



## Raising the bar? Thoughts on the establishment of the European Public Prosecutor's Office

Valsamis Mitsilegas and Fabio Giuffrida

### Abstract

After almost four years of negotiation and 20 years of academic and political debate, the Council Regulation setting up the European Public Prosecutor's Office (EPPO) was approved in October 2017, in the framework of the enhanced cooperation established in April 2017. The creation of a European prosecuting authority is a historic achievement for the European Union, especially when a wave of populism – as epitomised by Brexit – has undermined the process of integration.

The EPPO Regulation is probably the most ambitious instrument of EU law adopted so far, since it creates the first EU body with direct powers regarding individuals in the field of criminal law. The Office will be empowered to investigate and prosecute crimes affecting the financial interests of the EU. Recent calls, including those from Commission President Juncker and French President Macron, for an extension of the EPPO's powers to cases of cross-border terrorism bode well for the likely acceptance of this Office in the EU in the years to come. Yet the final text of the Regulation raises several concerns, such as those relating to the impact of supranational investigations on human rights and, more generally, about the expected effectiveness of the Office, given its cumbersome and multi-layered architecture.

This paper looks at the main provisions of the Regulation and the challenges it poses, focusing on the structure, powers, and competence of the EPPO. It also considers the judicial review of its acts, the protection of the rights of suspects and accused persons, and relations between the Office and its partners. The analysis shows that the Commission's innovative vision of a centralised prosecution at EU level, with its echoes of federalism, has been watered down in negotiations in the Council and replaced with the usual intergovernmental, collegiate vision that underpins numerous EU judicial cooperation structures and instruments.



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#### 1. Introduction

After almost four years of negotiation and 20 years of academic and political debate, the Council Regulation setting up the European Public Prosecutor's Office (EPPO) was approved in October 2017, in the framework of the enhanced cooperation established in April 2017.<sup>1</sup> When the Commission tabled its proposal<sup>2</sup> for a Regulation on the EPPO in July 2013, it argued that offences affecting the Union's financial interests ('PIF offences')<sup>3</sup> significantly damaged the EU budget, yet neither member states nor EU bodies (namely Eurojust, Europol, OLAF) could tackle them in a satisfactory and efficient way. A European body competent to investigate and prosecute such illegal conducts was therefore deemed necessary.

*The EPPO will investigate and prosecute crimes affecting the financial interests of the EU.*

*It is the first EU body with direct powers vis-à-vis individuals in the field of criminal law.*

Since the very beginning, negotiations about this body have been difficult. A group of national parliaments first expressed the objection that the text did not comply with the principle of subsidiarity. The Commission was forced to review its proposal and decided to maintain it, confirming its views on the need to establish the EPPO.<sup>4</sup> Nevertheless, the unanimous adoption of the text did not turn out to be feasible. In the Justice and Home Affairs Council of 8 December 2016, Sweden mentioned that it would not take part in the establishment of the EPPO and the Council formally registered the absence of unanimity in the General Affairs meeting of 7 February 2017.<sup>5</sup> Thus, in April 2017, 16 member states – later joined by another four – notified the European Parliament, the

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<sup>1</sup> Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), OJ L283, 31.10.2017 (hereinafter: 'EPPO Regulation' or simply 'Regulation'). Unless otherwise specified, the provisions mentioned in the footnotes below are Articles and Recitals of this Regulation.

<sup>2</sup> Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM(2013) 534 final, 17 July 2013.

<sup>3</sup> PIF stands for "*protection des intérêts financiers*".

<sup>4</sup> See the 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.

<sup>5</sup> Giuffrida (2017a). 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](http://www.consilium.europa.eu/press-releases-pdf/2017/2/47244654495_en.pdf)).

Council and the Commission of their wish to establish enhanced cooperation on the establishment of the EPPO, in accordance with Article 86(1) TFEU.<sup>6</sup> The 20 member states

*The establishment of the EPPO has been long debated and was eventually agreed by means of enhanced cooperation. Denmark, Ireland, the UK, Sweden, Poland, Malta, Hungary, and the Netherlands do not currently participate in the EPPO.*

reached agreement on the final text of the Regulation in June 2017, and the European Parliament gave its consent in October 2017.<sup>7</sup> Presently, Denmark, Ireland, the United Kingdom, Sweden, Poland, Malta, Hungary, and the Netherlands do not participate in the EPPO. Although the new Dutch government will “make a decision during its term in office on when the Netherlands will join the EPPO”,<sup>8</sup> the initial non-participation of this country has made it impossible to establish the EPPO in the same place as Eurojust, although the sharing of premises between the two entities was strongly supported during the negotiations.<sup>9</sup> The Office, which will become operational in 2020-21, will thus be located in Luxembourg.<sup>10</sup>

Against this backdrop, this paper sheds light on some key aspects of the EPPO and its main challenges.<sup>11</sup> First, the structure and powers of the Office are discussed (section 2), before addressing its competence (section 3). The focus then shifts to the protection of individuals’ human rights concerned by the activities of the EPPO (section 4) and to the judicial review of acts and decisions of the Office (section 5). Finally, section 6 deals with the relations of the EPPO with its partners. Section 7 concludes, summing up the main findings of the analysis.

## 2. Structure and powers

The Regulation defines the EPPO as “an indivisible Union body operating as one single Office with a decentralised structure”<sup>12</sup> and “organised at a central level and at a decentralised level”.<sup>13</sup>

*The EPPO is organised both at a central level (Luxembourg) and at a decentralised level (member states).*

<sup>6</sup> Council doc. 7761/17, 3 April 2017, p. 1.

<sup>7</sup> See the press release of the European Parliament plenary session of 5 October 2017 ([www.europarl.europa.eu/news/en/press-room/20171002IPR85127/ep-green-light-for-setting-up-eu-prosecutor-to-fight-fraud-against-eu-funds](http://www.europarl.europa.eu/news/en/press-room/20171002IPR85127/ep-green-light-for-setting-up-eu-prosecutor-to-fight-fraud-against-eu-funds)). According to Article 86 TFEU, the European Parliament could not act as co-legislator in the special legislative procedure for the adoption of the EPPO Regulation; it was only required to give its consent to the text unanimously agreed by the Council.

<sup>8</sup> Coalition Agreement between the People’s Party for Freedom and Democracy, the Christian Democratic Alliance, Democrats ’66 and the Christian Union, entitled “Confidence in the Future” and released on 10 October 2017 ([www.government.nl/latest/news/2017/10/10/government-presents-coalition-agreement](http://www.government.nl/latest/news/2017/10/10/government-presents-coalition-agreement)), p. 9.

<sup>9</sup> Among others, also the European Parliament had submitted that “it would be best for the EPPO and Eurojust to operate in the same location” (see the Resolution of 5 October 2016 on the European Public Prosecutor’s Office and Eurojust (2016/2750(RSP)), para. 10).

<sup>10</sup> Recital 121 and Article 106(2). See also the fact sheet released by the Commission in June 2017 ([http://europa.eu/rapid/press-release MEMO-17-1551\\_en.htm](http://europa.eu/rapid/press-release_MEMO-17-1551_en.htm)).

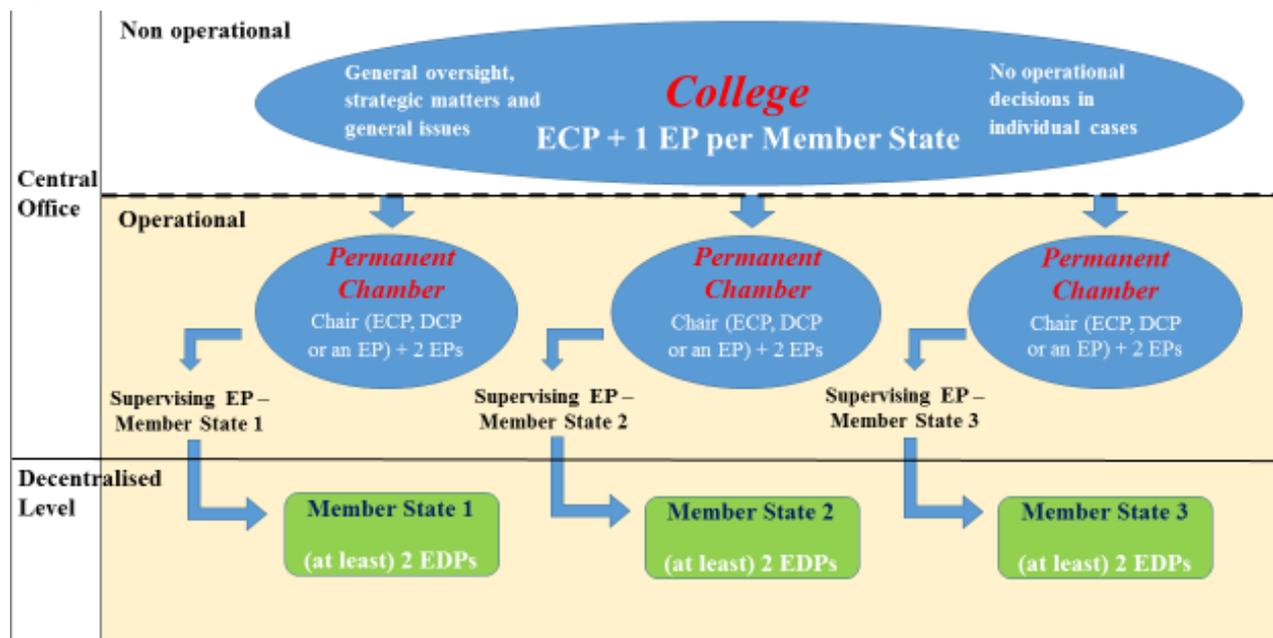
<sup>11</sup> Some issues are therefore not addressed in this paper, such as the data protection regime envisaged in the Regulation. For a more detailed analysis of a previous version of the Regulation, largely similar to the final one, see Giuffrida (2017b), whereupon this note draws.

<sup>12</sup> Article 8(1).

<sup>13</sup> Article 8(2).

The central level consists of a Central Office composed of the College, Permanent Chambers, the European Chief Prosecutor, his/her deputies and the European Prosecutors.<sup>14</sup> The decentralised structure consists of (at least two) European Delegated Prosecutors located in the member states.<sup>15</sup> The following figure represents the structure of the EPPO.

Figure 1. The structure of the EPPO



Note: **ECP**: European Chief Prosecutor; **DCP**: Deputy Chief Prosecutor; **EP**: European Prosecutor; **EDP**: European Delegated Prosecutor. **N.B.:** in exceptional circumstances, the supervising EP can also be from a different member state than the EDP. Source: Giuffrida (2017b), p. 14.

The European Chief Prosecutor is the head of the EPPO, organises the work of the Office, directs its activities and takes decisions in accordance with the Regulation and rules of procedure.<sup>16</sup> The College, which includes the European Chief Prosecutor and one European Prosecutor per member state<sup>17</sup> is responsible for the general oversight of the Office's activities and for taking decisions in strategic matters and on general issues arising from individual cases, but is *not* involved in taking operational decisions in individual cases.<sup>18</sup>

*Each member state appoints one European Prosecutor to the central Office of the EPPO. All European Prosecutors make up the College, which oversees the EPPO's activities.*

<sup>14</sup> Article 8(3).

<sup>15</sup> Articles 8(4) and 13(2).

<sup>16</sup> Article 11(1).

<sup>17</sup> Article 9(1).

<sup>18</sup> Article 9(2).

*The Permanent Chambers of the central Office in Luxembourg monitor and direct investigations and coordinate the EPPO's activities in cross-border cases.*

The Permanent Chambers, to be set up by the College, will be chaired by the European Chief Prosecutor or one of the deputies, or a European Prosecutor appointed as Chair, and have two additional members.<sup>19</sup> In addition to the permanent members, the European Prosecutor who supervises an investigation or a prosecution participates in the deliberations of the Permanent Chamber.<sup>20</sup> The Permanent Chambers direct and monitor the investigations and prosecutions conducted by the European Delegated Prosecutors,<sup>21</sup> and ensure the coordination of investigations and prosecutions in cross-border cases.<sup>22</sup>

The European Prosecutors, on behalf of the Permanent Chamber and in compliance with its instructions, “supervise the investigations and prosecutions for which the European Delegated Prosecutors handling the case *in their Member State of origin* are responsible”.<sup>23</sup> When necessary, they can intervene and give instructions on investigations and prosecution matters to the European Delegated Prosecutors.<sup>24</sup> Since the legal systems of member states are still very different

*On behalf of the Permanent Chamber, the European Prosecutors supervise the investigations and prosecutions carried out by the European Delegated Prosecutors of their member state of origin.*

when it comes to criminal law, “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*”.<sup>25</sup> Thus, the European Prosecutors will function as liaising channels of information between the Permanent Chambers and the European Delegated Prosecutors.<sup>26</sup>

<sup>19</sup> Article 10(1). According to the same provisions, the internal rules of the EPPO determine the number of Permanent Chambers, and their composition, as well as the division of competences between the Chambers.

<sup>20</sup> Article 10(9), which also lists the cases where the supervising European Prosecutor does not have the right to vote. On the supervising European Prosecutors, see immediately below in the text.

<sup>21</sup> Article 10(2).

<sup>22</sup> Ibid.

<sup>23</sup> Article 12(1) (emphasis added).

<sup>24</sup> Recital 23.

<sup>25</sup> 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](http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20161004&secondRef=TOC&language=en) (emphasis added). In exceptional circumstances, the supervising European Prosecutor can be from another member state than that of the European Delegated Prosecutor (see Article 12(2)).

<sup>26</sup> Article 12(5).

At the decentralised level, the European Delegated Prosecutors are responsible for the investigations and prosecutions and follow the directions and instructions of the Permanent Chamber in charge of the case, as well as the instructions from the supervising European Prosecutor.<sup>27</sup> They are also responsible for bringing a case to judgment.<sup>28</sup> The European Delegated Prosecutors act on behalf of the EPPO in their respective member states and have the same powers as national prosecutors in respect of investigations, prosecutions and bringing cases to judgment, in addition to the specific powers conferred on them by the EPPO Regulation.<sup>29</sup> According to Article 30(1), member states must indeed ensure that European Delegated Prosecutors may order or request, in cases of serious offences (i.e. punishable by a maximum penalty of at least four years' imprisonment), some investigative measures, which include search and seizure, freezing of instrumentalities or proceeds of crime and telecommunications interceptions.

*In the member states participating in the EPPO, investigations and prosecutions are carried out by the European Delegated Prosecutors, who follow the directions and instructions of the Permanent Chamber and of the supervising European Prosecutor.*

The European Delegated Prosecutors may also order or request arrest or pre-trial detention in accordance with the national law applicable in similar domestic cases and, if necessary, they can issue (or request the competent authority to issue) a European Arrest Warrant.<sup>30</sup> They may also exercise functions as national prosecutors to the extent that this does not prevent them from fulfilling their obligations under the EPPO Regulation.<sup>31</sup> The peculiar status of the European Delegated Prosecutors is usually described as being “double hat”<sup>32</sup> and raises pressing questions about whether they could really be “expected to independently serve two masters”.<sup>33</sup>

Furthermore, where cross-border cases necessitate measures to be undertaken in a member state other than the state of the European Delegated Prosecutor handling the case, the latter must assign the case to a European Delegated Prosecutor located in the member state where that measure will be carried out (‘assisting European Delegated Prosecutor’).<sup>34</sup> Evidence collected abroad must not be deemed inadmissible in the trial “on the mere ground that the

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<sup>27</sup> Article 13(1), second indent. In exceptional circumstances, the supervising European Prosecutor may take a reasoned decision to conduct the investigation personally, after having obtained the approval of the competent Permanent Chamber (Article 28(4)).

<sup>28</sup> Article 13(1), third indent.

<sup>29</sup> Article 13(1), first indent.

<sup>30</sup> Article 33(1) and (2).

<sup>31</sup> Article 13(3).

<sup>32</sup> See, among the many, Ligeti and Simonato (2013), p. 15; Weyembergh and Brière (2016), p. 12.

<sup>33</sup> Satzger (2015), p. 74. This author also wonders: “Would the Delegated Prosecutor really act objectively and openly against his superior or also against colleagues within the internal structure? Can he really be independent if he wants to continue a career in the national justice system and needs positive evaluations insofar?” (ibid.).

<sup>34</sup> Article 31(1).

evidence was gathered in another Member State or in accordance with the law of another Member State”.<sup>35</sup>

*Decisions on prosecutions are taken by the Permanent Chambers, upon the suggestion of the European Delegated Prosecutors.*

*The Permanent Chamber cannot drop the case if the European Delegated Prosecutor proposes to bring it to prosecution.*

Finally, when the European Delegated Prosecutor considers the investigation to be completed, he or she must submit a report to the supervising European Prosecutor, containing a summary of the case and a draft decision on how to handle the case (i.e. bring it to judgment, dismiss it, etc.).<sup>36</sup> These documents, accompanied if necessary by the assessment of the supervising European Prosecutor,<sup>37</sup> must then be forwarded to the competent Permanent Chamber, which decides whether the case will be brought to judgment, referred to national prosecuting authorities,<sup>38</sup> dismissed<sup>39</sup> or

concluded by means of simplified prosecution procedures provided by national law.<sup>40</sup> If the European Delegated Prosecutor proposes to bring the case to judgment, however, the Permanent Chamber has a limited margin of discretion: on the one hand, it cannot decide to dismiss the case; on the other hand, if it does not take a decision within 21 days,<sup>41</sup> the decision proposed by the European Delegated Prosecutor will be considered to have been accepted.<sup>42</sup>

In principle, the trial following the investigations of the EPPO will take place in the member state of the European Delegated Prosecutor that handled the case, namely the member state where investigations have been carried out.<sup>43</sup> A case must be initiated and handled by a European Delegated Prosecutor from the member state where “the focus of the criminal activity is or, if several connected offences within the competences of the EPPO have been committed, the Member State where *the bulk of the offences* has been committed”.<sup>44</sup> However, the Permanent Chamber can decide to deviate from such a rule, in

*The trial following the investigations of the EPPO takes place in the member state of the European Delegated Prosecutor handling the case.*

*The Regulation lists, in hierarchical order, some criteria allowing the Permanent Chamber to choose a different member state.*

<sup>35</sup> Article 37(1) (emphasis added).

<sup>36</sup> Article 35(1).

<sup>37</sup> *ibid.*

<sup>38</sup> Article 34. The case will be referred to national authorities either when the offence under investigation does not fall (anymore) within the competence of the EPPO or when the impact on the Union’s financial interests is limited (less than €100,000) and there is no need to investigate or to prosecute the case at Union level (see Article 34(1)-(3)).

<sup>39</sup> Article 39. The case will be dismissed where prosecution has become impossible because of a number of reasons listed in Article 39(1), spanning from the death or insanity of the suspect to the lack of evidence.

<sup>40</sup> Article 40.

<sup>41</sup> Since it cannot take the decision to dismiss the case, the Permanent Chamber will at least be entitled to “postpone it, [e.g.] by asking for further evidence” (Council doc. 15057/16, 5 December 2016, p. 4).

<sup>42</sup> Article 36(1) and (2).

<sup>43</sup> Article 36(3).

<sup>44</sup> Article 26(4) (emphasis added).

accordance with some criteria hierarchically listed in the Regulation,<sup>45</sup> and initiate an investigation or a prosecution in *another* member state than that of the focus of the criminal activity. The choice of the legislator to spell out and order the criteria to allocate jurisdiction is certainly welcome, since it helps to reduce the risks of forum shopping attached to the existence of a European prosecuting authority coping with 20 different legal systems. Yet the lack of adequate judicial review on the matter leaves room for criticism, as argued in section 5 below.

## 2.1 The balancing act in the Regulation

The text produced by the Council has put forward a multi-level, complex and at first sight rather bureaucratic system of European prosecution with clear and strong intergovernmental elements as regards the structure, composition and decision-making underpinning the activities of the European Public Prosecutor's Office. Although the investigations are mostly carried out on the ground by the European Delegated Prosecutors, central to the function of the EPPO are however the Permanent Chambers, which operate in a collegiate manner and involve in their decisions members from the states where investigations take place. This move, which seems to have left behind the paramount need to establish a prosecuting authority capable of taking swift decisions during the investigations,<sup>46</sup> is a clear signal to ensure ownership of the process by member states.<sup>47</sup> Yet the EPPO must be independent, i.e. its members must act in the interest of the Union as a whole and neither seek nor take instructions from any person external to the EPPO, any member state or any EU entity.<sup>48</sup> Already envisaged in the Commission's proposal,<sup>49</sup> the independence of the Office was a sticking point during the negotiations, since the status of prosecutors in domestic legal systems varies throughout the EU. One of the reasons justifying the current non-participation of the Netherlands in the enhanced cooperation is precisely the independence of the Office – a feature running counter to a fundamental principle of the Dutch legal system, where the public prosecution service follows the (general, and sometimes specific) instructions of the Minister of Justice, who is in turn accountable to the national Parliament.<sup>50</sup>

*The complex and multi-level structure of the EPPO risks undermining the effectiveness of its activities. It also shows the inclination of member states to preserve their sovereignty in the field of criminal law as much as possible.*

If the final text does not depart from the Commission's draft as far as the independence of the Office is concerned, it should be noted that the Commission had conceived of a rather different structure for the EPPO. In the Commission's proposal, the EPPO only consisted of a European

<sup>45</sup> These criteria are: "(a) the place of the suspect's or accused person's habitual residence; (b) the nationality of the suspect or accused person; (c) the place where the main financial damage has occurred" (ibid.; see also Article 36(3) EPPO Regulation).

<sup>46</sup> See, among the many, Weyembergh and Brière (2016), p. 15.

<sup>47</sup> See also Satzger (2015), pp. 75-76.

<sup>48</sup> Article 6(1).

<sup>49</sup> Article 5 of the Commission's proposal.

<sup>50</sup> See Zwiers (2011), pp. 64–65; Geelhoed (2016), pp. 96-98.

Public Prosecutor, his/her deputies and staff as well as European Delegated Prosecutors located in the member states.<sup>51</sup> The EPPO investigations and prosecutions would still have been carried out by the European Delegated Prosecutors, under the direction and supervision of the European Public Prosecutor only, without further layers such as the Permanent Chambers and the supervising European Prosecutors.<sup>52</sup>

The Commission had thus put forward a centralised, hierarchical and vertical model of European prosecution, which member states did not accept. On the contrary, they found an agreement on a collegiate structure, in which the European Delegated Prosecutors will remain the kingpins of the investigations, to be carried out mostly in accordance with national law. Whether and to what extent Permanent Chambers will be able or willing to go against the decisions suggested by the European Delegated Prosecutors, who are more acquainted than the members of the Permanent Chambers with the legal systems where investigations are conducted, remains to be seen. Splitting the level of regulation of the activities of the EPPO (mainly national law) and the level on which decisions are adopted (Permanent Chamber) can in fact lead to a catch-22 situation. Can the goal of guaranteeing homogenous and effective investigations and prosecutions against PIF offences be effectively reached if the nuts and bolts of the procedure remain national and if only limited instances – namely the decisional ones – are in the hands of the central level of the Office? Why upgrade to the European level only the power to take relevant decisions, when the grounds, requirements and procedures for those decisions are established mainly by national law?<sup>53</sup>

*The nuts and bolts of the procedure remain national and only limited decisional instances are in the hands of the central Office. It remains to be seen whether the EPPO can reach guarantee homogenous and effective protection of the EU budget.*

### 3. Competence

The Regulation defines the competence of the EPPO by reference to the offences that are included in the Directive on the fight against fraud to the Union's financial interests by means of criminal law ('PIF Directive'),<sup>54</sup> i.e. fraud in respect of revenues and expenditure, misappropriation, active and passive corruption that damages or is likely to damage the Union's financial interests, and money laundering of property derived from PIF offences, as well as inchoate offences (incitement, aiding and abetting, and attempt to commit PIF offences). It has been noted that there is a degree of uncertainty as the said offences will be those resulting from the implementation of the Directive by member states, which may result in divergent

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<sup>51</sup> Article 6(1) of the Commission's proposal.

<sup>52</sup> Article 6(4) of the Commission's proposal.

<sup>53</sup> Giuffrida (2017b), p. 31.

<sup>54</sup> Directive (EU) 2017/1731 of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law, OJ L198/29, 28.7.2017.

criminalisation approaches.<sup>55</sup> The Directive is expected to introduce a “very minimalistic degree of minimum harmonisation”,<sup>56</sup> so that the European panorama of substantive criminal law will remain fragmented. This could hamper the effectiveness of EPPO investigations and prosecutions, which will have to cope – even in the framework of a single case – with a variety of substantive criminal legislations.<sup>57</sup>

*The crimes for which the EPPO is competent are regulated in a recently adopted directive. Since substantive European criminal law is likely to remain fragmented, EPPO investigations and prosecutions will have to cope with a variety of substantive criminal legislations.*

The EPPO is also competent for crimes that are “inextricably linked” to PIF offences.<sup>58</sup> The guiding principle is that the EPPO will be competent for inextricably linked offences when the PIF offence is punished with a penalty that is as serious as, or more serious than, the one provided for the inextricably linked crime. This further EPPO competence gave rise to criticism during the negotiations, because it was seen as a way to further erode national sovereignty, allowing the EPPO to exercise its powers beyond the limited field of PIF offences. Nevertheless, it is appropriate that this provision has not been removed from the text since it is in the interest of justice that a single prosecuting office carries out investigations on crimes that are closely interwoven.

*After lengthy debates, member states have agreed that the EPPO is also competent for VAT fraud that it is connected with the territory of two or more member states and involves a total damage of at least €10 million.*

Even more controversial was the inclusion in the scope of the Directive (and thus within the mandate of the EPPO) of VAT fraud, objected to by member states but supported by the Commission and the European Parliament. After the Court of Justice sent a very strong signal in its ruling in *Taricco*, confirming that VAT fraud falls within the scope of the third-pillar fraud Convention which the new Directive replaces,<sup>59</sup> a compromise was found in the Council: the PIF Directive applies

to – and the EPPO will be competent for – VAT fraud that is connected with the territory of two or more member states and involves a total damage of at least €10 million.<sup>60</sup> The two mentioned requirements – entity of total damage and cross-border nature of VAT fraud – show a very limited willingness of member states to lose their control over the matter.

This is further confirmed by the fact that a visible federal element introduced by the Commission in its draft, namely the exclusive competence of the EPPO on PIF offences, has been replaced by a ‘priority’ competence of the Office, backed up by a right to evocation.<sup>61</sup> By

<sup>55</sup> See, among the many, Flore (2015), p. 302.

<sup>56</sup> Vervaele (2014), p. 97. See also Sicurella (2016), pp. 124ff.

<sup>57</sup> Ligeti (2013), p. 82.

<sup>58</sup> Article 22(3).

<sup>59</sup> Case C-105/14, *Taricco and Others*, judgment of 8 September 2015, para. 41.

<sup>60</sup> Art 2(2) of the PIF Directive. Recital 4 of the PIF Directive explains that “[t]he notion of total damage refers to the estimated damage that results from the entire fraud scheme, both to the financial interests of the Member States concerned and to the Union, excluding interest and penalties”.

<sup>61</sup> See Recital 58 on priority competence and Article 27 on the right of evocation.

granting the EPPO exclusive competence, the Commission sent a strong signal to member states that it is only the EPPO that is responsible and competent for the investigation and prosecution of the ‘European Union’ offences associated with fraud against the Union budget.<sup>62</sup>

*The competence of the EPPO has priority over that of national authorities. The Office is empowered to take over cases that domestic bodies are already investigating.*

On the contrary, priority competence and right to evocation imply that, if the EPPO becomes aware of the fact that an investigation in respect of an offence falling within its mandate is already undertaken by national authorities, it will consult with the latter authorities and will thereafter decide whether to open its own investigation and request the competent authorities to transfer the proceedings to it.<sup>63</sup>

Finally, Article 86(4) TFEU allows for an extension of the material scope of the EPPO so as to cover “serious crime having a cross-border dimension”. Such a decision to broaden the competence of the Office must be taken by the European Council acting unanimously, after obtaining the consent of the European Parliament and after consulting the Commission.<sup>64</sup> The option laid down in Article 86(4) TFEU was not discussed during the recently concluded negotiations on the EPPO Regulation, due to the reluctance of member states to entrust the EPPO with such a broad mandate. Yet, such an enlargement of the Office’s competence has been supported by the European Parliament,<sup>65</sup> and advocated especially following the terrorist attacks in Europe in 2015 and 2016.<sup>66</sup> Lastly, in the recent “State of the Union 2017”, the President of the European Commission anticipated that the Commission would table a Communication on the extension of the Office’s tasks on terrorism in September 2018.<sup>67</sup> Likewise, in his speech at the Sorbonne University in late September 2017, French President Emmanuel Macron included the extension of the EPPO’s competence to transnational terrorism among his proposals for relaunching the European Union.<sup>68</sup>

*The European Council can unanimously decide to extend the material scope of the EPPO to cover serious crime with a cross-border dimension. Support for broadening the Office’s mandate to terrorism has been shown in political and academic circles.*

<sup>62</sup> Art 11(4) of the Commission’s proposal.

<sup>63</sup> Article 27(1), (3), (4), and (5).

<sup>64</sup> Article 86(4) TFEU.

<sup>65</sup> European Parliament resolution of 25 October 2016 on the fight against corruption and follow-up of the CRIM resolution (2015/2110(INI)), P8\_TA (2016) 0403, para. 54.

<sup>66</sup> For further references see Grasso and Giuffrida (2018, forthcoming).

<sup>67</sup> European Commission, “State of the Union 2017. Roadmap for a more united, stronger and more democratic Union”, 13 September 2017.

<sup>68</sup> “Les principales propositions d’Emmanuel Macron pour relancer le projet européen”, *Le Monde*, 27 September 2017 ([www.lemonde.fr/europe/article/2017/09/26/les-principales-propositions-d-emmanuel-macron-pour-relancer-le-projet-europeen\\_5191799\\_3214.html](http://www.lemonde.fr/europe/article/2017/09/26/les-principales-propositions-d-emmanuel-macron-pour-relancer-le-projet-europeen_5191799_3214.html)).

#### 4. Rights of suspects and accused persons

The Regulation provides three different levels of protection of the rights of persons involved in the proceedings of the EPPO.<sup>69</sup> First, suspects and accused persons will have the procedural rights available to them under the applicable national law.<sup>70</sup> Such a regulation of defence rights on the basis of domestic law is in line with the 'hybrid' national/European nature of the EPPO.<sup>71</sup> The obvious downside is that, in cross-border cases, the suspect will be required to cope with a number of different rules concerning his/her rights, so that it could become rather difficult to organise an effective defence strategy.<sup>72</sup>

*Suspects and accused persons have procedural rights available to them under the applicable national law. The lack of homogenous rules on the defence side is contentious, especially in cases of a cross-border nature.*

With a view to tempering similar consequences, the Regulation provides for two further levels of protection – at EU level – of the rights of persons involved in the activities of the EPPO. First, the Regulation requires that any suspected or accused person in the criminal proceedings of the EPPO shall, “at a minimum”,<sup>73</sup> have those procedural rights provided for in Union law, including the directives on procedural rights adopted by the European Parliament and the Council in accordance with Article 82(2) TFEU.<sup>74</sup> In particular, the Regulation refers to the Directive on the right to interpretation and translation;<sup>75</sup> the Directive on the right to information and access to the case materials;<sup>76</sup> the Directive on the right to access to a lawyer;<sup>77</sup> the Directive on the right to remain silent and the right to be presumed innocent;<sup>78</sup> and the Directive on legal aid.<sup>79</sup> The directives can enhance the protection of fundamental rights during the proceedings of the EPPO in different ways: a number of key provisions conferring rights in the directives have direct effect; the Commission has full powers to monitor the implementation of these directives by member states and has the power to introduce infringement proceedings before the Court of Justice if it considers that the directives have not been implemented adequately; national criminal procedural law must be applied and interpreted in compliance and conformity with the directives; and, finally, the implementation of the directives must take place in compliance with the Charter.<sup>80</sup>

<sup>69</sup> See more in Mitsilegas and Giuffrida (2018, forthcoming).

<sup>70</sup> Article 41(3).

<sup>71</sup> Satzger (2015), p. 74.

<sup>72</sup> Kaiafa-Gbandi (2015), pp. 245-246.

<sup>73</sup> Article 41(2).

<sup>74</sup> Ibid.

<sup>75</sup> OJ L280/1, 26.10.2010.

<sup>76</sup> OJ L142/1, 1.6.2012.

<sup>77</sup> OJ L294/1, 6.11.2013.

<sup>78</sup> OJ L65/1, 11.3.2016.

<sup>79</sup> OJ L297/1, 4.11.2016.

<sup>80</sup> See more in Mitsilegas (2017b), pp. 201-214.

*Suspected and accused persons can also rely on the recently adopted directives on procedural safeguards, but this can only partially mitigate the fact that individuals concerned by the investigations of the EPPO enjoy different treatment according to the applicable legislation.*

Although the reference to the directives is welcome, most of their provisions represent a compromise among the member states. Therefore, the content of the rights provided therein can be sometimes quite broad and vague, with the consequence that the impact of the directives on national legal systems risks being 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”.<sup>81</sup>

Finally, the third level of protection of human rights is represented by the Charter of Fundamental Rights.<sup>82</sup> The applicability of the Charter to the activities of the EPPO is not contentious.<sup>83</sup> The provisions of the Charter are indeed addressed to a broad range of EU entities (“institutions, *bodies, offices* and agencies”),<sup>84</sup> which include the EPPO. Some of the Charter’s rights have been regulated in more detail in the above-mentioned directives (e.g. presumption of innocence), whereas others are still not regulated at the level of EU legislation. This is the case, for instance, of the right not to be tried or punished twice in criminal proceedings for the same criminal offence – enshrined in Article 50 of the Charter – which could be endangered in the context of the EPPO’s investigations, since there could be risks of double prosecution both at national and at supranational level. Thus, the 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”.<sup>85</sup> Likewise, the Regulation also prohibits OLAF to open parallel administrative investigations into the same facts where the EPPO decides to open a case.<sup>86</sup>

*The Charter of Fundamental Rights applies during the proceedings of the EPPO.*

## 5. Judicial review of acts and decisions of the EPPO

Notwithstanding the nature of the EPPO as a European Union body and in line with the Commission’s draft, the Regulation provides for the competence of national courts to rule on the “[p]rocedural acts of the EPPO that are intended to produce legal effects vis-à-vis third parties”.<sup>87</sup> The Court of Justice will instead have jurisdiction to give preliminary rulings concerning: i) the validity of procedural acts of the EPPO, “insofar as such question of validity is raised before any court or tribunal of a Member State directly on the basis of Union law”;<sup>88</sup>

<sup>81</sup> Weyembergh and Brière (2016), p. 35. Further concerns arise with regard to the costs of defence, which could be rather high in cross-border cases: see also Faletti (2017), p. 25.

<sup>82</sup> See Articles 5(1) and 41(1).

<sup>83</sup> See, among the many, Meij (2015), pp. 103-105; Nieto Martín (2015), pp. 315 ff.

<sup>84</sup> Article 51(1) of the Charter (emphasis added).

<sup>85</sup> Article 25(1).

<sup>86</sup> Article 101(2).

<sup>87</sup> Article 42(1).

<sup>88</sup> Article 42(2)(a).

ii) “the interpretation or the validity of provisions of Union law”,<sup>89</sup> including the Regulation; and  
 iii) the interpretation of the Articles of the Regulation delimiting the material competence of the EPPO.<sup>90</sup>

Furthermore, departing from the Commission’s draft on this point, the Regulation provides that Court of Luxembourg shall be competent to review the decisions of the EPPO to dismiss a case, “in so far as they are contested directly *on the basis of Union law*”.<sup>91</sup> Despite this improvement, the final text still envisages a very limited role for the Court of Justice, since the judicial review of the acts of the EPPO will be mostly carried out at national level. The treatment of the EPPO as a national body for the purposes of judicial review disregards the fact that EPPO acts and decisions are adopted by an EU body, with the consequence that the Regulation creates a European agency lying outside European judicial control.<sup>92</sup>

*National courts are competent to rule on the legality of EPPO acts and decisions having effect vis-à-vis third parties. The only exception is the decision to dismiss a case, which can be reviewed by the Court of Justice.*

The Commission justified this exclusion on the basis of the “special nature” of the EPPO.<sup>93</sup> However, if anything, the specificity of the EPPO in relation to other EU agencies – which consists of the fact that the EPPO is an operational body whose action has the potential to affect significantly fundamental rights across the EU – render EU judicial review even more imperative. Moreover, the possibilities allowed by the Treaty of Lisbon for specific rules concerning judicial review of EU agencies in general, and the EPPO in particular,<sup>94</sup> do not mean that these rules can entail the total exclusion of EU judicial review for EU agencies, including the EPPO. The exclusion of such a review would be a direct attack on the rule of law in the European Union and would challenge the obligation of the EU to uphold fundamental rights as enshrined in the European Convention of Human Rights (ECHR) and the Charter, in particular Articles 47 and 49 of the Charter. Exclusion of EU judicial review of the EPPO would be particularly hard to reconcile with the right to effective judicial protection, which has assumed a central role in EU constitutional law in recent years, in particular after judicial developments in *Kadi II*.<sup>95</sup> In the latter judgment, the Court of Justice made express reference to the need for the European judiciary to ensure the full review, in principle, of the lawfulness of all Union acts

<sup>89</sup> Article 42(2)(b).

<sup>90</sup> Article 42(2)(c).

<sup>91</sup> Article 42(3) (emphasis added).

<sup>92</sup> Mitsilegas (2015), pp. 78–84, upon which this section draws.

<sup>93</sup> Commission’s proposal, p. 5.

<sup>94</sup> Article 263, fifth paragraph TFEU: “Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them”; Article 86(3) TFEU: “The regulations referred to in paragraph 1 shall determine the general rules applicable to the European Public Prosecutor's Office...as well as...the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions”.

<sup>95</sup> Joined Cases C- 584/10 P, C- 593/10 P and C- 595/10 P, *European Commission v. Kadi*, judgment of 18 July 2013.

in the light of fundamental rights and mentioned in particular the respect for the rights of the defence and the right to effective judicial protection as enshrined in the Charter.

The Commission further justified the regime of judicial review at stake in light of the need to respect the principle of subsidiarity. However, this approach rests on a misunderstanding of the application of the principle of subsidiarity. The subsidiarity test to be met is whether the European Union level is the right level of legislative action with regard to the establishment of the EPPO to achieve the stated legislative objectives. The question of judicial review is a meta-question concerning the functioning of the EPPO, which should arise after the decision on whether the establishment of an EPPO per se meets the requirements of the subsidiarity test.

The issue of the judicial review of the EPPO can be viewed from three different but interrelated perspectives. First, one can distinguish between acts and decisions of the EPPO in its centralised functions on the one hand and under its decentralised formations on the other. Yet the centralised/decentralised distinction is difficult to make, in particular in light of the additional layers of the EPPO structure introduced during the negotiations. The second perspective is to distinguish between judicial review of different types of act adopted by the EPPO – with pre-prosecution acts (e.g. investigation acts) being left to national courts to deal with, while decisions on prosecution could be subject to EU judicial review. However, this distinction, as well as that put forward by the first perspective mentioned above, would disregard the fact that both investigation and prosecution decisions are taken by the same EU body whose acts should in principle be subject to EU judicial review. The third perspective would be to distinguish in terms of applicable law, with EPPO acts and decisions to which EU law applies being subject to EU judicial scrutiny, and acts and decisions to which national law applies being subject only to national judicial review. However, this perspective would also disregard the European Union nature of the EPPO and of the acts and decisions adopted by this body, and could lead to adverse consequences with regard to legal certainty as to which acts or decisions would qualify as ‘national’ for the purposes of judicial review.

European Union judicial review should thus have applied as extensively as possible to the acts and decisions of the EPPO. A key way to achieve this objective would be the use of the action of annulment under Article 263 TFEU. According to Article 263, fourth paragraph TFEU, any natural or legal person may institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures. The Court of Justice has interpreted the standing criteria for natural and legal persons as applying if the binding legal effects of the contested act are capable of affecting the interests of the applicant by bringing about a distinct change in its legal position. It is self-evident that the standing criteria under Article 263, fourth paragraph TFEU will apply to EPPO acts and decisions, which may have profound consequences for the fundamental rights of suspects and accused persons.

*The choice to shield EPPO acts and decisions from the judicial review of the Court of Justice does not sit easily with the right to effective judicial protection and with the basic constitutional principles of the EU.*

Note that not even the decisions of the EPPO on the *choice of forum* are subject to judicial review at EU level. It is known that there is currently no centralised binding mechanism of jurisdiction allocation in criminal matters in the European Union. Eurojust has limited non-binding powers, which have not been expanded or enhanced by the current Proposal for a Eurojust Regulation, and the 2009 Framework Decision on prevention and settlement of conflicts of jurisdiction merely establishes channels of information exchange and consultation between national authorities.<sup>96</sup> This shows the reluctance of member states to introduce EU-level binding rules that would limit their capacity to prosecute.

Against this backdrop, the choice of introducing some hierarchical criteria for the allocation of jurisdiction in the EPPO Regulation is a step forward.<sup>97</sup> Yet the fact that the choice of forum is not subject to any form of scrutiny at European level is a missed opportunity to enhance the legitimacy and efficiency of the forthcoming European prosecution. As seen above, the Court of Justice has only been tasked with giving preliminary rulings concerning the interpretation of the Articles of the Regulation on the Office's material competence.<sup>98</sup> Since the EPPO will mainly function on the basis of national laws, the choice of the member state where investigations are carried out or where the case has to be brought to justice is of fundamental importance. To

exclude the judicial review at EU level of EPPO decisions on the choice of forum would therefore amount to negating an effective remedy against acts that may have significant consequences for the protection of fundamental rights, including respect of the principle of legality (including foreseeability) and equality before the law. Lack of legal certainty with regard to the choice of forum decisions at

*The lack of EU judicial review on the choice of forum is contentious and risks negating an effective remedy against acts that may have consequences for the protection of fundamental rights.*

national level was found to be in violation of Article 7 ECHR by the European Court of Human Rights. In the case of *Camilleri v Malta*, the Court found that national law providing for two different possible punishments depending on the procedure chosen by the Attorney General failed to satisfy the foreseeability requirement and to provide effective safeguards against arbitrary punishment as provided in Article 7.<sup>99</sup> The reasoning of that judgment is likely to apply to transnational choice of forum decisions, including decisions by the EPPO, something that necessitates not only a clear procedure involving the defendant leading to the decision on the allocation of jurisdiction but also effective remedies at European Union level against choice and transfer of forum decisions by the EPPO.

In sum, in order to ensure effective judicial protection of individuals affected by the activities of the EPPO, it is necessary to provide for EU judicial review of the EPPO's investigative acts and decisions. It is true that, in practice, it could be unfeasible to extend the jurisdiction of the Court to *all* measures adopted by the EPPO and that, in some instances, it could be more convenient

<sup>96</sup> Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, OJ L328/42, 15.12.2009.

<sup>97</sup> See above, section 2.

<sup>98</sup> Article 42(2)(c).

<sup>99</sup> Application no. 42931/10, *Camilleri v. Malta*, judgment of 22 January 2013, especially paras. 42-43.

to leave such scrutiny to national authorities. However, at least some of the key decisions should be reviewed at EU level (e.g. choice of forum). Effective use of the possibilities offered, in particular by Articles 263 and 267 TFEU, would have contributed towards both effective judicial protection and the development of European Union law in this important field, with the full involvement of the Court of Justice and the direction and clarification it may offer to national courts in this context.

## 6. Relations with the partners

As for the Office's relations with the partners, the guiding principle is that the EPPO may establish and maintain cooperative relations with EU entities, international organisations, and the competent authorities of third countries and member states that do not participate in enhanced cooperation,<sup>100</sup> and conclude working arrangements with all of them. These agreements, however, "may neither form the basis for allowing the exchange of personal data nor have legally binding effects on the Union or its Member States".<sup>101</sup> Thus, they will mainly concern the exchange of strategic information and other technical details of cooperation.

As for Europol, the EPPO will be able to obtain, upon request, any relevant information held by the agency and may also ask Europol to provide analytical support to a specific investigation.<sup>102</sup> The Regulation instead envisages a closer relation with OLAF, which may be requested by the EPPO to: provide information, analysis, expertise, and operational support; facilitate coordination of specific actions of the competent national administrative authorities and EU bodies; and conduct administrative investigations.<sup>103</sup> OLAF will therefore support the activities of the EPPO with its complementary (administrative) powers;<sup>104</sup> their different nature notwithstanding, the Regulation forbids the two bodies from carrying out parallel investigations on the same fact.<sup>105</sup> Moreover, the EPPO will have indirect access to the information in OLAF's case management system, on the basis of a hit/no hit system.<sup>106</sup>

The same access will be granted to the Eurojust's case management system.<sup>107</sup> Confirming the "special relationship"<sup>108</sup> between the EPPO and Eurojust singled out in Article 86(1) TFEU,<sup>109</sup> the Regulation provides that relations between the two bodies must be based not only on

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<sup>100</sup> Article 99(1).

<sup>101</sup> Article 99(3). The exchange of personal data shall follow the rules of the *ad hoc* chapter of the Regulation (see Articles 47ff.).

<sup>102</sup> Article 102(2).

<sup>103</sup> Article 101(3).

<sup>104</sup> Article 101(1).

<sup>105</sup> Article 101(2).

<sup>106</sup> Article 101(5).

<sup>107</sup> Article 100(3).

<sup>108</sup> This expression was used in Article 58(1) of the Commission's proposal but was eventually dropped.

<sup>109</sup> The EPPO shall be established "from Eurojust" (Article 86(1) TFEU).

mutual cooperation within their respective mandates<sup>110</sup> but also on “the development of operational, administrative and management links”.<sup>111</sup> The support of Eurojust will be crucial in coordinating and facilitating judicial cooperation for serious crime that falls within the remit of the EPPO but also involves non-participating member states, or even third countries.<sup>112</sup>

Only practice will tell whether the relations of the EPPO with Eurojust and the other actors of the Area of Freedom, Security and Justice will yield good results or will complicate the status quo. For its nature, powers and mission, the EPPO is radically different from Eurojust and Europol, on the one hand, and from OLAF, on the other. Yet, it will not be able to carry out its investigations and prosecutions without their support, not least because of the non-participation of (currently) eight member states in enhanced cooperation. Risks of overlap and competition thus become even more real than in the past.<sup>113</sup>

*The EPPO will have to cooperate with Europol, OLAF, and especially Eurojust, whose support will be crucial to coordinating and facilitating judicial cooperation with non-participating member states. Risks of overlap and competition among EU bodies become even more real than before.*

As for relations with non-participating member states and third countries, the key question is whether the EPPO should be regarded as a competent authority for the purpose of implementation of the instruments concerning judicial cooperation. In other words, should it be allowed to issue and receive requests for mutual legal assistance or extradition? The Regulation does not offer a one-size-fits-all answer to this question.

First, as far as the extradition to *third countries* is concerned,<sup>114</sup> the Regulation simply states that the European Delegated Prosecutors will act on behalf of the EPPO and *on the basis of their national laws*. On the contrary, 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 of the Regulation.<sup>115</sup>

<sup>110</sup> Article 100(1). This is stated also in the provision concerning the relations of the EPPO with OLAF (Article 101(1)) and, in a more nuanced way, with Europol (Article 102(1)).

<sup>111</sup> Article 100(1).

<sup>112</sup> Article 100(2)(b).

<sup>113</sup> See Weyembergh, Armada and Brière (2014), pp. 57ff.

<sup>114</sup> See Article 59(4) of the Commission's proposal.

<sup>115</sup> See Article 104.

Second, as far as non-participating member states are concerned, the Regulation provides that – in the absence of a legal instrument expressly regulating the cooperation and surrender between the EPPO and non-participating member states – member states establishing the EPPO should recognise the Office as the competent authority for the purposes of implementation of the applicable Union acts on judicial cooperation and surrender in their relations with non-participating member states.<sup>116</sup> This means, for instance, that the EPPO will in principle be authorised to issue or request to issue European Arrest Warrants or European Investigations Orders in its relations with non-participating member states. Such relations are therefore regulated in a way that should guarantee an effective coordination between the competent national authorities and the EPPO,<sup>117</sup> which should act – at least in that regard – as a truly European body relying on European laws without any mediation of national legislation.<sup>118</sup> It is worth noting that the Council has invited the Commission to “reflect on submitting appropriate proposals in order to ensure effective judicial cooperation in criminal matters between the EPPO” and the non-participating member states.<sup>119</sup>

*The EPPO will in principle be authorised to issue or request to issue European Arrest Warrants or European Investigations Orders in its relations with non-participating member states, in the absence of a legal instrument expressly regulating such relations.*

*The Council has already invited the Commission to reflect on submitting appropriate proposals to deal with the matter.*

In this frame, it will be interesting to see how the relations between the EPPO and the post-Brexit United Kingdom will be regulated. Before the vote of 23 June 2016, the European Union Committee of the House of Lords had scrutinised the impact of the establishment of the EPPO on the UK. Among the other issues, it expressed concerns for some statements of Theresa May, at the time Home Secretary, who had declared that “the UK might not be legally obliged to respond to requests for assistance from the EPPO”.<sup>120</sup> The Committee noted that such an uncooperative attitude could risk making the UK a “safe haven for illegally obtained EU funds”.<sup>121</sup>

In the aftermath of the 2016 referendum, the same Committee issued a report on the future EU-UK security and police cooperation, where no relevant remarks on the EPPO can be found. However, as for relations with Europol, the Committee highlighted that treating the UK as a third country with which the agency would have to conclude an ordinary operational agreement “would not be sufficient to meet the UK’s needs”;<sup>122</sup> similar conclusions – although slightly more nuanced – are drawn for the future relations with Eurojust.<sup>123</sup> The policy paper

<sup>116</sup> Article 105(3).

<sup>117</sup> Weyembergh and Brière (2016), p. 47.

<sup>118</sup> Giuffrida (2017b), pp. 35-37.

<sup>119</sup> Council doc. 9896/17 ADD 1 COR 1, 7 June 2017.

<sup>120</sup> European Union Committee of the House of Lords (2014), p. 28 (emphasis added).

<sup>121</sup> Ibid. (emphasis added).

<sup>122</sup> European Union Committee of the House of Lords (2016), p. 20 (emphasis added).

<sup>123</sup> Ibid., p. 24.

recently published by the government on security, law enforcement and criminal justice does not give any significant guidance either: the EPPO is not mentioned at all and, as far as the cooperation with the agencies is concerned, it is only mentioned that the UK will be seeking a “bespoke relationship” with Europol.<sup>124</sup>

In sum, handling relations between the UK and EU agencies – including the EPPO – in the same way as ordinary relations with a third country seems unsatisfactory for the UK, which will unavoidably enjoy a reduced degree of participation in these bodies. On the other hand, in the light of the fundamental contribution given by this country to the development of Europol and Eurojust, the EU will lose a key player in the field. Future cooperation will depend on the extent to which the UK will be deemed to comply with key EU law standards, including

*How relations between the UK and the EPPO will be handled after Brexit is unclear. Future cooperation will depend on how far the UK is deemed to comply with key EU law standards, especially those concerning data protection.*

– in particular in cases involving the exchange of personal data – an assessment by EU institutions that the UK provides an adequate level of data protection.<sup>125</sup> In any case, from a legal standpoint, the UK will be a third country for all intents and purposes, so that the cooperation between the EPPO and the UK should follow the rules laid down in the Regulation and briefly summarised above.

## 7. Conclusion

The EPPO Regulation is probably the boldest and most ambitious instrument of EU (criminal) law adopted thus far. It is also one of the most contested. The Commission produced a highly innovative vision of centralised prosecution at EU level, with echoes of federalism in its use of concepts such as the exclusive competence of the EPPO. Unsurprisingly, this text met the resistance of national parliaments and governments, and an enhanced cooperation involving 20 member states eventually replaced the Commission’s federal vision with the usual intergovernmental, collegiate model that characterises a number of current EU judicial cooperation structures, in particular Eurojust.<sup>126</sup>

The EPPO will indeed be organised at both a central level and a decentralised level. The latter consists of the European Delegated Prosecutors, who will be part of national prosecution services and, simultaneously, members of the EPPO. This ‘double hatted’ status allows the European Delegated Prosecutors to exercise all the ordinary powers they have as national prosecutors, yet it raises concerns about the actual independence they will enjoy when dealing with the crimes affecting the Union’s financial interests (so-called ‘PIF offences’). The European Delegated Prosecutors will carry out the investigations under the direction of the Permanent Chambers and the supervision of European Prosecutors. Together with the College, which will not intervene on individual cases, and the European Chief Prosecutor, who will be the head of

<sup>124</sup> HM Government, “Security, law enforcement and criminal justice. A future partnership paper”, 2017, p. 19.

<sup>125</sup> Mitsilegas (2017a).

<sup>126</sup> Mitsilegas (2016), pp. 32-33.

the Office, the Permanent Chambers and supervising European Prosecutors form the central level of the EPPO (section 2). The multiple layers provided for in the Regulation sit very well with the will of the member states to preserve their sovereignty as much as possible on the one hand, but on the other they run counter to the need of the EPPO to function in a smooth and efficient way. Moreover, the gap between the level where most of the decisions are taken (EU level/Permanent Chamber) and the level where actions have to be taken (national level/European Delegated Prosecutors) poses several questions about the expected effectiveness of the body (section 2.1).

The boundaries of the EPPO's competence will be set out by national laws. Crimes affecting the EU budget will indeed be defined by national legislations, which are expected to be harmonised to a limited extent by the recently adopted PIF Directive: the persistent discrepancies among the national criminal justice systems could therefore represent a further obstacle to the effectiveness of the activities of the EPPO. After lengthy debates in the Council, it has been agreed that the Office will also be competent with regard to VAT fraud that is linked to the territories of two or more member states and involves a total damage of at least €10 million. Although at least three years are needed before the EPPO is able to start its activities, strong support for the enlargement of its competence to cases of cross-border terrorism has already emerged (section 3).

The protection of the rights of suspects and accused persons mostly relies on national laws as well. As a consequence, individuals concerned by the investigations of the EPPO will receive different treatment according to the applicable national law and, in cross-border cases, this patchwork scenario can have adverse consequences on the right to organise an effective defence. The reliance on the rights provided in the Charter and in the recent directives on procedural safeguards can only partially mitigate the problems raised by the inherently hybrid structure of the EPPO, a body which will be partially European and partially based on national criminal justice systems (section 4).

Such a hybrid nature of the EPPO also justifies, in the Commission's and member states' view, the regime of judicial review laid down in the Regulation: the acts of the EPPO intended to produce legal effects vis-à-vis third parties will be revised 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 can 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. These rules do not sit easily with the right to effective judicial protection enshrined in the Charter and with the basic constitutional principles of the EU: acts and decisions of an EU body that may have profound consequences for fundamental rights will indeed be shielded from EU judicial scrutiny. The lack of judicial review, at EU level, of the choice of forum is especially striking (section 5).

Finally, the EPPO's relations with its partners (EU bodies, third countries, international organisations and non-participating member states) will be mostly regulated by working arrangements to be concluded by the Office. A specific instrument can also be adopted to ensure effective judicial cooperation between the EPPO and the non-participating member

states. The privileged partner of the EPPO will be Eurojust, and the close relations between the two bodies might have called for a common location. However, the non-participation of the Netherlands in the enhanced cooperation led to the placing of the EPPO in Luxembourg. Once the EPPO is established, whether further overlap and competition among EU bodies acting in the Area of Freedom, Security and Justice will occur can be evaluated (section 6).

The EPPO represents an extremely important step forward on the road to increasing integration and its establishment is underpinned by an obvious and praiseworthy reason, namely to better protect the EU budget and, consequently, European taxpayers. Yet some of its features raise concerns because the Office is empowered to adopt relevant decisions without relying on a homogenous, European corpus of rules.<sup>127</sup> In the complex and multi-level scenario envisaged by the Regulation, where EU and national law are inextricably linked, it is crucial that issues related to the effective protection of human rights are not left behind. Indeed, it is ensuring the effective protection of fundamental rights that will confer legitimacy on any EU project to further integrate the area of prosecution. This protection will also address issues of lack of trust between EU member states and between member states and the European Union, and create the conditions for a wider acceptance of the EPPO project by the European public.

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<sup>127</sup> Giuffrida (2017c), p. 40.

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