law”.⁵⁶ This Framework Decision was meant to reduce the diversity of national legislation on organised crime, but it failed in reaching this goal; its impact on national legislation has been indeed very limited, as acknowledged by the Commission in its recent Report on the implementation of the Framework Decision.⁵⁷

The Regulation adds that the EPPO is competent for the crimes which are “**inextricably linked**”⁵⁸ to PIF offences. The text of the draft Regulation is silent on the meaning of this expression, whereas the Preamble clarifies that the notion of ‘inextricably linked offences’ should be considered “in light of the relevant case law which, for the application of the *ne bis in idem* principle, retains as a relevant criterion the identity of the material facts (or facts which are substantially the same), understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together in time and space”.⁵⁹ The regulation of this **ancillary competence** of the EPPO seems **unsatisfactory** for many reasons.

First, **an unambiguous definition of what is meant by ‘inextricably linked offences’ should be found in the draft Regulation itself**, in order to reduce to the minimum the risks of a divergent interpretation of the same rule across the participating EU member states. Second, the reference to the case-law of the Court of Justice on the principle of *ne bis in idem* seems **contentious**. That jurisprudence is meant to lay down some criteria for the assessment of whether two sets of circumstances – for the purposes of the application of the *ne bis in idem* principle – have to be regarded as *the same fact*: if this is the case, a person cannot be judged twice for that same fact. On the contrary, ‘inextricably linked offences’ are by definition

⁵⁶ Article 17(1a) draft Regulation.

⁵⁷ Report from the Commission to the European Parliament and the Council based on Article 10 of Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime’, COM(2016) 448 final, 7 July 2016, p. 10. See also Mitsilegas (2011).

⁵⁸ Article 17(2) draft Regulation.

⁵⁹ Recital no. 49 of the Preamble to the draft Regulation. On this matter see, among the others, Nieto Martín and Muñoz de Morales Romero (2015), pp. 120-155. The first decision where the Court of Luxembourg dealt with the notion of ‘same facts’, for the purposes of application of Article 54 of the Convention Implementing the Schengen Agreement on *ne bis in idem*, was Case C-436/04, *Van Esbroeck*, 9 March 2006. The principle laid down therein, i.e. that the right to *ne bis in idem* applies with regard to a “set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected” (Case C-436/04, *Van Esbroeck*, cit., para. 42), has been confirmed in all the following judgements of the Court on the matter (see C-467/04, *Gasparini and others*, 28 September 2006, para. 54; Case C-150/05, *Van Straaten*, 28 September 2006, para. 48; Case C-288/05, *Kretzinger*, 18 July 2007, para. 29; Case C-367/05, *Kraaijenbrink*, 18 July 2007, para. 26; for the application of this principle also in the frame of the procedures concerning the European Arrest Warrant see Case C-261/09, *Mantello*, 16 November 2010, para. 39).

different crimes than PIF offences, so that one can wonder how that case-law can help in identifying them.

It can be reminded, in fact, that the previous version of the Preamble (i.e. that of the text under negotiations in December 2016) was much clearer on the matter, and it is regrettable that the EU legislator has changed its mind on the point. According to the previous version of Recital No. 49, “The notion of inextricably linked offences should be considered in light of the jurisprudence of the Court of Justice of the European Union. Such may be the case, for example, for offences which have been committed for the main purpose of creating the conditions to commit the offence affecting the financial interests of the Union, such as offences strictly aimed at ensuring the material or legal means to commit the offence affecting the financial interests of the Union, or to ensure the profit or product thereof”.⁶⁰ The *previous* notion of ‘inextricably linked offences’ partially resembled that of ‘related criminal offences’ of the Regulation on Europol: since the latter notion is much clearer than the current recital on the ‘inextricably linked offences’ and is also in line with some rules already provided for by national legislation,⁶¹ **the option of using the same wording of the Regulation on Europol in the text of the draft EPPO Regulation could have been considered.**

In addition, it is to be noted that this further competence of the EPPO will be triggered only if – in principle – PIF offences are “preponderant”.⁶² This term was used in the Commission’s proposal,⁶³ but it has been removed from the text of the Regulation and left to the Preamble. Article 20(3) of the draft Regulation lists the criteria according to which the PIF offence are considered ‘preponderant’ in respect of the ‘inextricably linked offences’. In principle, the Office can exercise its powers if the maximum penalty provided for PIF offences is greater than that for the inextricably linked offences.⁶⁴ These penalties are determined by national legislators: once more, the remit of the EPPO will be significantly influenced by national legislation, with the risk that discrepancies among national systems can hamper the activities of the Office.

⁶⁰ Recital no. 49 of the Preamble to the previous version of the draft Regulation (Proposal for a Regulation on the establishment of the European Public Prosecutor’s Office - Consolidated text, Council doc. 15200/16, 2 December 2016).

⁶¹ The crimes falling within the competence of Europol are listed in Annex I to the Regulation on Europol; in addition to them, Europol’s objectives shall also cover ‘related criminal offences’, i.e. criminal offences committed in order to: i) “procure the means of perpetrating acts in respect of which Europol is competent”; ii) “facilitate or perpetrate acts in respect of which Europol is competent”; iii) “ensure the impunity of those committing acts in respect of which Europol is competent” (Article 3(2) Regulation on Europol). This wording recalls, for example, that of Article 371(2) of the Italian Code of Criminal Procedure, which regulates the cases where the investigations of different public prosecutor’s offices have to be coordinated.

⁶² Recital no. 49b of the Preamble to the draft Regulation.

⁶³ Article 13 Commission’s proposal.

⁶⁴ Article 20(3)(a) draft Regulation. However, “with the consent of relevant national prosecution authorities” (Article 20(3a) draft Regulation), the EPPO can exercise its competence even when the PIF offence is punished with a lower penalty than the inextricably linked offence.

In short, the breadth of the competence of the EPPO is currently not very clear, although it will still rely to a considerable extent on national legal systems. This is confirmed by the fact that, should conflicts of jurisdiction arise between the EPPO and national prosecution authorities, **national authorities** will have the final word on whether a given crime falls within the mandate of the EPPO.⁶⁵ The choice of placing the *Kompetenz-Kompetenz* in the hands of national bodies shows the inherent peculiarity of the Office: such an EU body, meant to fight EU fraud at the EU level, will be largely constrained by national laws and procedures. It comes as no surprise, therefore, that **the European Parliament has criticised this provision, advocating a competence of an independent court, such as the Court of Justice.**⁶⁶

Finally, it is to be noted that, in comparison with the Commission's proposal, a shift from the exclusive competence of the EPPO on PIF offences to the **shared competence** between the Office and national authorities has occurred.⁶⁷ This change confirms the will of limiting the powers of the EPPO and it implies that, on the one hand, the Office *can* evoke the case if investigations have already been opened at the national level and that, on the other hand, the EPPO can decide to refer the case back to national authorities according to the rules provided in the draft Regulation.⁶⁸ In other words, "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".⁶⁹

6. Structure and status of the Office

The EPPO is organised into **central** and **decentralised** levels. The central Office is composed of the College, the Permanent Chambers, the European Chief Prosecutor, his(her) deputies, the European Prosecutors (EP), and the Administrative Director, whereas the European Delegated Prosecutors (EDPs) operate at the decentralised level.

The **EDPs** are national prosecutors who are simultaneously members of the EPPO.⁷⁰ As a consequence, when they are not dealing with crimes within the competence of the EPPO, they continue to carry out their ordinary tasks: this peculiar status is usually referred to as '**double hat**', meaning that when EDPs wear the national hat they continue to be national prosecutors for all intents and purposes, whereas when they wear the European hat they have to follow instructions from the central Office.

⁶⁵ Article 20(5) draft Regulation. The matter shall be dealt with by national authorities which are competent to decide on the attribution of competences concerning prosecution at national level.

⁶⁶ European Parliament, Resolution of 5 October 2016 on the European Public Prosecutor's Office and Eurojust, cit., para. 3.

⁶⁷ See Article 11(4) Commission's proposal and recital no. 7 of the Preamble to the draft Regulation.

⁶⁸ On the steps of the investigations of the EPPO, including the right to evocation, see more below, section 7.

⁶⁹ Weyembergh and Brière (2016), p. 20 (emphasis added).

⁷⁰ Article 12 draft Regulation.

The EDPs play a central role in the EPPO: they **carry out the investigations under the direction of the central Office** and put in practice in their member state the decisions taken at the EU level by the Permanent Chambers.

At the other end of the spectrum, the **College** is the management body of the Office and is composed of the European Chief Prosecutor and one European Prosecutor per member state. It has **no operational powers in individual cases** and it deals only with strategic matters and general issues.⁷¹ It adopts the budget of the Office and sets up the Permanent Chambers.⁷²

The **Permanent Chambers** shall have three members, the chair and two permanent members.⁷³ The internal rules of procedure, to be adopted by the College, will specify how many Chambers have to be established.⁷⁴ The same internal rules “shall ensure an equal distribution of workload on the basis of a system of *random allocation of cases* and shall, in exceptional cases, provide for procedures allowing...for deviations from the principle of random allocation upon decision by the European Chief Prosecutor”.⁷⁵ **The Chambers are thought to be the beating heart of the EPPO**, since they adopt **the most relevant operational decisions of the Office**, which need to be subsequently enacted by the European Delegated Prosecutors.

However, the Regulation adds another layer between the Chambers and the EDPs, namely the **supervising European Prosecutor**, who supervises the activities of the EDPs and can give instructions to them in a specific case.⁷⁶ (S)he is one of the European Prosecutors of the College, and more precisely the one **from the same member state of the supervised European Delegated Prosecutor**.⁷⁷ Reasons of efficiency therefore underpin the peculiar role of the supervising European Prosecutors “as *liaisons and channels of information* between the Permanent Chambers and the European Delegated Prosecutors in their respective Member States of origin”:⁷⁸ the legal systems of member states “still vary to a considerable degree, and it is clear that only a prosecutor with his or her background in a given legal system *will be able to know exactly what actions are most appropriate and efficient in that given state*”.⁷⁹ Moreover, in the last version of the draft Regulation a further power has been attributed to the supervising European Prosecutor: where the national law provides that an act of a prosecutor can be

⁷¹ Article 8(2) draft Regulation.

⁷² Respectively, Articles 48(1) and 8(3) draft Regulation.

⁷³ Article 9(1) draft Regulation. The chair of the Permanent Chamber is the European Chief Prosecutor, one of his/her deputies or a European Prosecutor appointed as a chair in accordance with the internal rules of procedure (ibid.).

⁷⁴ Ibid.

⁷⁵ Ibid. (emphasis added).

⁷⁶ Article 11(1) and (2) draft Regulation.

⁷⁷ Article 11(1) draft Regulation.

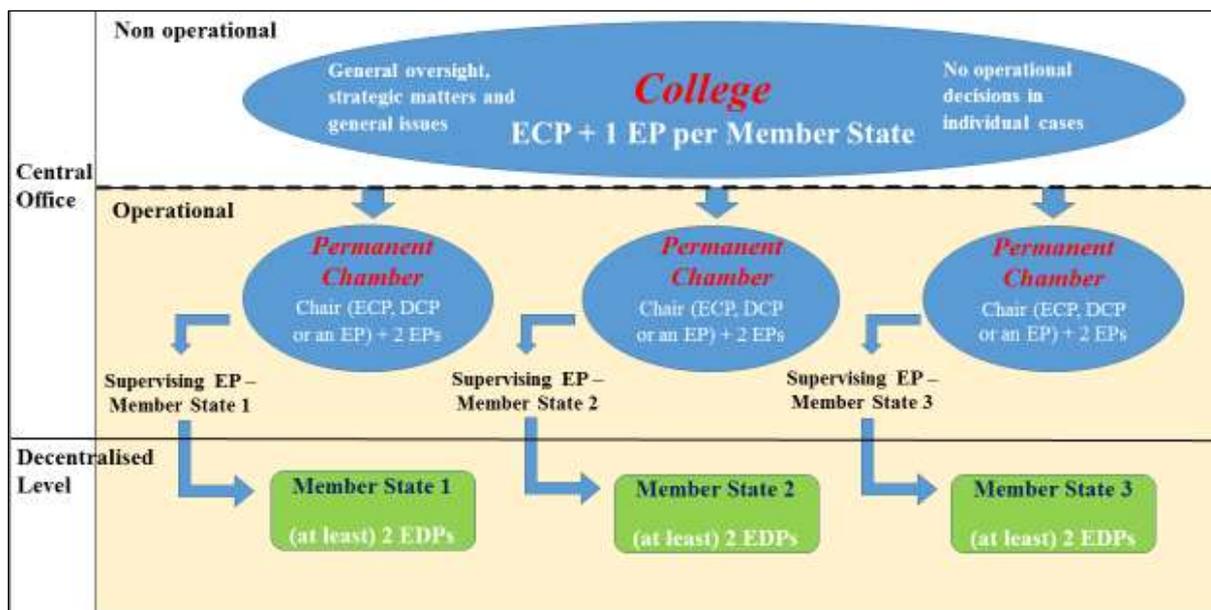
⁷⁸ Article 11(3) draft Regulation (emphasis added).

⁷⁹ Intervention of Ivan Korčok, President-in-Office of the Council during the debate of the European Parliament of 4 October 2016, transcript available at www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20161004&secondRef=TOC&language=en (emphasis added).

reviewed within the structure of the public prosecutor's office, the review of an act of an EDP shall be reviewed by the supervising European Prosecutor.⁸⁰

In sum, a **complex framework of powers and responsibilities** emerges, defined as a structure with "too many chiefs and not enough Indians".⁸¹ The figure below represents this complex framework.

Figure 1. Structure of the EPPO



Note: **ECP**: European Chief Prosecutor; **DCP**: Deputy Chief Prosecutor; **EP**: European Prosecutor; **EDP**: European Delegated Prosecutor. **N.B.:** pursuant to Article 11(1a) of the draft Regulation, the supervising EP can also be – in exceptional circumstances – from a different member state than the EDP. The number of the Permanent Chambers is to be decided by the internal rules of procedure.

Source: The author.

Serious concerns have been raised with regard to the collegial structure of the Office, since it seems unrealistic to expect that it will help the EPPO function efficiently.⁸² In addition, **such a cumbersome structure mirrors that of Eurojust**, which also features a College composed of one representative per member state. The difference lies in the fact that Eurojust's College can exercise both operational and strategic powers; this has turned out to be a serious obstacle to its efficient functioning.⁸³ However, the need to establish a brand new body with the same

⁸⁰ Article 11(2a) draft Regulation.

⁸¹ Csúri (2016), p. 24.

⁸² The majority of authors have been strongly critical towards a collegial structure of the EPPO, even before the draft Regulation provided for it: see, among the many, Vervaele (2010), p. 193; Espina Ramos (2011), p. 40; Spiezia (2013), p. 558; Damaskou (2015), p. 146. Among those who support the collegial model of the EPPO, see Ostropolski (2016), pp. 71-72. The Commission's proposal put forward a blatantly less cumbersome structure: the Office was thought to be composed only of the European Chief Prosecutor, his(her) deputies and the EDPs. However, this choice was not welcomed by some member states and during the Greek presidency (2014) the original text was considerably altered by introducing the above-mentioned additional layers.

⁸³ See, among the many, Jeney (2012), pp. 37ff.

structure and composition of an existing one is quite difficult to justify, especially in light of the current limited powers of the EPPO, which looks like a “reinforced Eurojust”⁸⁴ rather than a real EU Prosecutor.

Moreover, other concerns arise with regard to the supervising European Prosecutors. For example, even though the EDPs shall follow directions and instructions of the Permanent Chamber, as well as the instructions of the supervising EP,⁸⁵ there are no mechanisms to solve the possible conflicts among the two tiers of the central Office. What if the supervising EP and the Chamber have different views on the same matter? Whereas the EDP failing to follow the instructions of the Chamber or of the European Prosecutor can be ‘punished’ by reallocating his(her) case to another EDP in the same member state,⁸⁶ nothing is advised in case of conflict between the Permanent Chamber and the supervising European Prosecutor.

The real question to address is whether the position of the Chamber should prevail, in light of its role in the EPPO, or whether the final word should be that of the supervising EP since (s)he is definitely more acquainted with the legal system in which the investigations are carried out. The draft Regulation suggests that the power to adopt key decisions is bestowed upon the Chambers, which could therefore ignore the different stance of the supervising EP. After all, it seems that the latter shall not even be part of the Permanent Chamber to which the case is assigned, as the wording of Article 9(6) draft Regulation suggests: “*In addition to the permanent Members, the European Prosecutor who is supervising an investigation or a prosecution...shall participate in the deliberations of the Permanent Chamber*”.⁸⁷ The supervising European Prosecutor has the right to vote, except for some decisions listed in the same Article 9(6) of the draft Regulation.

Practical problems of uneven distribution of workload could also arise, since some European Prosecutors will most probably be called to supervise a greater number of investigations than others. Therefore, the last version of the draft Regulation has introduced a **derogation from the national link**: “A European Prosecutor may request, in an exceptional manner, *on grounds related to the workload* resulting from the number of investigations and prosecutions in his/her Member State of origin, or a conflict of interest concerning him or her, that the *supervision* of investigations and prosecutions of individual cases handled by *European Delegated Prosecutors in his/her Member State of origin* be assigned to other European Prosecutors, subject to their agreement of the latter”.⁸⁸ The decision thereof has to be taken by the European Chief Prosecutor.

⁸⁴ Caianiello (2013), pp. 123-124.

⁸⁵ Article 12(1) draft Regulation. See also Article 11(2) draft Regulation, which provides that the supervising European Prosecutor may give instructions to the European Delegated Prosecutor in a specific case, “in compliance with the instruction given by the competent Permanent Chamber”.

⁸⁶ Article 23(3)(b) draft Regulation.

⁸⁷ Article 9(6) draft Regulation (emphasis added).

⁸⁸ Article 11(1a) draft Regulation (emphasis added).

The choice of allowing a derogation from the national link preserves the independence of the Office but risks undermining its efficiency: in the simplest scenario, investigations carried out in member state A will be supervised by a European Prosecutor coming from member state B, under the direction of a Chamber composed of prosecutors of member states C, D and E. Supervision will be carried out by persons who are not experts of the legal system where the investigations – and in principle the trial – take place, and who realistically do not even speak the language of the proceedings (at least in the majority of cases).

The complex internal hierarchy of the EPPO is coupled with the **external independence** of the Office, enshrined in Article 6 of the draft Regulation. As a consequence, the members of the EPPO should not take instructions from persons external to the Office itself, from EU bodies or from member states.⁸⁹ The EPPO shall be accountable to the *Council*, the *Commission* and the *European Parliament*, which have therefore the power to apply to the Court of Justice with a view to the removal of the European Chief Prosecutor and of the European Prosecutors under certain circumstances.⁹⁰ The EPPO shall also transmit to each of these institutions, as well as to the national parliaments, an annual report.⁹¹ The experience of Eurojust shows that such a report is an instrument with *very limited practical relevance*, since “the work and performance of Eurojust only formally reaches the political levels of the Council and *substantive evaluation or political debate on this topic is not held*”.⁹² In addition, the European Chief Prosecutor shall appear once a year before the European Parliament and before the Council, and before national parliaments at their request, to give an account of the general activities of the EPPO.⁹³

Therefore, notwithstanding the relevant embedding of the EPPO in national systems, its accountability has been lifted at the European level. Such a decision, as well as that on the independence of the Office, has raised concerns in those countries where the prosecution authorities are hierarchically subordinate to the Ministry of Justice, which is in turn accountable for their activities (such as in the Netherlands).⁹⁴ Nevertheless, the need for an independent EPPO has been voiced by many authors and supported by the European Parliament,⁹⁵ not least because the independence of the Office – especially from national authorities – could lead

⁸⁹ Article 6(1) draft Regulation.

⁹⁰ Respectively, Articles 13(4) and 14(5) draft Regulation.

⁹¹ See Article 6a(1) draft Regulation.

⁹² Jeney (2012), p. 40 (emphasis added). The author explains that the conclusions adopted by the Council on Eurojust’s annual report are actually adopted without discussion at the political level, since the draft is discussed in the working parties COPEN and CATS and then agreed by the COREPER II as an A item, i.e. without deliberation (ibid., p. 39).

⁹³ Article 6a(2) draft Regulation.

⁹⁴ The strongly critical Dutch position on the matter has been summed up as it follows: “There should be accountability at the Member State level for the actions and results of investigation, prosecution, and sentencing of criminal activities. It is considered unacceptable that democratic control over the EPPO is foreseen in an annual report that only will be presented to the European Parliament, whereas the actual investigation and prosecution would take place in the Member States” (Van der Hulst, 2016, p. 100; see also Geelhoed, 2016, pp. 94ff.).

⁹⁵ See, among the many, Espina Ramos (2011), p. 42; Lohse (2015), p. 169. For further considerations on the independence of the EPPO see Symeonidou-Kastanidou (2015), pp. 255-278.

solving problems related to the low priority that PIF offences usually have among the national public prosecutor's offices.⁹⁶

Moreover, it is interesting to note that **the role of national parliaments with regard to the accountability of the EPPO is much less relevant than that envisaged in the current Regulation on Europol**, whose Article 51 deals with the so-called 'Joint Parliamentary scrutiny'. Pursuant to the latter provision, the scrutiny on the activities of the agency shall be carried out by the Joint Parliamentary Scrutiny Group (JPSG), established together by the national parliaments and the competent committee of the European Parliament. Debates on how the JPSG shall function and work are ongoing at the time of writing.⁹⁷ In line with the advocated independence of the EPPO, it is not surprising that a similar regime of accountability has not been replicated in the draft Regulation. On the contrary, the role of national parliaments is limited to receiving the annual report of the Office and to requesting the European Chief Prosecutor to appear before them to give an account of the general activities of the EPPO.

A similar difference between the Office and Europol was already provided for by the Treaty of Lisbon, which regulates in a different way the regimes of accountability for the EPPO on the one hand, and for Eurojust and Europol on the other. Whereas Article 86 TFEU is silent on the issue, Articles 85 (on Eurojust) and 88 (on Europol) TFEU provide that the regulations concerning these agencies shall lay down the procedures for the evaluation and scrutiny of their activities by the European Parliament and the national parliaments.

7. Investigations

The following bullet points intend to summarise the most relevant steps of the investigations of the EPPO.

1. **Initiation of the investigation and choice of the competent member state.** The decision to initiate the investigation is adopted – without undue delay⁹⁸ – by the **European Delegated Prosecutor**; however, in case of inactivity of the EDP, the competent **Permanent Chamber** instructs the EDP to initiate the investigation.⁹⁹ The competent EDP is the one from the member state where “the *focus of the criminal activity* is or, if several connected offences within the competences of the Office have been committed, the Member State where the *bulk of the offences* has been committed”.¹⁰⁰
 - 1a. **Right of evocation.** When the investigation has already been initiated by national authorities in a member state, the EDP from that member state can evoke the case;

⁹⁶ Bachmaier Winter (2015), pp. 128-129.

⁹⁷ See more in the Draft Proposal of Troika Working Group on Europol Joint Parliamentary Scrutiny Group for the LIBE Inter-Parliamentary Committee Meeting, 28 November 2016, available at www.epgencms.europarl.europa.eu/cmsdata/upload/05eb6a1b-2a40-40bf-9e76-7fdb9a71c35d/Troika_Working_Group_Proposal_for_LIBE_ICM.pdf.

⁹⁸ Article 5(5) draft Regulation.

⁹⁹ Article 22(3) draft Regulation.

¹⁰⁰ Article 22(4) draft Regulation (emphasis added).

however, if the EDP does not consider it necessary to exercise the right of evocation, (s)he shall inform the **Permanent Chamber**, which can instruct the EDP to **evoke the case**.¹⁰¹

1b. **Reallocation of the case.** Until the end of the investigation, the **Permanent Chamber** can decide to allocate the case to the EDP of *another member state*, if this is in the general interest of justice, taking due account of the current state of the investigation; such a decision is to be taken “after consultation with the European Prosecutors and/or European Delegated Prosecutors concerned”¹⁰² and on the basis of the criteria listed in the draft Regulation.¹⁰³

The choice of the member state where the investigation has to be carried out is of fundamental importance both for the prosecution and for the defence: since the EPPO mostly relies on national law, the parties to the proceedings have the powers and the rights provided for by that system. In principle, **the ensuing trial shall take place in that same member state**.¹⁰⁴ Nevertheless, such a choice is **not subject to any judicial review at the EU level**. In addition, the territorial competence of the EPPO is identified by means of **quite vague notions**, such as ‘focus of the activity’ and ‘bulk of the offences’, which do not sit squarely with the necessary legal certainty which should underpin the activities of the EPPO.

2. **Conducting the investigations.** Investigations are conducted by the **EDP** who is competent on the basis of the above-mentioned rules, **under the direction of the Permanent Chamber and the supervision of the competent European Prosecutor**. However, there are two exceptions to this rule:

- the case can be allocated to **another European Delegated Prosecutor in the same member state**, if the competent EDP cannot perform the investigations or does not follow the instructions of the Chamber or of the European Prosecutor;¹⁰⁵
- in the most serious cases, the **supervising European Prosecutor** can decide to conduct the investigations himself(herself).¹⁰⁶

The EDP can order the **investigative measures** which are available to prosecutors under national law in similar national cases.¹⁰⁷ In addition, member states shall ensure that the EDPs can request some investigative measures expressly listed in Article 25(1) of the draft Regulation (such as searching premises or intercepting electronic communications), at least in cases where the offence under investigation is punishable

¹⁰¹ Article 9(3a)(b) draft Regulation.

¹⁰² Article 22(5)(a) draft Regulation.

¹⁰³ See Article 22(4) and (5) draft Regulation.

¹⁰⁴ See Article 30(2) draft Regulation.

¹⁰⁵ Article 23(3) draft Regulation.

¹⁰⁶ Article 23(4) draft Regulation. This provision shall not apply in those cases where a derogation from the national link has been authorised pursuant to Article 11(1a) draft Regulation, i.e. when the supervising Prosecutor and the EDP are from different member states (see above, section 6).

¹⁰⁷ Article 25(2) draft Regulation.

by a maximum penalty of at least four years of imprisonment.¹⁰⁸ The procedures and the modalities for taking the measures shall be governed by national law, but the draft Regulation introduces further requirements, since all the measures may be ordered only where “there are reasonable grounds to believe that the specific measure in question might provide information or evidence useful to the investigation, and where there is no less intrusive measure available which could achieve the same objective”.¹⁰⁹ In any case, **the costs of the measures to be adopted have to be paid by national authorities**, unless an exceptionally costly investigative measure is necessary. In similar circumstances, the European Delegated Prosecutors may consult the Permanent Chamber on whether the cost of the investigative measure could **partly** be met by the EPPO.¹¹⁰

3. **Cross-border investigations.** In cross-border cases, the general rule is that the EDP handling the case (HEDP) **assigns the execution of an investigative measure** to the EDP of the member state in which the measure needs to be executed (the ‘assisting EDP’). In some circumstances (such as when the assignment is incomplete or when the requested measure does not exist under national law), the assisting EDP has to inform his supervising European prosecutor and the EDP handling the case in order to solve the problem bilaterally. If they cannot agree, **the Permanent Chamber is called in to decide whether and by when the assigned or another measure shall be undertaken by the assisting EDP.**¹¹¹
4. **Pre-trial arrest.** If the EDP has to arrest someone in his(her) member state, (s)he applies **national law**. If the person is located in another member state, the EDP shall issue a **European Arrest Warrant (EAW).**¹¹²

The distribution of tasks during the investigations of the EPPO is represented by the following table.¹¹³

¹⁰⁸ Article 25(1) draft Regulation.

¹⁰⁹ Article 25(3) draft Regulation.

¹¹⁰ Article 49(5a) draft Regulation.

¹¹¹ Article 26 draft Regulation.

¹¹² Article 28 draft Regulation.

¹¹³ The table also includes a reference to the procedures for lifting privileges or immunities, provided for by Article 24 draft Regulation. Since the matter is quite sensitive, this is the only moment in which the European Chief Prosecutor intervenes during the investigations.

Figure 2. Investigations of the EPPO

INVESTIGATIONS	European Delegated Prosecutor (EDP)	European Prosecutor (EP)	Permanent Chamber	European Chief Prosecutor (ECP)
Initiation of the investigations	X in accordance with the applicable national law if the investigation is not initiated		X →	
Reallocation of the case (another EDP in the same or another member state)			X (after consultation with EPs and/or EDPs)	
Right of evocation	X if the case is not evoked		X →	
Conduction of the investigations	X in accordance with national law and the Regulation	X (in exceptional cases)	→	
Cross-border investigations	X (measures are assigned to the assisting EDP) in accordance with national law If conflicts arise		X (decision to be taken in accordance with national law and the Regulation)	
Request to lift privileges or immunities				X in accordance with procedures laid down by national law or Union law (according to the source of the immunities/privileges)
Request to arrest or cross-border surrender	X in accordance with national law (including laws implementing the EAW Framework Decision)			

Source: The author.

The table confirms that the EDPs will be the kingpins of the investigations of the EPPO, which will be mostly carried out pursuant to national law. The intervention of the Permanent Chambers is mainly limited to ‘crisis situations’: if the EDP has not decided to do so, they instruct him(her) to initiate the investigations or to evoke the case; if the EDP does not follow the instructions of the central Office, they can reallocate the case; if there is not an agreement on the measures to be adopted in cross-border cases, they decide on the issue. Such a scenario is problematic. Because of the lack of a corpus of European procedural rules and of the – almost entirely – national regulation of the investigations of the EPPO, once the EDP has decided (not) to do something, why should his(her) decision be overturned by the Permanent Chamber? For instance, in the case where the EDP decides not to open an investigation “in accordance with

the applicable national law” (Article 22(1), draft Regulation), how could the Permanent Chamber – which is composed by prosecutors from other member states – instruct the EDP to initiate it? The investigation should be launched in accordance with that same national law which led the EDP not to open that investigation. Further complications could occur if the supervising EP shares the view of the EDP handling the case and not that of the Permanent Chamber.

In other words, disjointing the level of regulation of the activities of the EPPO (mainly national law) and the level on which decisions are taken (Permanent Chambers) could lead to a complex catch-22. It is true that the main goal of the EPPO is to guarantee homogenous and effective investigations and prosecutions against PIF offences all over Europe, but can this goal be truly reached if the nuts and bolts of the procedure remain national and only limited moments – namely the decisional ones – are in the hands of the central level of the Office? Is it acceptable to upgrade on the European plane just the power to take relevant decisions, when the grounds, requirements and procedures for those decisions are established mainly by national law?

The current regulation of the proceedings of the EPPO becomes even less tenable in light of a further element, namely the choice to give up on the concept of ‘single legal area’. In the Commission’s proposal it was stated that the territory of the EU member states has to be considered a “single legal area”¹¹⁴ for the purposes of EPPO investigations and prosecutions. This concept was already put forward in the *Corpus Juris* and in the so-called ‘Model Rules’.¹¹⁵ The consequence of a single legal area is that the EPPO should work as a unique prosecution authority throughout the EU and that it should be able to give orders and directions to the members of its Office without the need to resort to the instruments of mutual recognition.¹¹⁶ The concept of a single legal area is precisely meant to leave behind the dynamics of mutual recognition, which are on the contrary central in the current system of judicial cooperation at the EU level.

As a consequence of the ‘single legal area’ and with regard to cross-border investigations, the Commission’s proposal provided that the European Delegated Prosecutor who conducts the investigations has to “act in close consultation”¹¹⁷ with the EDP of the other member state where an investigative measure has to be carried out. Thus a close consultation between the EDPs should have been sufficient to lead to the adoption of investigative measures in different member states, as it should be normal in the frame of a single office working in a single legal area. As far as the pre-trial arrest is concerned, it was likewise stated that the EPPO “may request from the competent judicial authority the arrest or pre-trial detention of the suspected

¹¹⁴ Article 25(1) Commission’s proposal.

¹¹⁵ In the framework of a project conducted at the University of Luxembourg, a group of experts published a corpus of 67 detailed rules for the future functioning of the EPPO, the so-called ‘Model Rules for the procedure of the EPPO’ (‘Model Rules’). See more at www.eppo-project.eu/. On the ‘single legal area’, see Article 18(1) *Corpus Juris 2000* and Rule 2 of the Model Rules.

¹¹⁶ Kostoris (2013), pp. 392-393.

¹¹⁷ Article 18(2) Commission’s proposal.

person in accordance with national law”.¹¹⁸ The order to arrest, therefore, would have come from the EPPO, even though national law would have applied as usual.

However, as seen above, both cross-border investigations and pre-trial arrest in the framework of EPPO activities are now regulated in a completely different way, namely one which replicates to a large extent the rationale of the existing mutual recognition instruments. This is self-evident in the case of pre-trial arrest, where the use of the EAW is expressly envisaged.

The rules on cross-border investigations are more complicated. The matter could have been regulated by a reference to the recent Directive on the European Investigation Order (EIO). The EIO is a judicial decision issued by national judicial authorities of a member state (‘issuing authority’) to have one or more specific investigative measure(s) carried out in another member state, with the aim to obtain evidence. As with the EAW, in practical terms the EIO is a form to be completed by a national competent authority who will send it to the executing state where the needed evidence can be found. The executing authority shall recognise an EIO without any further formality being required.

During the negotiations, “an alignment of the EPPO provision with those of the EIO was...rejected in favour of a *sui generis* regime for the EPPO. Relying on mutual recognition was rightly considered as completely deviating from the idea that the EPPO is a single European body acting across EU MSs”.¹¹⁹ However, looking at the rules of the draft Regulation concerning cross-border investigations, the logic of mutual recognition does not seem to have been completely left behind.

For example, the EIO Directive provides for the possibility of the executing authority to have recourse to an investigative measure other than that requested by the issuing authority, “where the investigative measure selected by the executing authority would achieve the same result by less intrusive means than the investigative measure indicated in the EIO”.¹²⁰ Something similar is to be found in the draft EPPO Regulation. When the assisting EDP considers that “an alternative but less intrusive measure would achieve the same results as the measure assigned”,¹²¹ (s)he shall inform the supervising European Prosecutor and consult with the EDP handling the case. If the matter cannot be resolved bilaterally by the EDPs within seven working days, it is deferred to the Permanent Chamber, which shall decide “whether and by when the assigned measure needed, or a substitute measure, shall be undertaken by the assisting European Delegated Prosecutor”.¹²²

¹¹⁸ Article 26(7) Commission’s proposal.

¹¹⁹ Weyembergh and Brière (2016), pp. 31-32.

¹²⁰ Article 10(3) EIO Directive.

¹²¹ Article 26(5)(c) draft Regulation.

¹²² Article 26(7) draft Regulation.

Likewise, a similar procedure can be triggered in other cases mentioned in the draft Regulation.¹²³ It is true that Article 11 of the EIO Directive lists a number of grounds for non-recognition or non-execution of the EIO which are not provided in the draft EPPO Regulation. However, on the one hand, the procedure just mentioned – attempt to solve the case bilaterally and further possible deferral of the matter to the Permanent Chamber – suggests that there will be cases in which the assisting EDP basically refuses the prompt execution of the measure assigned by the EDP handling the case. Moreover, this procedure recalls that provided for by the EIO Directive in most of the cases where the executing authority intends not to execute the EIO.¹²⁴

On the other hand, as noted by Weyembergh & Brière, since the measure to be adopted in the member state of the assisting EDP could need a judicial authorisation (see immediately below), the “question thus remains 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*”.¹²⁵

As far as the judicial authorisation of the investigative measures is concerned, in fact, the EPPO Regulation does not provide for any simplification. If the authorisation is required in the assisting member state, it has to be duly obtained; if it is refused by the competent authority, the EDP handling the case shall withdraw the assignment. If the authorisation is not needed in the assisting state but is required in that of the EDP handling the case, it must be obtained as well and must be submitted together with the assignment.¹²⁶

The regulation of the EIO Directive does not look significantly different. Since the issuing authority may only issue an EIO when the investigative measure(s) indicated in the EIO could have been ordered under the same conditions in a similar domestic case,¹²⁷ it is to be argued that if a judicial authorisation would be needed in similar national cases it shall be likewise necessary for the measure requested with the EIO. Once the executing authority receives the EIO, unless there are grounds for non-recognition or non-execution, the EIO shall be executed without any further formality being required. This should imply that no judicial authorisation would be necessary in the executing member state, even though the text of the EIO Directive is somehow ambiguous when it defines the notion of ‘executing authority’: this term refers to “an authority having competence to recognise an EIO and ensure its execution in accordance

¹²³ Apart from that already mentioned, the other cases where the procedure recalled in the text is triggered occur when “the assisting European Delegated Prosecutor considers that: (a) the assignment is incomplete or contains a manifest relevant error; (b) the measure cannot be undertaken within the time limit set out in the assignment for justified and objective reasons; [...] or (d) the assigned measure does not exist or would not be available in a similar domestic case under the law of his or her Member State” (Article 26(5) draft Regulation).

¹²⁴ “In the cases referred to in points (a), (b), (d), (e) and (f) of paragraph 1 [i.e. the paragraph listing all the ground for non-execution or non-recognition of the EIO] before deciding not to recognise or not to execute an EIO, either in whole or in part the executing authority *shall consult the issuing authority*, by any appropriate means, and shall, where appropriate, request the issuing authority to supply any necessary information without delay” (Article 11(4) EIO Directive, emphasis added).

¹²⁵ Weyembergh and Brière (2016), p. 32 (emphasis added).

¹²⁶ Article 26(3) draft Regulation.

¹²⁷ Article 6(1)(b) EIO Directive.

with [the EIO] Directive and the procedures applicable in a similar domestic case. *Such procedures may require a court authorisation in the executing State where provided by its national law*".¹²⁸

The main similarities between the EIO Directive and the rules on cross-border investigations in the current draft Regulation are represented in the table below, where the provision of the Commission's proposal is also included.

Figure 3. Cross-border investigations in the framework of the EPPO vs. EIO Directive

Commission's proposal		EPPO draft Regulation (HEDP/assisting EDP)	EIO Directive (issuing authority/executing authority)
Where investigation measures need to be executed in a MS other than the one where the investigation was initiated, the EDP who initiated it shall act in close consultation with the EDP where the investigation measure needs to be carried out. That EDP shall either undertake the investigation measures himself/herself or instruct the competent national authorities to execute them. In cross-border cases the European Public Prosecutor may associate several EDPs with the investigation and set up joint teams. He/she may instruct any EDP to collect relevant information or undertake specific investigation measures on his/her behalf (Art. 18 (2) and (3)).	Measure in another MS	HEDP <u>assigns the adoption of the measure</u> to the EDP of the other MS (Art. 26(1)).	The competent authority <u>issues an EIO</u> (Art. 1).
	Judicial authorisation	If required in the MS of the <u>assisting EDP</u> : <u>it shall be obtained</u> ; if refused, the assignment shall be withdrawn (Art. 26(3)). If not required in the MS of the assisting EDP, but required in the <u>MS of HEDP</u> : <u>it shall be obtained</u> and submitted with the assignment (Art. 26(3)).	If required in the MS of the <u>executing authority</u> : ambiguity. ¹ If required in the MS of the <u>issuing authority</u> : <u>it shall be obtained</u> .
	Recourse to a different type of investigative measure/ Refusal/ Postponement	When one of the circumstances mentioned in Art. 26(5) occurs, the <u>assisting EDP shall inform his supervising EP and consult with the HEDP</u> in order to resolve the matter bilaterally; e.g., this should happen when "an <i>alternative but less intrusive measure</i> would achieve the same results as the measure assigned" (Art. 26(5)(b)). If the matter is not resolved within 7 days, the Permanent Chamber decides (Art. 26(6)-(7)).	Art. 10 regulates the <u>recourse to a different type of investigative measure</u> , e.g. "where the investigative measure selected by the executing authority would achieve the same result by <i>less intrusive means</i> than the investigative measure indicated in the EIO" (Art. 10(3)). Art. 11 lists <u>grounds for non-recognition or non-execution of the EIO</u> ; in most of those cases, before deciding not to execute the EIO, the executing authority shall consult the issuing authority (Art. 11(4)).
	Formalities and procedures to be respected	Those of the HEDP, unless they are <u>contrary to the fundamental principles of law</u> of the MS of the assisting EDP (Art. 27).	Those indicated by the <u>issuing authority</u> , if they are <u>not contrary to the fundamental principles of law</u> of the executing MS (Art. 9(2)).

Note: **EDP**: European Delegated Prosecutor; **EIO**: European Investigation Order; **EP**: European Prosecutor; **executing authority**: the authority having competence to recognise an EIO and to ensure its execution in accordance with the EIO Directive and the procedures applicable in a similar domestic case; **HEDP**: European Delegated Prosecutor handling the case; **issuing authority**: a judge, a court, an investigating judge or a public prosecutor issuing the EIO; **MS**: member state.

¹ Article 9 of the EIO Directive provides that the executing authority shall recognise an EIO without any further formality being required, but Article 2(d) Directive defines the 'executing authority' as "an authority having competence to recognise an EIO and ensure its execution in accordance with [the EIO] Directive and the procedures applicable in a similar domestic case. Such procedures may require a court authorisation in the executing State where provided by its national law".

Source: The author.

In light of the foregoing, the current regulation of the EPPO's investigations does not seem to significantly depart from the current scenario of judicial cooperation at the EU level, and it is not

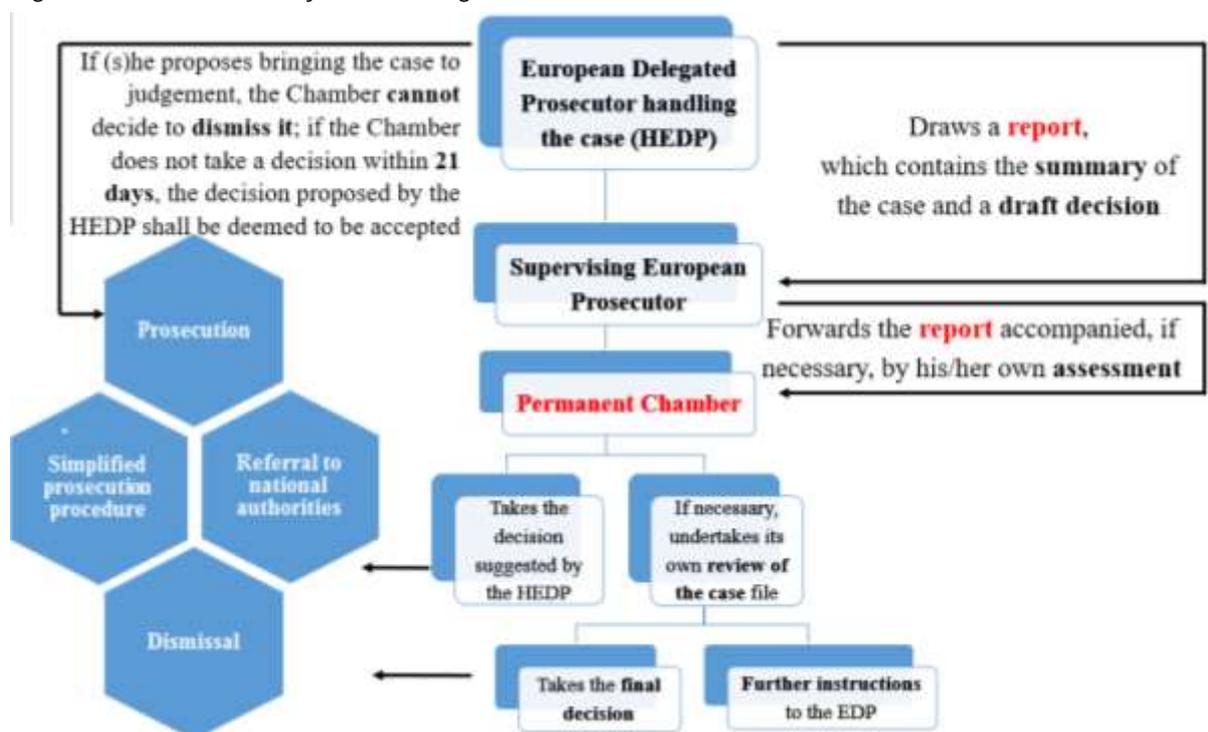
¹²⁸ Article 2(d) EIO Directive (emphasis added).

clear why the negotiations have not led to design “an EPPO specific mechanism”¹²⁹ for cross-border investigations and pre-trial arrest.

8. Prosecution

Once the investigations are over, the decision to prosecute or dismiss the case is taken with the procedure summarised below.

Figure 4. Termination of the investigation



Source: The author.

When the EDP handling the case considers the investigations complete, (s)he submits a **report** to the **supervising European Prosecutor**. The report contains both a summary of the case and a draft decision on what is deemed to be appropriate (dismiss a case or bring it to prosecution, etc.). Next, the supervising European Prosecutor has to **forward** these documents to the competent Permanent Chamber, if necessary accompanied by his(her) own **assessment**. In principle, the Chamber is not bound either by the draft decision of the HEDP or by the assessment of the supervising European Prosecutor, since it can undertake its own review of the case before taking a final decision or giving further instructions to the EDP.¹³⁰

The most recent versions of the draft Regulation have introduced some relevant changes in that regard. A **silent procedure** has been introduced: if the EDP suggests bringing a case to

¹²⁹ Weyembergh and Brière (2016), pp. 32-33.

¹³⁰ See Article 29(1) and (2) draft Regulation.

judgment and the Permanent Chamber does not take any decision within 21 days, the decision proposed by the EDP shall be deemed to have been accepted.¹³¹ However, **if the EDP is of the opinion that a prosecution shall be launched, the Permanent Chamber cannot decide to dismiss a case,**¹³² it can only “postpone it, e.g. by asking for further evidence”.¹³³

In principle, **the competent member state is that of the EDP handling the case.** However, the Permanent Chamber can decide that it is more appropriate for the prosecution to be launched in another member state, on the basis of the same criteria to be taken into account when identifying the EDP competent to carry out the investigations.¹³⁴ The issue of the **choice of forum** is one of the most debated, since at the EU level there are no binding rules on conflicts of jurisdiction. Already at the time of the *Corpus Juris*, Christine Van den Wyngaert suggested that this choice should have been revised by a European pre-trial chamber;¹³⁵ likewise, the Model Rules provide that the choice of forum may be subject to an appeal to be decided at the EU level.¹³⁶ However, the draft Regulation only states that **the competent forum is chosen by the Permanent Chamber, without any form of judicial control at the EU level,** notwithstanding the strong criticism of many authors and experts.¹³⁷

The decision of the Permanent Chamber could also lead to the **dismissal of the case,** namely in cases of: death or insanity of the suspect or accused person, amnesty or immunity granted to him(her) (unless the immunity has been lifted), winding up of the suspect or accused legal person, expiry of the national statutory limitation to prosecute, *ne bis in idem*, and lack of relevant evidence.¹³⁸ The Regulation makes clear that such a decision of the Chamber has to be adopted when the prosecution has become impossible “*pursuant to the law of the Member State*”¹³⁹ of the EDP handling the case. This implies that all the grounds for refusal have to be interpreted according to national law. When the death or the insanity of the suspect or accused person is brought to the fore, as well as the winding up of the suspect or accused legal person, it is obvious that the prosecution becomes impossible and that the Permanent Chamber has to dismiss the case; the differences among legal systems should not be relevant. On the contrary,

¹³¹ Article 30(1a) draft Regulation.

¹³² Article 30(1) draft Regulation.

¹³³ Proposal for a Regulation on the establishment of the European Public Prosecutor’s Office – Policy debate, Council doc. 15057/16, 5 December 2016, p. 4.

¹³⁴ Article 30(2) draft Regulation.

¹³⁵ Van den Wyngaert (2004), pp. 238-239.

¹³⁶ Rule 64 of the Model Rules.

¹³⁷ For similar views on the need of an EU scrutiny on the choice of forum see, among the many, Vervaele (2010), p. 192; Lohse (2015), p. 181; Meijers Committee (2016), pp. 1-2. Wasmeier argues that a scrutiny at the national level could be sufficient, if national courts can rely on “an appropriate ‘yardstick’”. This can only be a legal framework on Union level; without it, national courts will hardly be in the position to review a multilateral choice of forum” (Wasmeier, 2015, p. 154). As mentioned, for the time being there is no EU legislation setting out binding criteria to solve conflicts of jurisdiction.

¹³⁸ Article 33(1) draft Regulation.

¹³⁹ *Ibid.* (emphasis added).

in all the other circumstances, the lack of a homogenous substantive criminal law can be a serious obstacle for the effectiveness of the EPPO.

For example, the case has to be dismissed in case of “expiry of the national statutory limitation to prosecute”.¹⁴⁰ However, the regime of statutory limitation varies significantly among the member states, so that it could happen that the European prosecutions have to be dropped just because one of the member states regulates its limitation periods in an unsatisfactory way. **The issue is not merely speculative, as the recent *Taricco* case shows.**¹⁴¹ In this decision, the Court of Justice ruled that the at the time Italian regime on the statute of limitation of VAT frauds was “liable to have an adverse effect on the fulfilment of the Member States’ obligations under Article 325(1) and (2) TFEU if that national rule prevents the imposition of effective and dissuasive penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union, or provides for longer limitation periods in respect of cases of fraud affecting the financial interests of the Member State concerned than in respect of those affecting the financial interests of the European Union”.¹⁴² This judgment shows how pressing can be the need of a common substantive criminal law regime for the EPPO, including a common regulation of the statutes of limitation.

Finally, apart from the referral of the case to the national authorities when the crime does not fall within the competence of the EPPO or when the case is minor,¹⁴³ the Chamber can also decide to apply a **simplified prosecution procedure**, upon proposal of the HEDP.¹⁴⁴ The Commission’s proposal regulated the transaction between the EPPO and the defendant,¹⁴⁵ whereas the current text does not set out a common procedure at the EU level and it refers to the applicable national law: therefore, the simplified procedures are allowed only if they already feature in domestic criminal justice systems. To sum up, the distribution of tasks in the phase following the investigations can be represented as follows:¹⁴⁶

¹⁴⁰ Article 33(1)(d) draft Regulation.

¹⁴¹ Case C-105/14, *Taricco and others*, 8 September 2015. On this judgment see, among others, Billis (2016), pp. 20-38; Caianiello (2016), pp. 1-17; Giuffrida (2016), pp. 100-112. The *Taricco* case triggered the reopening of the negotiations on the possible inclusion of VAT frauds in the scope of the PIF Directive (see section 5).

¹⁴² Case C-105/14, *Taricco and others*, cit., para. 58.

¹⁴³ See Article 28a draft Regulation.

¹⁴⁴ Article 34 draft Regulation.

¹⁴⁵ Article 29 Commission’s proposal.

¹⁴⁶ The table also includes acts that have not been discussed in text, such as the reopening of the investigations (Article 33(2) draft Regulation) and the appeal against judgments of national courts (Article 30(6) draft Regulation).

Figure 5. Prosecutions of the EPPO.

PROSECUTIONS	European Delegated Prosecutor (EDP)	European Prosecutor (EP)	Permanent Chamber (PC)	European Chief Prosecutor (ECP)
Decision to prosecute	report →	(if present) assessment →	X (it cannot dismiss the case, if the EDP proposes bringing a case to judgment, if within 21 days it does not decide, the decision of the EDP is deemed to be accepted)	
Choice of forum			X in accordance with the criteria listed in the Regulation	
Dismissal of the case	report →	(if present) assessment →	X in accordance with the law of the handling EDP, on account of the grounds listed in the Regulation	
Reopen the investigations on the basis of new facts			X	
Simplified prosecution procedures	proposal → in accordance with the conditions provided in national law	(if present) assessment →	X taking into account the grounds listed in the Regulation	
Referral to national authorities (minor cases, no competence, etc.)			X in the circumstances provided in the Regulation	
Appeal against judgment of national courts	report → or X (without prior instructions of the PC, if deadlines are tight); after lodging the appeal, (s)he submit the report		X instructs the EDP to maintain or withdraw the appeal	

Source: The author.

The difference between the table above and the one concerning the investigative phase is straightforward. Once the investigations are closed, **the key decisions of the proceedings are all taken by the Permanent Chambers**, with the relevant exception of the decision to bring a case to judgment, which the Chamber cannot but rubber-stamp.

Therefore, the true ‘European moment’ of the activities of the EPPO is the one in between the investigations, mostly regulated by national law, and the trial, entirely regulated by national law. Since this ‘European moment’ is strongly constrained by domestic laws and regulated at the EU level only by a handful of rules, one can wonder whether the Permanent Chambers will actually be able to impose their views on the EDP handling the case or whether they will (or should) follow the decisions and suggestions of the latter, who is much more acquainted with the national system in which the investigations and the trial take place.¹⁴⁷

If the Permanent Chambers will not be able to contradict the EDPs, then the whole sense of establishing the EPPO is difficult to grasp. On the other hand, if they do prevail on contrary

¹⁴⁷ As mentioned, the last version of the draft Regulation has partially faced this problem with regard to the decision to bring a case to judgment by significantly reducing the discretion of the Permanent Chambers.

decisions of the EDPs, their victory risks being a pyrrhic one, since the proceedings shall follow domestic rules and the Chambers would have little to say on that. In addition, it is true that they can reallocate the case to another EDP of the same member state when the EDP handling the case fails to follow the instructions of the Chamber,¹⁴⁸ but it is also true that if the decision of the EDP is justified on grounds of law it is questionable whether the change of the EDP will actually lead to the adoption of a different decision. The gap between the level where the decisions are made (EU level/Permanent Chamber) and the level where actions have to be taken (national level/EDPs) could lead – once more – to very problematic situations, or even paralyse the body.

Finally, in the framework of the rules on prosecution, the rule on **evidence** needs to be mentioned. Article 31 of the draft Regulation is quite synthetic. On the one hand, as with the Commission's proposal, it confirms that **the Regulation does not prevent trial courts from freely assessing the evidence presented by the EPPO or by the defendant**. On the other hand, it introduces a 'negative rule' on the admission of evidence, stating that evidence presented by the EPPO or the defendant "shall not be denied admission on the mere ground that the evidence was gathered in another Member State or in accordance with the law of another Member State".¹⁴⁹ In other words, national rules will apply with the only limitation that evidence cannot be excluded just because of its foreign provenance. In light of the currently envisaged functioning of the EPPO and of the lack of any homogenous EU corpus of rules concerning evidence, such a provision seems reasonable, apart from the usual caveat that a system which mostly replicates the current one does not seem to have a blatant added value.

Certainly, this provision looks less contentious than the previous version of Article 31, which added that "[w]here the law of the Member State of the trial Court requires that the latter examines the admissibility of evidence, it shall ensure it is satisfied that its admission would not be incompatible with Member States obligations to respect the fairness of the procedure, the rights of defence, or other rights as enshrined in the Charter, in accordance with Article 6 TEU".¹⁵⁰ A similar provision seemed to suggest that such scrutiny of national authorities had to be carried out only *if* national law requires a check on the admissibility of evidence and on the basis of excessively vague concepts ('fairness of the procedure', 'rights of defence', etc.). Risks of "legal uncertainty"¹⁵¹ were evident. The current regulation of the matter does not guarantee that the circulation of evidence in the framework of the activities of the EPPO will be straightforward and unproblematic, but at least it does not place any further – admittedly obscure – obligation on national authorities.

¹⁴⁸ Article 23(3) draft Regulation.

¹⁴⁹ Article 31(1) draft Regulation.

¹⁵⁰ Article 31(1) draft Regulation in the version of 12 October 2016 (Proposal for a Regulation on the establishment of the European Public Prosecutor's Office – Completed text, Council doc. 12774/2/16, 12 October 2016).

¹⁵¹ Helenius (2015), p. 201.

9. Procedural safeguards

Under the title ‘procedural safeguards’, the draft Regulation contains rules concerning two extremely debated issues, namely the protection of the rights of the suspects and accused persons and the judicial review of the acts of the EPPO.

9.1 Rights of the suspects and accused persons

As far as the rights of the defendant are concerned, Article 35 of the draft Regulation provides three different levels of protection.¹⁵² First, suspects and accused persons shall have the procedural rights available to them under the **applicable national law**, including the possibility to present evidence, to request the appointment of experts or expert examination and hearing of witnesses, and to request the EPPO to obtain such measures on behalf of the defence.¹⁵³ Such a regulation of defence rights on the basis of domestic law is in line with the hybrid nature of the EPPO. As argued by Maria Kaiafa-Gbandi, however, if such a complementarity of domestic law can be “practically favorable for rights”, the envisaged system “may become extremely dysfunctional and ineffective for individuals concerned, due to its high complexity brought forth not only by the combination of EU and national law, but also by the *multitude of applicable national provisions*. Moreover, it does not ensure legal certainty or foreseeability for suspects and defendants in order to enable effective defense patterns, neither does it avert the risk of patchwork proceedings that allow the subsistence of different levels of protection within the same criminal procedure, even when it refers to the same right...”¹⁵⁴

In order to temper similar consequences, the draft Regulation provides for two further levels of protection – on the EU plane – of the rights of the persons involved in the proceedings of the EPPO. First, the activities of the Office shall be carried out “in full compliance with the rights of suspects and accused persons enshrined in the *Charter of Fundamental Rights* of the European Union, including the right to a fair trial and the rights of defence”.¹⁵⁵ Among others, the right to *ne bis in idem* deserves particular attention, since the establishment of the EPPO could pose risks of double prosecution both at the national and at the supranational level. Therefore, the draft Regulation provides that if the EPPO “decides to exercise its competence, the competent national authorities shall not exercise their own competence in respect of the same criminal conduct”.¹⁵⁶ Likewise, the draft Regulation also prohibits OLAF to “open any parallel administrative investigation into the same facts”¹⁵⁷ where the EPPO decides to open a case.

¹⁵² For further considerations on EPPO and human rights see also Mitsilegas and Giuffrida (2017forthcoming).

¹⁵³ Article 35(3) draft Regulation. The possibility to present evidence and to request the appointment of experts or hearing of witness was provided for in the Commission’s proposal but it was subsequently removed from the text. It has been introduced again in the last version of the draft Regulation currently available.

¹⁵⁴ Kaiafa-Gbandi (2015), pp. 245-246 (emphasis added).

¹⁵⁵ Article 35(1) draft Regulation (emphasis added).

¹⁵⁶ Article 20(1) draft Regulation.

¹⁵⁷ Article 57a(2) draft Regulation.

Apart from the Charter, the draft Regulation refers to the **Directives on the rights of the individuals** in criminal proceedings recently adopted by the European Parliament and the Council pursuant to Article 82(2) TFEU, namely those concerning: the right to interpretation and translation;¹⁵⁸ the right to information and access to the case materials;¹⁵⁹ the right to access to a lawyer and the right to communicate with and have third persons informed in case of detention;¹⁶⁰ the right to remain silent and to be presumed innocent;¹⁶¹ and the right to legal aid.¹⁶²

On the one hand, some provisions of these Directives could have **direct effect**, should they not be implemented correctly or on time by the member states. This could reduce the imbalance between the direct applicability of EU law as far as the prosecution side is concerned and the absence of a directly applicable EU legislation on defence rights. On the other hand, however, the regulation of procedural safeguards of the suspects and accused persons seems unsatisfactory. Most of the provisions of the Directives represent a compromise among the member states. Therefore, the content of the rights provided therein is often quite broad and vague, with the consequence that the impact of those instruments on the national legal systems risks to be all in all quite limited; this means that “suspects and accused will continue to be subject to different standards depending on the applicable national law”.¹⁶³

For instance, the Directive on legal aid only introduces general and broad duties for the member states, such as that to “ensure that suspects and accused persons who lack sufficient resources to pay for the assistance of a lawyer have the right to legal aid when the interests of justice so require”.¹⁶⁴ Likewise, it is provided that the legal aid system should be of adequate quality.¹⁶⁵ In other words, member states still enjoy a relevant margin of discretion in the implementation of this Directive. Moreover, a relevant practical problem that the investigations of the EPPO will probably pose is that of the **costs of the defence**. If a person is required to

¹⁵⁸ Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, OJ L280, 26.10.2010.

¹⁵⁹ Directive 2012/13/EU on the right to information in criminal proceedings, OJ L142, 1.6.2012.

¹⁶⁰ Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L294, 6.11.2013. The right of access to a lawyer is also enshrined in Article 47 of the Charter (“Everyone shall have the possibility of being advised, defended and represented”).

¹⁶¹ 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 L65, 11.3.2016. Article 48(1) of the Charter expressly mentions the presumption of innocence (“Everyone who has been charged shall be presumed innocent until proved guilty according to law”).

¹⁶² Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, OJ L297, 4.11.2016. Pursuant to Article 47 of the Charter, “Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice”.

¹⁶³ Weyembergh and Brière (2016), p. 35.

¹⁶⁴ Article 4(1) Directive (EU) 2016/1919.

¹⁶⁵ Article 7 Directive (EU) 2016/1919.

exercise his(her) right of defence with regard to investigations carried out in different countries, it can be easily understood the reason why this issue will raise several concerns and it seems unlikely that an adequate solution can be found in the general provisions of the Directive on legal aid.¹⁶⁶

The choice of making the draft Regulation refer to the Charter, to the applicable national law, and to the Directives shows once more the will not to put forward any new EU regulation on the matter and to limit as much as possible the impact of the body on national systems.

9.2 Judicial review

The issue of the rights of the suspects and accused persons is strictly interlinked with that of the judicial review of the acts of the EPPO. In that regard, the Commission's proposal provides that, for the purposes of judicial review, the EPPO has to be considered a national authority, with the consequence that only national courts would be competent to rule on its acts.¹⁶⁷ This provision ignited a lively debate, since many authors, experts and politicians argued that a European body should have been submitted to the control of the European Court of Justice.

A balance has been found in the Council. The current draft Regulation, such as the Commission's proposal, provides that decisions of the EPPO having legal effects *vis-à-vis* third parties shall be subject to the review of **competent national courts**.¹⁶⁸ The same applies to the failure of the EPPO to adopt a procedural act – having the same effect *vis-à-vis* third parties – which the EPPO is required to adopt on the basis of the Regulation.¹⁶⁹

However, **the Court of Justice has been made competent to rule on the decisions of the EPPO to dismiss the case**. If such decisions are based on the grounds provided by Union law, they are subject to procedures provided for by the **fourth paragraph of Article 263 TFEU**, i.e. the provision that allows natural or legal persons to institute proceedings before the Court against an act addressed or which is of direct and individual concern to them. Second, the Court of Justice has been expressly recognised the power to give **preliminary rulings** concerning: i) the validity of procedural acts of the EPPO, “insofar as such a question of validity is raised before any court or tribunal of a Member State directly on the basis of Union law”;¹⁷⁰ ii) “the interpretation or the validity of provisions of Union law”,¹⁷¹ including the Regulation; and iii)

¹⁶⁶ On the practical problems linked with the expectedly high costs of the defence in the frame of the activities of the EPPO, see Council of Bars and Law Societies of Europe (2013), p. 6; European Criminal Bar Association (2013), pp. 195-196.

¹⁶⁷ Article 36 Commission's proposal.

¹⁶⁸ Article 36(1) draft Regulation.

¹⁶⁹ *Ibid.*

¹⁷⁰ Article 36(2)(a) draft Regulation.

¹⁷¹ Article 36(2)(b) draft Regulation.

the interpretation of the Articles of the Regulation which delimit the material competence of the EPPO.¹⁷²

Even though the draft Regulation takes the Commission's proposal a step further toward EU scrutiny of the decisions and acts of the EPPO, a closer look shows that this development is all in all quite limited.

In fact, the competence of the Court of Justice to give preliminary rulings on the interpretation or validity of the Regulation, including its Articles on the material competence of the EPPO, was already uncontested on the basis of EU law. Since the Regulation will be an act of the Council, the competence of the Court of Justice to rule on its interpretation or validity comes from Article 267(1)(b) TFEU, rather than from the provisions of the EPPO Regulation. The preliminary ruling on the validity of the procedural acts of the EPPO, however, was not provided for by the original proposal. Such a competence of the Court of Justice comes into consideration only when the question of validity is raised "on the basis of Union law". Therefore, this seems to imply that, for instance, a procedural act of the EPPO can be subject to a preliminary reference when a national tribunal has reason to believe that this act violates general principles of EU law, fundamental rights, the Treaties or even the Regulation itself.

Moreover, as mentioned, the Council has decided to raise at the EU level the scrutiny on the decisions of the EPPO to dismiss the case, "insofar as they are contested directly on the basis of Union law".¹⁷³ As discussed above, the Regulation lists some grounds to dismiss the case, and one could imagine that the judicial review of the decisions at stake could be triggered because the case has been closed on the basis of a ground which is not provided for by the Regulation or because this decision has been taken in breach of the procedures thereof.

The power of the Court of Justice to review the decisions to dismiss a case is consistent with the current envisaged structure of the EPPO: such a decision is taken at the EU level by the Permanent Chambers, so that it is reasonable to make it subject to the control of the Court of Luxembourg. For the very same reason, however, one could wonder why the other decisions taken by the Permanent Chambers cannot be reviewed at the EU level. A tentative (political) answer on the special consideration paid to the dismissal decisions could be linked with the mission of the EPPO: since the EPPO is meant to bridge over the current deficiencies of the fight against crimes affecting EU financial interests, the choice not to launch the prosecution has to be revised at the EU level in order to avoid that cases are unreasonably dropped.

¹⁷² Article 36(2)(c) draft Regulation. In addition to the cases discussed in the text, the Court of Justice is also competent in any dispute concerning: i) compensation for damage caused by the EPPO; ii) arbitration clauses contained in contracts concluded by the EPPO; and iii) staff-related matters (respectively, Article 36(4), (5), and (6) draft Regulation). The Court of Justice has jurisdiction on the dismissal of the European Chief Prosecutor and of European Prosecutors, too (Article 36(7) draft Regulation). Finally, pursuant to the fourth paragraph of Article 263 TFEU, the Court is competent to review the decisions of the EPPO which are not procedural acts, such as those dismissing the EDPs or concerning data protection (Article 36(8) draft Regulation).

¹⁷³ For further considerations on the judicial review of the EPPO's dismissal decisions see Gölher (2015), pp. 102-125.

In conclusion, **it is clear that the EU legislator is called on to strike a very delicate balance in the matter at stake**. On the one hand, the need to guarantee a uniform application of the EU rules concerning the European investigations would call for the scrutiny of the Court of Justice. It would be quite odd, under a constitutional point of view, to establish an EU body which is not under the control of the Court of Luxembourg. In that regard, the compromise found in the Council could still be considered unsatisfactory: pursuant to Articles 263 and 265 TFEU, the Court of Justice is empowered to review the legality of acts of EU bodies intended to produce legal effects *vis-à-vis* third parties and to rule on the failure to act of those bodies, so that the limitations to such a competence enshrined in the draft Regulation do not sit very well with these provisions.¹⁷⁴

On the other hand, however, the European review of *all* the acts of the EPPO could be less convenient for the parties (especially the private ones) to the proceedings, not least because of possibly higher costs and of serious risks of prolonging the procedures far beyond a reasonable time. Moreover, since the decisions of the Office are mostly based on domestic law, it does not seem unreasonable to allow national authorities to review the validity of the EPPO's acts and decisions.

In light of the foregoing, it is not surprising that the Parliament has submitted that “in order to ensure the effectiveness of judicial review in line with Article 47 of the Charter of Fundamental Rights of the European Union and with the Treaties, any operational decision affecting third parties taken by the EPPO should be subject to judicial review before a *competent national court*”.¹⁷⁵ Aware of the questionable legitimacy of an EU body which would not be accountable to the Court of Justice, the Parliament has also added that “judicial review by the European Court of Justice should be possible”.¹⁷⁶

10. Relations with the partners

Articles 56ff. of the draft Regulation deal with the relations of the EPPO with its partners. In line with the changes introduced by the Treaty of Lisbon, which has bestowed upon the Council the power of concluding international agreements, the EPPO is only entitled to conclude **working arrangements** with other EU bodies, third countries or international organisations.¹⁷⁷

Specifically, the EPPO is required to establish and maintain a **close relationship** with Europol, Eurojust and OLAF, even though the privileged partner of EPPO should be **Eurojust**. In an admittedly obscure way, Article 86 TFEU provides that the EPPO has to be established “from Eurojust”. According to the draft Regulation, the Office is a separate entity from Eurojust but the two bodies shall develop “operational, administrative and management links between

¹⁷⁴ Weyembergh and Brière (2016), p. 38.

¹⁷⁵ European Parliament, Resolution of 5 October 2016, cit., para. 5 (emphasis added).

¹⁷⁶ Ibid.

¹⁷⁷ See Article 56(2a) draft Regulation. A similar provision can be found in Article 23(4) Europol Regulation.

them”.¹⁷⁸ As far as operational matters are concerned, the EPPO can associate Eurojust with its activities concerning cross-border cases, for example by sharing information and personal data according to the provisions of the Regulation.¹⁷⁹ The Office shall also have indirect access to the case management system of Eurojust, so that the EPPO will only be empowered to know whether Eurojust is dealing or has dealt with the same case, but it will not be authorised to consult directly the files stored at Eurojust.¹⁸⁰ Finally, even though the two bodies are separate, they should have close relations, including in administrative matters, and the EPPO may “rely on the support and resources of the administration of Eurojust”.¹⁸¹

Article 86(2) TFEU also mentions **Europol**, stating that the EPPO shall carry out its activities “where appropriate in liaison with Europol...”. Therefore, when necessary, the EPPO shall resort to the analytical and strategic competences of this agency, as provided in Article 58 of the draft Regulation. Article 86 TFEU does not mention **OLAF**. However, the draft Regulation goes beyond the silence of the Treaties and deals with the relations between the latter and the EPPO. The Office shall have an indirect access to OLAF’s case management system (as it is with Eurojust)¹⁸² and OLAF can be requested by the Office to provide information, analyses, expertise and operational support, as well as to conduct administrative investigations or to facilitate coordination of specific actions of the competent national administrative authorities and EU bodies.¹⁸³

Unlike the original proposal, the current draft Regulation contains an Article concerning the relations with the **member states that will not be part of the EPPO**. This provision will play a relevant role for the everyday functioning of the Office, in light of the realistic establishment of the EPPO by means of enhanced cooperation and of the opt-out of Ireland, Denmark and the United Kingdom. On the basis of **working arrangements** to be concluded by the EPPO and non-participating member states, the latter could post liaison officers to the EPPO and the Office can designate contact points in the non-participating member states.¹⁸⁴ The same possibility on such an ‘exchange of personnel’ is provided in the Article concerning the relations of the EPPO with third countries and international organisations.¹⁸⁵ This regulation mirrors the

¹⁷⁸ Article 57(1) draft Regulation. The cooperation with Eurojust, as well as the need for the EPPO to rely on its support, is mentioned also in Article 3 draft Regulation.

¹⁷⁹ Article 57(2)(a) draft Regulation.

¹⁸⁰ “The European Public Prosecutor’s Office shall have indirect access on the basis of a hit/no-hit system to information in Eurojust’s case management system. Whenever a match is found between data entered into the case management system by the European Public Prosecutor’s Office and data held by Eurojust, the fact that there is a match will be communicated to both Eurojust and the European Public Prosecutor’s Office, as well as the Member State which provided the data to Eurojust” (Article 57(3) draft Regulation).

¹⁸¹ Article 57(5) draft Regulation.

¹⁸² Article 57a(5) draft Regulation is phrased in a very similar way to Article 57(3) (see above, footnote 181).

¹⁸³ Article 57a(3) draft Regulation. For further considerations on the relations of the EPPO with OLAF, Europol, and Eurojust see also Weyembergh, Armada and Brière (2014), pp. 43-56; Marletta (2016), pp. 143-144.

¹⁸⁴ Article 59a draft Regulation.

¹⁸⁵ Article 59(1) and (2) draft Regulation.

existing situation at Eurojust, where some third countries have posted liaison officers and which has contact points in more than 40 countries.¹⁸⁶

The relations with third countries and with non-participating member states pose a common problem: should the EPPO be regarded as a **competent authority** for the purposes of implementation of the instruments concerning judicial cooperation? In other words, **should the EPPO be allowed to issue and receive requests for mutual legal assistance or extradition?** With regard to relations with third countries, the Commission's proposal answered in the affirmative and introduced an obligation for the member states either to "recognise the European Public Prosecutor's Office as a competent authority for the purpose of the implementation of their international agreements on legal assistance in criminal matters and extradition, or, where necessary, [to] alter those international agreements to ensure that the European Public Prosecutor's Office can exercise its functions on the basis of such agreements..."¹⁸⁷ The current draft Regulation is more complicated and provides different scenarios.

First, with regard to **third countries**, any possibility for the EPPO to intervene in the field of **extradition** has been removed from the text. It is now provided that "[w]here it is necessary to request the extradition of a person the *European Delegated Prosecutor handling the case* may request the *competent authority of his/her Member State* to issue an extradition request in accordance with applicable treaties and/or national law".¹⁸⁸ Once more, the negotiations have watered down the original provisions and the forthcoming EPPO will not be attributed any additional or new power in the field. Quite curiously, this provision mirrors the new regulation of the pre-trial arrest during the investigations of the EPPO: as mentioned, if the person is in a different member state from that of the EDP handling the case, the latter will have to ask the surrender of the suspect by means of an EAW. **When the deprivation of liberty of a person is brought to the fore, therefore, the EPPO does not play any peculiar role but relies entirely on national systems and existing rules.** However, apart from extradition, the EPPO can be recognised as the competent authority in all the other matters of legal assistance with regard to third countries, according to the detailed rules to be found in the draft Regulation.¹⁸⁹

Second, as far as the **non-participating member states** are concerned, during the negotiations it was suggested that the member states establishing the EPPO could have recognised the Office as the competent authority for the purposes of implementation of the applicable Union acts on judicial cooperation in their relations with non-participating member states. However, the final version of the current draft Regulation does not feature this provision, even though

¹⁸⁶ <http://www.eurojust.europa.eu/about/Partners/Pages/third-states.aspx>.

¹⁸⁷ Article 59(4) Commission's proposal.

¹⁸⁸ Article 59(7) draft Regulation (emphasis added).

¹⁸⁹ See Article 59(3) and (4) draft Regulation. The matter is extremely sensitive, because it could also happen that third countries do not accept the EPPO as a competent authority. Therefore, the draft Regulation deems it appropriate to set out detailed rules concerning the EPPO's relations with third countries. See also the – admittedly long – recital no. 102a of the Preamble to the draft Regulation.

some states had suggested reintroducing it.¹⁹⁰ As noted by Weyembergh & Brière, 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”.¹⁹¹ In light of the political sensitiveness of the matter, it is not surprising that further indications on the relations of the EPPO with non-participating member states can be found in recital no. 102aa of the draft Regulation. It restates, first, that the Regulation shall not bind those states. Second, it adds that the Commission should, if appropriate, submit proposals in order to ensure effective judicial cooperation in criminal matters between the EPPO and the non-participating member states. This should in particular concern the rules relating to legal assistance in criminal matters and surrender, in full respect of the Union *acquis* and of the duty of **sincere cooperation**, enshrined in Article 4(3) TFEU.¹⁹²

Finally, the draft Regulation envisages a fundamental role for **Eurojust** in the coordination of the investigations of the EPPO when non-participating member states are involved: Eurojust can be invited to provide support in the transmission of the EPPO's decisions or requests for mutual legal assistance to, and execution in, those member states.¹⁹³

In conclusion, the current draft Regulation has paid more attention to the relations of the EPPO with the partners – especially the other EU bodies – than the Commission's proposal; however, it has reduced the innovations that the forthcoming Office could have brought in the existing panorama of EU criminal law.

11. Conclusion

This contribution has discussed some of the most contentious features of the forthcoming EPPO, as it is envisaged in the current draft Regulation. The establishment of this body was strenuously supported by the Commission and, after years of political and academic debate, a proposal for a Regulation was eventually issued in July 2013 (section 2). Nevertheless, **some doubts on the real need of the EPPO are still raised**, especially because of the lack of a clear picture of the phenomenon that the EPPO aims at tackling, i.e. crimes affecting the financial interests of the EU, and because the current scenario of EU criminal law seems now better equipped to fight against (cross-border) criminality than it was 20 years ago (section 3). For example, agencies aimed at enhancing the cooperation of judicial and police authorities of member states have been created (Eurojust and Europol), the powers of the European office

¹⁹⁰ See Article 59a(3) and footnote 82 to Article 59a in the version of the draft regulation of 12 October 2016 (Proposal for a Regulation on the establishment of the European Public Prosecutor's Office – Completed text, Council doc. 12774/2/16, 12 October 2016).

¹⁹¹ Weyembergh and Brière (2016), p. 47.

¹⁹² The non-participating member states will still have the duty to guarantee an adequate protection of the EU financial interests also pursuant to Article 325 TFEU (*ibid.*, p. 46).

¹⁹³ Article 57(2)(b) draft Regulation.

competent to carry out administrative investigations on fraud affecting the EU budget (OLAF) have been expanded, legal instruments laying down rules to streamline the procedures of extradition and of transmitting evidence from one country to another have been adopted, etc. **Rather than establishing a brand new body with an unclear added value, especially if the number of member states willing to set it up will be limited, it could be more appropriate to enhance the current instruments and bodies.**

In fact, it is already clear that, should the EPPO finally be created, **some member states will not take part in it**, at least at the initial stage. **Enhanced cooperation** is therefore the most realistic way to set up the Office (section 4). However, because the interest at stake is inherently European, **the participation of as many member states as possible is highly desirable**; in that regard, in the negotiations it has emerged that enhanced cooperation will hardly be launched if fewer than 20 member states support the EPPO.

The functioning of the EPPO will be characterised by a **high degree of interplay between EU law and national law**; the crux of the matter is self-evident: **the more national law is brought to the fore to regulate the functioning of the EPPO, the more the supra-national nature of the Office is watered down**, with the subsequent risk that the EPPO adds little value to the existing scenario of judicial cooperation.

The boundaries of the competence of the EPPO will be set out by national laws. Crimes affecting the EU budget will indeed be defined by national legislation, which will be harmonised to a limited extent by the forthcoming PIF Directive: **the enduring discrepancies among the national criminal justice systems can therefore represent an obstacle to the effectiveness of the activities of the EPPO**. After lengthy debates in the Council, it has been agreed that the Office shall be competent also with regard to **VAT fraud which is connected with the territory of two or more member states and involves a total damage of at least €10 million**. The threshold was believed to be too high by the Parliament and the Commission, but the agreed text will probably not be altered (section 5).

Moreover, **the current structure of the forthcoming body looks much more complex than it was in the Commission's proposal**. The Office shall in fact be organised at a **central level** and at a **decentralised level**. The latter consists of the **European Delegated Prosecutors (EDPs)**, at least two per each member state participating into the EPPO: they will be part of national prosecution services and, simultaneously, members of the EPPO. Therefore, when they carry out their activities beyond the sphere of PIF crimes, they continue to be national prosecutors for all intents and purposes, whereas when they wear the 'European hat' they have to follow instructions from the central Office.

The central Office is composed of the College, the European Chief Prosecutor, the Permanent Chambers and the European Prosecutors. Composed of one European Prosecutor per member state, the College does not have operational powers in individual cases and is the management body of the EPPO. The **Permanent Chambers shall direct the activities of the European Delegated Prosecutors**, who **carry out the investigations** and put in practice in their member state the decisions taken at the EU level by the Permanent Chambers. The activities of the European

Delegated Prosecutors shall also be **supervised by a European Prosecutor, in principle that from their same member state.**

The multiple layers provided in the draft Regulation sit very well with the will of the member states to preserve their sovereignty as much as possible on the one hand, but they run counter to the need of the EPPO to function in a smooth and efficient way on the other hand (section 6). Therefore, **the EPPO would benefit from a simplification of the currently envisaged structure.**

This work has shown that, **during the investigations, the EDPs carry out most of the necessary activities whereas the Permanent Chambers intervene mainly in 'crisis situations'**. For example, if the EDP does not follow the instructions of the central Office, they can reallocate the case; if there is not an agreement on the measures to be adopted in cross-border cases, they decide on the issue.

In addition, the role of the European Delegated Prosecutors is further enhanced in comparison with the Commission's proposal, since the concept of 'single legal area' has been removed from the text. According to the original text, the territory of the EU member states had to be considered a '**single legal area**' for the purposes of EPPO investigations and prosecutions. The consequence was that the EPPO could have functioned as a unique prosecution authority throughout the EU and that it should have been able to give orders and directions to the members of its Office without the need to resort to the instruments of mutual recognition. **In the current draft Regulation, the concept has been set aside** and the logic of mutual recognition will be called to play a relevant role in the frame of the EPPO's activities, even though the establishment of this body was meant to leave behind similar logic and to introduce a minimum degree of integration of the national criminal justice systems. Therefore, the legal fiction of the '**single legal area**' **shall be reintroduced in the draft Regulation, in order to guarantee that the EPPO can carry out its tasks swiftly and efficiently** (section 7).

This contribution has then highlighted that, **at the end of the EPPO investigations, all the relevant decisions shall be taken by the Permanent Chambers**, with the exception of that to bring a case to judgment; the latter decision is made by the European Delegated Prosecutor handling the case and the Chamber cannot but rubber-stamp it. If this is in line with the need to guarantee a European response to PIF offences, it has been shown that the gap between the level where the decisions are made (EU level/Permanent Chamber) and the level where actions have to be taken (national level/EDPs) could pose several problems and potentially paralyse the body (section 8).

The issue of procedural safeguards has subsequently been discussed. In addition to the application of the Charter of Fundamental Rights, the rights of the persons involved in the proceedings of the EPPO shall be protected by means of national laws, which include those provisions adopted for the implementation of the recent Directives on procedural rights. However, once more, the degree of harmonisation of these instruments is very limited and **the individuals will enjoy different protection according to the applicable national law** (section 9.1). Likewise, judicial review of the acts of the EPPO intended to produce legal effects *vis-à-vis* third parties shall be carried out by **national courts**, whereas **the scrutiny of the Court of Justice has**

been limited to the decisions of the Office to dismiss a case. The Court has been empowered to give preliminary rulings on the validity of procedural acts of the EPPO, in so far as such a question of validity is raised directly on the basis of Union law (section 9.2). However, **it would be necessary to extend the control of the Court of Justice at least on the choice – to be adopted by the Permanent Chamber – of the member state where the trial following the EPPO’s investigations will take place.**

Finally, the relations of the EPPO with its partners (EU bodies, third countries, international organisations and non-participating member states) will be regulated by **working arrangements** to be concluded by the Office. The privileged partner of the EPPO shall be **Eurojust** and the strong relations between the two bodies would have suggested that they shared the seat in The Hague. However, the likely non-participation of the Netherlands in the establishment of the Office makes this arrangement quite unrealistic (section 10).

In sum, the EPPO could represent an extremely important step forward in the path of an increasing integration and its establishment is underpinned by an obvious and praiseworthy reason, namely to better protect the EU budget and, consequently, taxpayers. However, in light of the current draft Regulation **the EPPO looks like a king without a kingdom: it can adopt relevant decisions without a common legal area where it can exercise its powers and without even relying on a homogenous, European corpus of rules.** Investigations and prosecutions will be regulated mainly by national laws and carried out by the European Delegated Prosecutors, whereas only the decisional and key moments have been lifted at the supranational level. The lack of EU-wide rules of substantive and procedural criminal law makes the activities of the EPPO dependent on – and constrained by – national laws more than it would be necessary for a body which aims to be a strong and efficient supranational Prosecutor’s Office.

Some suggestions have been put forward in this work and had already been voiced in academic and political fora. They could be endorsed by the member states which will show their commitment to the establishment of the Office in the enhanced cooperation. Should this not be the case, the words of the current Director-General of OLAF should be kept in mind: “Setting up an EPPO *only makes sense if this body can protect the interests of the EU better than the systems currently being used*, and if it, therefore, will benefit EU citizens”.¹⁹⁴ It is contentious that the Office – with the currently envisaged structure and powers – could significantly improve the fight against PIF offences. Should the enhanced cooperation lead to envisaging an EPPO which does not appear satisfactory and efficient, the alternative of strengthening the existing instruments and bodies rather than establishing a brand new body should be adequately taken into account.

¹⁹⁴ Kessler (2016), pp. 2-3 (emphasis added).

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