

The European Public Prosecutor's Office: strategies for coping with complexity

Budgetary Affairs



DIRECTORATE GENERAL FOR INTERNAL POLICIES
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THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE: STRATEGIES FOR COPING WITH COMPLEXITY

STUDY

Abstract

This study analyses challenges related to the establishment of the European Public Prosecutor's Office (EPPO) as enhanced cooperation among the current 22 Member States and discusses possible solutions for coping with them. Complexity is identified as a main challenge owing to the EPPO's specific multilevel structure, the relationship between the EPPO and non-participating Member States, and the fact that the EPPO Regulation leaves many procedural rules to the law of the Member State in which an investigation takes place. Depending on the nature of the challenge, the suggested strategies to cope with complexity encompass legislative, administrative, and monitoring measures.

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LIST OF ABBREVIATIONS

AG	Advocate General
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CMS	Case Management System
CONT	Committee on Budgetary Control of the European Parliament
DECP	Deputy European Chief Prosecutors
EASO	European Asylum Support Office
ECA	European Court of Auditors
ECB	European Central Bank
ECP	European Chief Prosecutor
EDP	European Delegated Prosecutors
EJN	European Judicial Network
EP	European Parliament
EPPO	European Public Prosecutor's Office
ESCB	European System of Central Banks
EU	European Union
EUACJC	EU Agency for Criminal Justice Cooperation (formerly Eurojust)
GDP	Gross Domestic Product
GNI	Gross National Income
GNP	Gross National Product
IAS	Internal Audit Service
JHA	Justice and Home Affairs

LIBE	Committee on Civil Liberties, Justice and Home Affairs of the European Parliament
MEP	Member of the European Parliament
MoU	Memorandum of Understanding
NGO	Non-Governmental Organisation
OJ	Official Journal
OLAF	Office Européen de Lutte Antifraude - European Anti-Fraud Office
ODPP	The Irish Office of the Director of Public Prosecutions
PIF	Protection des Intérêts Financiers – Protection of the EU's financial interests
SAI	Supreme Audit Institutions
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
VAT	Value Added Tax

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EXECUTIVE SUMMARY

The European Public Prosecutor's Office is a new body of the European Union in which 22 Member States participate in the framework of an enhanced cooperation launched in 2017. Article 86 TFEU serves as legal basis for the creation of the EPPO, which was made possible through Council Regulation (EU) 2017/1939. The key function of the EPPO is the investigation and prosecution of crimes against the EU's financial interests, as defined by the Directive on the Protection of Financial Interests of the Union (PIF Directive), revised in 2017. Through its Delegated European Prosecutors at the national level, the EPPO will be inserted in, and interact with, national criminal justice systems. Prosecuted by the EPPO, PIF crimes will be judged and adjudicated by national judges. This study analyses challenges related to the functioning of the European Public Prosecutor's Office (EPPO), from the interdisciplinary perspective of European law, public policy, public administration, criminal procedure and financial accountability. The study also suggests possible solutions and delivers comparative insights based on a selection of participating and non-participating Member States.

Complexity as a main challenge for the establishment of the EPPO

Complexity is identified as a main challenge for the EPPO, not only during the setting up of this new body, but also once the EPPO becomes operational, as scheduled for the end of 2020. Complexity may be explained by the EPPO's specific multilevel structure, with central services based in Luxembourg and Delegated European Prosecutors working in each participating Member State. The EPPO Regulation adds to this complexity given that the procedural rules that will be followed are partly covered by the Regulation, but mostly left to the law of the Member State in which an investigation takes place. The further strategic development of the EPPO will therefore have to reduce these challenges.

Internal structure and independence of the EPPO

The College will be the EPPO's core decision-making body, consisting of the European Chief Prosecutor and one European Prosecutor per Member State. Permanent Chambers that monitor and direct the investigations carried out by the Delegated European Prosecutors in the Member States will be at the very heart of the EPPO's daily work. The legal number of European Prosecutors allows for the creation of seven Permanent Chambers at the EPPO's headquarters in Luxembourg, if the attachment of prosecutors to the chamber is bound to be 'permanent'. The study proposes a model division of labour, based on five thematic and two cross-cutting chambers. The number and creation of Permanent Chambers will be ever more salient as external pressure for the broadening of the EPPO's mandate increases. Staffing the EPPO adequately will require striking a balance between the language skills and technical expertise of the candidates, to ensure an adequate balance between leadership and performance in terms of intra-institutional and inter-institutional relations.

The EPPO's initial mandate to protect the Union's financial interests requires precautionary strategies to protect the independence of the EPPO. There is a risk of political, interest group and media pressure being exerted on the EPPO and, more specifically, upon the Delegated European Prosecutors working in the Member States due to the persistent high-level of corruption in some participating Member States and given the political implications of some cases that might come to be investigated by the EPPO.

Ensuring swift insertion of the EPPO in the national systems

Most of the EPPO's investigative work will be carried out at Member State level by the Delegated European Prosecutors with the support of national police agencies and other law enforcement agencies supporting criminal investigations. At the end of an investigation, an accusation will be brought before the competent national court. Therefore the study identifies the need for the swift insertion of the EPPO in the national judicial systems as being crucial for any successful investigation. However, this will

remain a challenging task due to highly divergent criminal justice systems in the Member States. Support, by way of an electronic case management system, is a core interface between the EPPO and the Member States' own criminal justice systems. The study identifies risks to the timely readiness of this system, due to ongoing questions related to the system's architecture.

Ensuring effective cooperation with non-participating Member States

The study identifies specific risks related to the six Member States that have not joined the EPPO to date. A comparative evaluation of the risks for the Union's financial interests identifies Hungary and Poland as the most risk-prone country cases, given the extent to which they receive EU funding. For both countries, the risk of corruption is perceived as far above the average, compared to other EU countries. Both countries' governments are currently involved in conflicts with EU institutions on standards related to the adequate respect for the rule of law. Therefore, EU institutions and other supranational bodies should be particularly attentive to the protection of the Union's financial interests in Hungary and Poland. While the risks for the Union's financial interests can be perceived as much lower for Sweden and Denmark, the non-participation of these two EU Member States will add to the complexity of the EPPO's tasks. Since Danish and Irish non-participation is derived from these countries' broader opt-outs for Justice and Home Affairs cooperation, it is unlikely that the EPPO departs from the enhanced cooperation framework in the near future. The United Kingdom, as the sixth non-participating Member State, will become a third country after "Brexit" which might bring its own very specific risks for the Union's financial interests. The rules foreseen in the EPPO Regulation pertaining to the EU's relationship with non-participating Member States are vague. It remains to be seen whether the principle of *sincere cooperation* (Article 4(3) TEU) will prove to be sufficient for smooth and effective cooperation in cross-border investigations.

Ensuring effective cooperation with the institutions and bodies of the European Union

The EPPO's work will be interconnected, and sometimes overlap, with the work of existing institutions and bodies in the field of EU financial accountability: the European Anti-Fraud Office (OLAF), Eurojust, Europol and the European Court of Auditors. Effective cooperation will require working arrangements to be developed through practice. While each EU institution and body will continue to carry out its specific tasks, new arrangements will need to be developed where tasks overlap. OLAF, Europol and Eurojust will have to take more responsibility for the protection of the Union's financial interests in Member States that did not join the EPPO. Working arrangements will need to be established to ensure swift cooperation with the EPPO so that the investigations led by the latter are not harmed.

Judicial protection of suspects and accused persons

The EPPO will contribute to the prosecution and imposition of criminal sanctions to persons. It creates a risk that fundamental rights and civil liberties are breached along the way and ensuring that the fundamental right to a fair trial, as well as proscribing impunity, is of paramount importance to prevent that the democratic legitimacy of the European Union suffers a backlash. The status of the EPPO and, most of all, the status of the Delegated European Prosecutors, must be assessed in the light of the jurisprudence of both the Luxembourg and Strasbourg courts. When Member States' courts adjudicate on EPPO-related matters, they act within the boundaries of EU law and, as such, they are bound by the European Union Charter for Fundamental Rights, as interpreted by the CJEU. Attention should be paid to the way in which potential breaches of fundamental rights committed by law enforcement agencies acting on the basis of EPPO's orders (in investigations led by the latter) might be assessed by the European Court of Human Rights in Strasbourg.

Broadening the mandate of the EPPO

The study explores the debate on extending the EPPO's mandate to terrorism, finding it to be premature. It recommends considering an extension of the EPPO's mandate to the investigation of counterfeiting the Euro, and to cross-border money-laundering and corruption, which both fit better and more logically with its current mandate.

ZUSAMMENFASSUNG

Die Europäische Staatsanwaltschaft (EUSTa) ist eine neue Einrichtung der Europäischen Union, an der sich 22 Mitgliedstaaten im Rahmen einer 2017 eingeleiteten verstärkten Zusammenarbeit beteiligen. Artikel 86 AEUV bildet die Rechtsgrundlage für die Errichtung der EUSTa, die durch die Verordnung (EU) 2017/1939 des Rates ermöglicht wurde. Die wichtigste Aufgabe der EUSTa ist die Ermittlung und Verfolgung von Straftaten zum Nachteil der finanziellen Interessen der EU, wie sie in der 2017 überarbeiteten Richtlinie über den Schutz der finanziellen Interessen der Europäischen Union (PIF-Richtlinie) definiert sind. Mit den auf nationaler Ebene tätigen Delegierten Europäischen Staatsanwälten wird sichergestellt, dass die EUSTa mit den nationalen Strafrechtssystemen verzahnt wird und mit diesen interagiert. Über die von der EUSTa verfolgten Straftaten zum Nachteil der finanziellen Interessen der EU wird jedoch vor den nationalen Gerichten verhandelt und entschieden. In dieser Studie werden die Herausforderungen im Zusammenhang mit der Arbeitsweise der EUSTa analysiert, und zwar aus einer themenübergreifenden Perspektive unter Berücksichtigung des europäischen Rechts, der öffentlichen Ordnung, der öffentlichen Verwaltung, des Strafrechts und der finanziellen Rechenschaftspflicht. In der Studie werden auch mögliche Lösungen vorgeschlagen und vergleichende Einblicke gewährt, die auf einer Auswahl der teilnehmenden und nicht teilnehmenden Mitgliedstaaten beruhen.

Komplexität als größte Herausforderung für die Errichtung der EUSTa

Die Komplexität wird als eine der größten Herausforderungen für die EUSTa betrachtet, und zwar nicht nur während der Errichtung dieser neuen Einrichtung, sondern auch wenn die EUSTa - wie für Ende 2020 geplant - ihre Arbeit aufnimmt. Die Komplexität ergibt sich aus dem spezifischen mehrstufigen Aufbau der EUSTa, deren zentrale Dienste in Luxemburg angesiedelt sind, wohingegen die Delegierten Europäischen Staatsanwälte in den teilnehmenden Mitgliedstaaten tätig sind. Durch die EUSTa-Verordnung wird die Situation noch komplexer, da die einzuhaltenden Verfahrensvorschriften teilweise in der Verordnung enthalten sind, aber größtenteils dem Recht des Mitgliedstaats zu entnehmen sind, in dem die Untersuchung durchgeführt wird. Diese Schwierigkeiten müssen daher im Rahmen der weiteren strategischen Entwicklung der EUSTa verringert werden.

Interne Struktur und Unabhängigkeit der EUSTa

Das Kollegium wird das wichtigste Entscheidungsgremium der EUSTa sein. Es setzt sich aus dem Europäischen Generalstaatsanwalt und einem Europäischen Staatsanwalt je Mitgliedstaat zusammen. Im Mittelpunkt der täglichen Arbeit der EUSTa werden die Ständigen Kammern stehen. Sie überwachen und leiten die von den Delegierten Europäischen Staatsanwälten in den Mitgliedstaaten geführten Ermittlungen. Die gesetzliche Anzahl der europäischen Staatsanwälte ermöglicht die Einrichtung von sieben Ständigen Kammern am Hauptsitz der EUSTa in Luxemburg, sofern die Anbindung der Staatsanwälte an die jeweilige Kammer „ständiger Natur“ sein soll. In der Studie wird eine exemplarische Arbeitsteilung vorgeschlagen, die auf fünf themenspezifischen Kammern und zwei Kammern mit allgemeiner Zuständigkeit basiert. Die Anzahl und Einrichtung der Ständigen Kammern wird mit zunehmendem externen Druck hin zu einer Ausweitung des Mandats der EUSTa immer wichtiger werden. Eine angemessene personelle Ausstattung der EUSTa erfordert ein ausgewogenes Verhältnis zwischen den Sprachkenntnissen und dem technischen Fachwissen der Bewerber, da sich nur so ein angemessenes Gleichgewicht zwischen Führung und Leistung im Hinblick auf innerinstitutionelle und interinstitutionelle Beziehungen gewährleisten lässt.

Das ursprüngliche Mandat der EUSTa, also der Schutz der finanziellen Interessen der Union, erfordert vorausschauende Strategien zum Schutz der Unabhängigkeit der EUSTa. Es besteht die Gefahr, dass von politischer Seite, von Interessengruppen und von den Medien Druck auf die EUSTa und insbesondere

auf die in den Mitgliedstaaten tätigen Delegierten Europäischen Staatsanwälte ausgeübt wird, da in einigen teilnehmenden Mitgliedstaaten immer noch ein hohes Maß an Korruption herrscht und einige Fälle, die von der EUSTa untersucht werden könnten, möglicherweise politische Implikationen haben.

Sicherstellung einer raschen Einbindung der EUSTa in die nationalen Systeme

Die meisten Ermittlungen der EUSTa werden auf der Ebene der Mitgliedstaaten von den Delegierten Europäischen Staatsanwälten mit Unterstützung der nationalen Polizeibehörden und anderer Strafverfolgungsbehörden, die strafrechtliche Ermittlungen unterstützen, durchgeführt. Nach Abschluss einer Untersuchung wird vor dem zuständigen nationalen Gericht Anklage erhoben. Daher wird in der Studie festgestellt, dass es für einen erfolgreichen Ausgang der Ermittlungen von entscheidender Bedeutung ist, dass die EUSTa zügig in die nationalen Justizsysteme eingebunden wird. Dies wird jedoch aufgrund der sehr unterschiedlichen Strafjustizsysteme in den Mitgliedstaaten eine schwierige Aufgabe bleiben. Die Unterstützung mithilfe eines elektronischen Fallmanagementsystems bildet eine zentrale Schnittstelle zwischen der EUSTa und den Strafjustizsystemen der Mitgliedstaaten. In der Studie werden die Risiken identifiziert, die sich aufgrund ungelöster Fragen im Zusammenhang mit der Systemarchitektur für die rechtzeitige Einsatzbereitschaft dieses Systems ergeben.

Sicherstellung einer effektiven Zusammenarbeit mit den nicht teilnehmenden Mitgliedstaaten

In der Studie werden spezifische Risiken im Zusammenhang mit den sechs Mitgliedstaaten identifiziert, die nicht an der EUSTa teilnehmen. Eine vergleichende Bewertung der Risiken für die finanziellen Interessen der Union zeigt, dass Ungarn und Polen aufgrund des Umfangs, in dem sie EU-Mittel erhalten, die am stärksten gefährdeten Länder sind. Für beide Länder wird das Korruptionsrisiko im Vergleich zu anderen EU-Ländern als weit über dem Durchschnitt liegend betrachtet. Die Regierungen beider Länder befinden sich derzeit in Konflikten mit den EU-Organen, was Standards im Zusammenhang mit der angemessenen Achtung des Rechtsstaatsprinzips betrifft. Daher sollten die EU-Organen und andere supranationale Einrichtungen dem Schutz der finanziellen Interessen der Union in Ungarn und Polen besondere Aufmerksamkeit schenken. Während die Risiken für die finanziellen Interessen der Union im Falle Schwedens und Dänemarks als viel geringer einzuschätzen sind, wird die Nichtteilnahme der beiden genannten EU-Mitgliedstaaten die Komplexität der Aufgaben der EUSTa erhöhen. Da sich die Nichtteilnahme Dänemarks und Irlands aus den breiter formulierten Opt-outs dieser Länder für die Zusammenarbeit in den Bereichen Justiz und Inneres ergibt, ist es unwahrscheinlich, dass die EUSTa in naher Zukunft vom Rahmen der verstärkten Zusammenarbeit abweicht. Das Vereinigte Königreich wird als sechster nicht teilnehmender Mitgliedstaat nach dem „Brexit“ zu einem Drittstaat, was eigene, sehr spezifische Risiken für die finanziellen Interessen der Union mit sich bringen könnte. Die in der EUSTa-Verordnung enthaltenden Bestimmungen über die Beziehungen der EUSTa zu den nicht teilnehmenden Mitgliedstaaten sind unklar formuliert. Es bleibt abzuwarten, ob sich der Grundsatz der loyalen Zusammenarbeit (Artikel 4 Absatz 3 EUV) als ausreichend für eine reibungslose und effektive Zusammenarbeit bei grenzüberschreitenden Ermittlungen erweisen wird.

Sicherstellung einer effektiven Zusammenarbeit mit den Organen und Einrichtungen der Europäischen Union

Die Tätigkeit der EUSTa wird mit den Tätigkeiten der nachfolgend genannten bestehenden Organe und Einrichtungen im Bereich der finanziellen Rechenschaftspflicht der EU verbunden sein und sich manchmal mit deren Tätigkeiten überschneiden: das Europäische Amt für Betrugsbekämpfung (OLAF), Eurojust, Europol und der Europäische Rechnungshof. Eine effektive Zusammenarbeit setzt voraus, dass die Arbeitsmodalitäten in der Praxis entwickelt werden. Während jedes Organ und jede Einrichtung der EU weiterhin seine/ihre spezifischen Aufgaben wahrnehmen wird, müssen neue Vereinbarungen

ausgearbeitet werden, wenn sich die Aufgaben überschneiden. OLAF, Europol und Eurojust werden mehr Verantwortung für den Schutz der finanziellen Interessen der Union in denjenigen Mitgliedstaaten übernehmen müssen, die nicht an der EUSTa teilnehmen. Es müssen Arbeitsvereinbarungen getroffen werden, um eine reibungslose Zusammenarbeit mit der EUSTa zu gewährleisten, damit die von dieser geführten Ermittlungen nicht beeinträchtigt werden.

Gerichtlicher Schutz von Verdächtigen und Beschuldigten

Die EUSTa wird einen Beitrag dazu leisten, dass Personen strafrechtlich verfolgt und bestraft werden. Dies birgt die Gefahr, dass dabei Grundrechte und bürgerliche Freiheiten verletzt werden. Daher ist es von größter Bedeutung, dass das Grundrecht auf ein faires Verfahren gewahrt und Straflosigkeit unterbunden wird, wenn verhindert werden soll, dass die demokratische Legitimität der Europäischen Union untergraben wird. Der rechtliche Status der EUSTa und vor allem der Status der Delegierten Europäischen Staatsanwälte muss unter Berücksichtigung der Rechtsprechung sowohl des EuGH als auch des Europäischen Gerichtshofs für Menschenrechte bewertet werden. Wenn die Gerichte der Mitgliedstaaten über EUSTa-bezogene Angelegenheiten entscheiden, handeln sie innerhalb der Grenzen des EU-Rechts und sind somit an die Charta der Grundrechte der Europäischen Union und an deren Auslegung durch den EuGH gebunden. Es sollte aufmerksam darauf geachtet werden, in welcher Weise eventuelle Grundrechtsverletzungen durch Strafverfolgungsbehörden, die (in von der EUSTa geführten Ermittlungen) auf der Grundlage von Anordnungen der EUSTa tätig werden, vom Europäischen Gerichtshof für Menschenrechte in Straßburg beurteilt werden könnten.

Ausweitung des Mandats der EUSTa

In der Studie wird die Diskussion über die Ausweitung des Mandats der EUSTa auf den Terrorismus untersucht, wobei eine solche Ausweitung als verfrüht betrachtet wird. Es wird empfohlen, eine Ausweitung der Ermittlungsbefugnisse der EUSTa auf die Fälschung von Euro-Banknoten sowie auf die grenzüberschreitende Geldwäsche und Korruption zu prüfen, da diese Straftaten sowohl besser als auch sinnvoller zu ihrem derzeitigen Mandat passen.

SYNTHESE

Le Parquet européen est un nouvel organe de l'Union européenne qui réunit 22 États membres dans le cadre d'une coopération renforcée instaurée en 2017. Il a été institué par le règlement (UE) n° 2017/1939 du Conseil sur le fondement de l'article 86 du traité FUE. Il a principalement pour mission de mener des enquêtes et d'engager des poursuites dans le cadre de la lutte contre les infractions pénales portant atteinte aux intérêts financiers de l'Union, telles que définies par la directive relative à la protection des intérêts financiers de l'Union (directive PIF) révisée en 2017. Le Parquet européen est destiné à s'intégrer dans les systèmes nationaux de justice pénale et à coopérer avec eux, par l'intermédiaire des procureurs européens délégués affectés dans les États membres. Les infractions pénales contre les intérêts financiers de l'État donneront lieu à des poursuites engagées par le Parquet européen, mais seront jugées et sanctionnées par les juridictions nationales. La présente étude propose une analyse interdisciplinaire des problématiques liées au fonctionnement du Parquet européen, qu'elle aborde sous l'angle du droit européen, des politiques publiques, de l'administration publique, de la procédure pénale et de la responsabilité financière. Elle propose également des solutions et présente des observations tirées de la comparaison entre quelques États membres participants et non-participants.

La complexité, principal frein à la mise en place du Parquet européen

La principale difficulté tient à la complexité qui caractérise la mise en place du Parquet européen, et marquera son entrée en fonction prévue pour la fin 2020. Cette complexité peut être attribuée à l'organisation à double niveau du Parquet européen, qui reposera d'une part sur des services centraux situés au Luxembourg et d'autre part sur les procureurs européens délégués affectés dans chacun des États membres participants. Elle est accentuée par le fait que les règles de procédure applicables ne sont que partiellement régies par le règlement sur le Parquet européen et qu'elles relèveront en grande partie de la législation de l'État membre où se déroule l'enquête. Il conviendra donc d'atténuer les effets de cette complexité dans le cadre du développement stratégique futur du Parquet européen.

Structure interne et indépendance du Parquet européen

Le collège, composé du chef du Parquet européen et d'un procureur européen par État membre, constituera l'organe central de décision du Parquet européen. Les chambres permanentes, chargées de superviser et de diriger les enquêtes menées par les procureurs européens délégués affectés dans les États membres, assureront un rôle central dans l'activité quotidienne du Parquet européen. Le nombre de procureurs fixé par le règlement permet la création de sept chambres permanentes au sein du siège du Parquet européen à Luxembourg, si toutefois les procureurs sont affectés aux chambres à titre permanent. L'étude propose également de répartir les tâches entre cinq chambres thématiques et deux chambres transversales. La question du nombre de chambres permanentes revêtira une importance croissante à mesure que s'accroîtront les pressions extérieures en faveur d'un élargissement du mandat du Parquet européen. Il conviendra, pour doter le Parquet européen d'un personnel qualifié, de déterminer un point d'équilibre entre compétences linguistiques et savoir-faire technique des candidats, afin que ceux-ci soient pourvus de l'autorité et de la compétence nécessaires tant dans le cadre des relations intra-institutionnelles que dans celui des relations interinstitutionnelles.

La mission initiale du Parquet européen, qui consiste à protéger les intérêts financiers de l'Union, appelle la mise en place de stratégies préventives propres à garantir l'indépendance de cet organe. Le Parquet européen, et plus particulièrement les procureurs européens délégués affectés dans les États membres, peuvent être soumis à des pressions politiques ou médiatiques ou se voir confrontés à des groupes d'intérêt, en raison de la corruption à haut niveau qui continue de sévir au sein de certains États

membres participants et des retombées politiques des affaires sur lesquelles le Parquet européen est susceptible d'enquêter.

Garantir l'intégration rapide du Parquet européen au sein des systèmes nationaux

L'activité d'enquête du Parquet européen sera principalement menée par les procureurs européens délégués à l'échelle des États membres, avec la coopération des autorités de police nationales et des autres autorités répressives susceptibles d'intervenir dans les enquêtes pénales. Au terme de l'enquête, un acte d'accusation sera soumis à la juridiction nationale compétente. Par conséquent, selon l'étude, l'intégration rapide du Parquet européen dans les systèmes judiciaires nationaux constitue un préalable indispensable à toute enquête. La tâche sera toutefois ardue, compte tenu des différences notables qui existent entre les différents systèmes de justice pénale des États membres. Un système électronique de gestion des dossiers servira d'interface entre le Parquet européen et les systèmes de justice pénale des États membres. L'étude souligne que ce système risque de ne pas être disponible en temps utile: en effet, des questions subsistent à propos de son architecture.

Garantir une coopération efficace avec les États membres non-participants

L'étude insiste sur les risques spécifiques liés aux six États membres qui n'ont pas, à ce jour, rejoint le Parquet européen. Il ressort d'une évaluation comparative que la Hongrie et la Pologne sont les pays qui font peser le risque le plus sérieux sur les intérêts financiers de l'Union, eu égard à l'importance des aides qu'elles perçoivent de l'Union européenne. Les deux pays sont perçus comme présentant un risque de corruption bien plus élevé que la moyenne des pays de l'Union européenne. Leurs gouvernements sont actuellement en conflit avec les institutions européennes à propos des exigences de l'Union en matière de respect de l'état de droit. Par conséquent, les institutions de l'Union européenne et les autres organes supranationaux doivent se montrer particulièrement attentifs à la protection des intérêts financiers de l'Union en Hongrie et en Pologne. Si la Suède et le Danemark représentent une menace beaucoup plus faible pour les intérêts financiers de l'Union, leur non-participation ajoutera à la complexité des tâches du Parquet européen. Dans la mesure où la non-participation du Danemark et de l'Irlande découle des dérogations dont ces pays bénéficient plus généralement en matière de coopération dans les domaines de la justice et des affaires intérieures, il est peu vraisemblable que le Parquet européen s'écarte, dans un avenir proche, du cadre de la coopération renforcée. Le Royaume-Uni, sixième État membre non-participant, sera, à l'issue du Brexit, également susceptible de faire peser des risques très spécifiques sur les intérêts financiers de l'Union. Les dispositions du règlement sur le Parquet européen relatives aux relations de l'Union européenne avec les États membres non-participants sont imprécises. La question de savoir si le principe de *coopération sincère* suffira à garantir une coopération harmonieuse et efficace lors des enquêtes transfrontières reste ouverte.

Garantir une coopération efficace avec les institutions et les organes de l'Union européenne

Les missions du Parquet européen et des institutions et organes œuvrant dans le domaine de la responsabilité financière de l'Union, à savoir l'Office européen de lutte antifraude (OLAF), Eurojust, Europol et la Cour des comptes européenne, seront connexes, voire même parfois identiques. Aussi, pour garantir l'efficacité de leur coopération, il conviendra de mettre en place une répartition pragmatique des tâches. Les institutions et organes européens continueront à accomplir leurs missions spécifiques; néanmoins, des solutions devront être mises au point pour éviter que certaines tâches ne se recoupent. L'OLAF, Europol et Eurojust devront intervenir davantage pour protéger les intérêts financiers de l'Union dans les États membres non-participants. Il conviendra d'élaborer une organisation du travail propre à faciliter leur coopération avec le Parquet européen, de manière à protéger les enquêtes menées par ce dernier.

Protection juridictionnelle des suspects et des personnes accusées

Le Parquet européen contribuera aux poursuites et au prononcé de sanctions pénales à l'encontre d'individus. Il existe dès lors un risque d'atteinte aux droits et libertés fondamentaux. Il est donc indispensable de veiller à ce que le droit fondamental à un procès équitable soit respecté et que l'impunité soit combattue, afin d'éviter que la légitimité démocratique de l'Union européenne ne soit remise en question. Le statut du Parquet européen, et en particulier celui des procureurs européens délégués, doivent être examinés à la lumière de la jurisprudence de la Cour de justice de l'Union européenne et de la Cour européenne des droits de l'homme. Lorsqu'elles statuent sur des affaires relevant du Parquet européen, les juridictions nationales appliquent le droit de l'Union et sont tenues, à ce titre, par les dispositions de la charte des droits fondamentaux de l'Union européenne, telle qu'interprétée par la Cour de justice de l'Union européenne. Une attention particulière doit être portée à la façon dont la Cour européenne des droits de l'homme de Strasbourg appréciera les potentielles atteintes aux droits fondamentaux commises par les autorités répressives agissant sur instruction du Parquet européen dans le cadre des enquêtes menées par ce dernier.

Élargir le mandat du Parquet européen

L'étude examine la possibilité d'élargir le mandat du Parquet européen aux questions de terrorisme, mais juge la question prématurée. Elle recommande d'étendre le mandat du Parquet européen aux enquêtes sur les contrefaçons de l'euro et sur le blanchiment de capitaux et la corruption transfrontières, qui constituent des missions plus adaptées et plus cohérentes au regard de son mandat actuel.

1 THE EPPO AS A NEW INSTITUTIONAL ACTOR FOR THE PROTECTION OF THE UNION'S FINANCIAL INTERESTS: LEGISLATIVE PROCEDURE, EXPECTATIONS AND CHALLENGES

KEY FINDINGS AND POSSIBLE SOLUTIONS

- The EPPO is the result of long and complicated negotiations. Some of the compromises made at the negotiation stage contribute to the complexity of the institutional setting to be established for this new body.
- At Member State level, Ministries of Finance have traditionally led the negotiation and implementation of PIF instruments. This requires time-consuming coordination with the Ministries of Justice and triggers potential conflicts where the Member States are financially responsible for the mismanagement of EU funds under shared management. It is recommended here to attach greater intervention to the Justice and Home Affairs Council (and thus to the Member States' Ministries of Justice) in future developments of the EPPO and PIF instruments.

The Treaty of Lisbon paved the way for the establishment of a European Public Prosecutor's Office (EPPO) in Article 86 (1) TFEU, following long discussions going back to the late nineties. The establishment of the EPPO as a new EU body represents a rare case whereby the transfer of new powers to the EU could be achieved without treaty change. Member States would remain able to protect their sovereignty in the sensitive matter of criminal prosecution through unanimous voting of government representatives in the Council for the adoption of the EPPO Regulation.

It is well known that the initial proposal presented by the Commission in 2013 was poorly received first by national parliaments¹, and then at ministerial level where political decision makers failed to reach unanimity. Under the Luxembourg Presidency of the Council in the second half of 2015, a compromise was reached on a number of key topics (Council of the EU 2015c), but reasons linked to the material competences of the EPPO (a European prosecutor for which crimes?) became a bone of contention among Member States until the impossibility to achieve the required unanimity was recorded at the end of 2016. Enhanced cooperation was permitted by the TFEU as a subsidiary exit, which by that time seemed the only way to push forward that project, deemed strategic by the Commission and the European Parliament.

Through a series of informal meetings brokered by France and Spain, which were held outside the Council premises and without the formal involvement of its presidency, the enhanced cooperation was progressively strengthened. When the amount of participant states was deemed sufficient, the enhanced cooperation was launched in June 2017. The long negotiations successfully ended with the adoption of the final text by Justice and Home Affairs (JHA) Ministers of the Regulation (EU) 2017/1939 (hereinafter, the EPPO Regulation), on 12 October 2017.

¹ The following parliaments /chambers adopted reasoned opinions: Cyprus (Chamber of Representatives, 2 votes), Czech Republic (Senate, 1 vote), France (Senate, 1 vote), Hungary (National Assembly, 2 votes), Ireland (Houses of the Oireachtas, 2 votes), Malta (Chamber of Representatives, 2 votes), the Netherlands (Chamber of Representatives and Senate, 2 votes), Romania (Chamber of Deputies, 1 vote), Slovenia (National Assembly, 1 vote), Sweden (Riksdag, 2 votes), the United Kingdom (House of Commons and House of Lords, 2 votes). The reasoned opinions are accessible through <http://www.ipex.eu/IPEXL-WEB/dossier/document/COM20130534.do>

Box 1: Explanatory factors for suboptimal prosecution of PIF crimes

- Lack of follow-up of OLAF recommendations by national prosecution systems.
- Limited law enforcement resources invested in PIF crimes.
- Fragmentation of law enforcement efforts in PIF crimes.
- Delaying or non-cooperative attitudes towards judicial cooperation in PIF crimes with a cross-border dimension, in certain states.

The main argument put forward in favour of an EU prosecuting institution is that not all Member States' judicial institutions take the task of prosecuting offences against the EU's financial interests (*protection des intérêts financiers, PIF*) seriously enough. National authorities may be inclined not to investigate PIF crimes to retain those EU funds in their territories, even if illegal. The **lack of Union authority to prosecute PIF crimes fosters widespread impunity**, with an ensuing damage for the EU budget which is not negligible.

Several factors can account for the **suboptimal results yielded by national prosecution of PIF crimes**, which includes the conviction rate and the amount of illicit assets recovered from PIF crimes (the latter allows for

rebalancing the damage to the EU budget), as showcased in Box No.1. These arguments are highlighted in the official documents of the European Union, although further analysis would be needed to back them up with clear-cut evidence. Practical difficulties in detecting, and then measuring, the 'shadow economy' in this and other areas hinders the ability to approach this subject with sound methodological grounds.

Box 2: Expected added value of the EPPO

- Higher rate of prosecution of PIF crimes.
- Better prosecution leading to higher conviction rate in PIF crimes.
- Higher rate of asset recovery

Source: European Commission (2013)

We might have **three expectations for the EPPO**, as outlined by the Commission (Box No.2). These elements of institutional 'additionality' should in turn, over time, become the measuring rod for the EPPO's performance and its actual added value. Low performance of the EPPO in the key areas of its mandate would reveal that the real goals behind its creation were other: integration

goals (to strengthen the integration method in previously uncharted policy areas), internal goals (to explore the extent to which the EU is capable of putting in practice new capabilities in the field of criminal procedure law), or inter-state goals (to manage interstate struggles –e.g. between net contributors and net recipients- as to the way in which EU funds should be best managed).

Box 3: Criminal offences within the EPPO's mandate (PIF crimes)

1. - Direct damage to the EU's financial interests committed intentionally through:

- Fraud
- Corruption
- Bribery
- Misappropriation

2. - Indirect damage to the EU's financial interests

- Intra-EU VAT fraud above EUR 10 million

3. - Assumed damage to the EU's financial interests

- Money-laundering

Source: Art. 4 PIF Directive

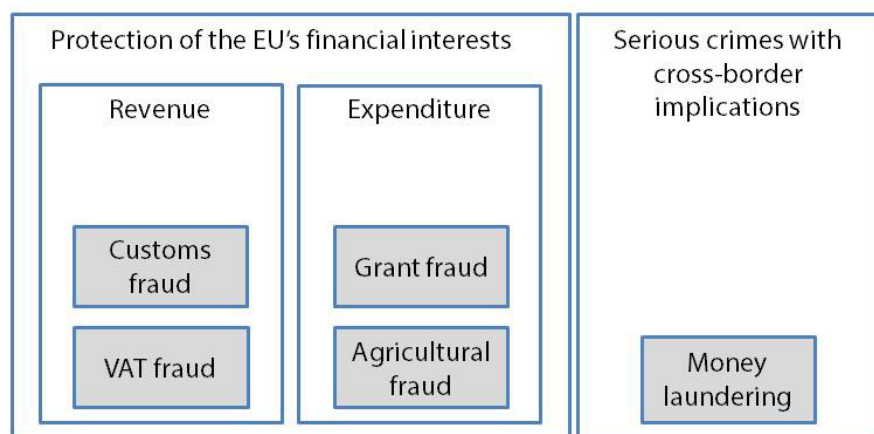
We should rightly question the added value that EPPO brings, particularly for national authorities, given that the current institutional setting already comprises numerous institutions with diverging and overlapping powers, tasked to monitor the execution of the EU budget, prevent fraud and investigate leads on suspected PIF crimes, both at the EU and national level.

First and foremost, it should be noted that the EPPO's mandate has been strictly limited to **PIF crimes**. It has not, in any way, received autonomous powers to pursue corruption and fraud at large. Such a mandate would be rejected as unacceptable, at the national level, encroaching on national competences in this field, and as a breach of the principle of subsidiarity.

The EPPO is endowed with investigating and prosecuting powers as regards a finite list of offences which must receive a criminal response at Member State level, by virtue of the PIF directive, as listed in Box No. 3.

In that sense, the methodology to define EPPO's mandate resembles a jigsaw. The Treaty of Lisbon leaves the door open to broadening its mandate in the future to extend to serious crimes with a cross-border dimension.

Figure 1: Material scope of the EPPO's mandate.



Against this backdrop, **the EPPO represents a new body in an EU institutional framework that features numerous actors.** Some of them operate as administrative investigating (law enforcement) bodies (national police corps, as well as law enforcement agencies at national and EU level), including the financial accountability watchdogs at national (supreme audit institutions, SAI) and EU level (European Court of Auditors, ECA, and the Office de Lutte Anti-Fraude, OLAF). These bodies are endowed with varying investigating powers, and some also with sanctioning powers (in certain cases, powers are limited to naming-and-shaming and issuing recommendations, while other bodies may impose fines).

The networking institutions for judicial cooperation set up at the EU level (Eurojust and the European Judicial Network (EJN)) also help protect the Union's financial interests. Given this existing institutional set-up, **the actual "added value" of EPPO remains a key question** for the European Parliament. It should be borne in mind that **every single piece in the EPPO's 'jigsaw mandate' conceals a vast arena of national and EU law enforcement bodies of varying nature, powers, resources, and organisational cultures.** This challenging institutional configuration, to some extent, will surely place a strain on the EPPO's capacity to establish its working arrangements, build inter-institutional relations and create relevant synergies in order to deliver 'added value'.

Launching the EPPO within a framework for enhanced cooperation should rightly be a source of concern when it comes to ensuring its capacity to effectively perform the goals assigned to it. In numerous cases, PIF crimes are committed by organised criminal gangs or organised cross-border schemes that move freely across Member States within the internal market. Restricting the investigating or prosecuting capacity of the EPPO to the territorial scope of the 22 participating Member States means, in practice, that criminals might take shelter in a non-participating Member State and the EPPO might not be able to reach them unless well-functioning cooperation arrangements are achieved with those countries. Prosecuting PIF crimes in an internal market of 27 Member States (once the UK has left)

will be complex given that 5 Member States (Denmark, Hungary, Ireland, Poland and Sweden) have decided not to join it. Brexit further complicates the scenario.

At the time of writing, uncertainty is rife as to whether and when the United Kingdom will eventually withdraw from the Union, and under which terms (comprehensive withdrawal agreement, sectorial agreements, unilateral extension of targeted provisions, or no deal at all). There is widespread agreement that the transitional period will last several years until the dust has settled. As such, the options must be carefully analysed, first, to allow for the participation of associated states that have privileged relations with the Union in other policy areas (e.g. Norway), and second, to clarify the role the EPPO might one day play in the fight against PIF crimes, in terms of its own engagement with third countries that are recipients of (misspent) EU funds. Figure No. 2 provides an overview of the various frameworks within the geographic scope of the EPPO's future activities. Darker areas represent the participating Member States of the EPPO, while grey areas are non-participating EU Member States.

Figure 2: Variable geometry and the EPPO.



Criminal procedures and criminal justice systems still vary considerably among the Member States. Prosecution and sanctions for the same offences may, therefore, differ depending upon the Member State where the offender is prosecuted. One of the potential problems could be determining the State where the offence is committed in order to establish the applicable criminal and procedural law, even more when judicial action is brought against criminal networks operating from different States. There are currently no plans to establish an EU Criminal Court. In light of this fact, the harmonising effect of the EPPO will remain limited to a prosecution side, looking to the various national judicial systems for the adjudication of the offences and execution of penalties. **The lack of a consistent set of powers for**

prosecuting authorities across the EU-27 may become a challenge for the EPPO. Likewise, reluctant compliance to EU harmonisation mechanisms at the national level may become a stumbling block.

The revised PIF Directive (EU) 2017/1371² is crucial for the EPPO's work as it sets the standards for criminal offences that will fall under the EPPO's authority. Some of the participating Member States still have to implement this Directive. At Member State level, Ministries of Finance have traditionally taken the lead for the negotiation and implementation of PIF instruments. This requires time-consuming coordination with the Ministries of Justice and triggers potential conflicts where the Member States are financially responsible for the mismanagement of EU funds under shared management. **We recommend giving due consideration to the idea of attributing competence both for the further development of the EPPO and for the PIF instruments to the Justice and Home Affairs Council and thus to the Member States' Ministries of Justice in the future.**

This study is based on fieldwork with regard to selected EU Member States: Austria, Bulgaria, Germany, the Netherlands and Spain as participating Member States; Ireland, Poland, and the United Kingdom as Member States that have not (yet) joined the EPPO.

² Directive (EU) 2017/1371 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, OJ EU L 198 of 28.7.2017, 29.

2 INTRA-INSTITUTIONAL CHALLENGES FOR THE EPPO: STRUCTURE, MANDATE, AND RESOURCES

KEY FINDINGS AND POSSIBLE SOLUTIONS

- The EPPO's complexity is related to the specific multi-level structure, with central services based in Luxembourg and Delegated European Prosecutors working in each participating Member State. The EPPO Regulation adds to this complexity given that the procedural rules that will be followed are partly covered by the Regulation, but are mostly left to the law of the Member State in which an investigation takes place.
- Collegiality at the central level introduces foreign elements in the traditional functioning of a prosecuting body, whose consequences remain unknown at this stage.
- The internal rules of the EPPO should ensure (through majority rules or other) that the College effectively fulfils its filtering role for candidates to European Delegated Prosecutors nominated by Member States with regard to their competence and independence, to avoid that the effectiveness of this preventive mechanism is hollowed out in practice.
- The division in Permanent Chambers should replicate the main thematic and cross-cutting areas of the EPPO's mandate, to ensure even coverage of all functions, and smooth communication and coordination with the law enforcement agencies at national and EU level which embody the partner epistemic communities for the EPPO.
- Adequate balance between practical experience and language skills should be ensured when appointing the European Prosecutors and the European Delegated Prosecutors, to ensure effective engagement, teamwork and leadership. Determining the language regime of the EPPO through the internal rules of procedure will be a major task for the first College.
- Safeguards to the independence of the EPPO may be assessed from various perspectives: legal, political, judicial and security safeguards. The independence of the European Delegated Prosecutors is not sufficiently guarded against national interference through disciplinary measures, in stark contrast to the safeguards introduced with regard to the national central bank governors in the framework of the European System of Central Banks. However, the EPPO Regulation imposes certain filters to national authorities when imposing disciplinary measures to the European Delegated Prosecutors. In case of national override, the Commission should follow past precedents and trigger an action for infringement before the CJEU in order to defend the European nature of the European Delegated Prosecutors, their independence and/or their powers. In this regard, the EP should remain vigilant in the context of its scrutiny powers, including – if considered pertinent – making suggestions to the Council so that the EPPO Regulation is aligned with the ECB Statute provisions introducing judicial guarantees to protect Central Bank Governors against arbitrary dismissal by national governments.
- The current version of the EPPO Regulation establishes an obligation for the European Delegated Prosecutors to respect fundamental rights as enshrined in the Charter for Fundamental Rights of the EU. In line with the Treaty and the statutory regulations of other supervisory bodies of the Union, future revisions of the EPPO Regulation should include their submission to the European Convention for Fundamental Rights, as general principles of EU law, or to the ECHR itself by the time the EU has acceded to it. Likewise, provisions on the lifting of immunity and criminal liability should be inserted in the constitutive regulation or the Rules of Procedure.

2.1 STRUCTURAL COMPLEXITY IN THE EPPO

In this section, we introduce first the core institutional elements of the EPPO (2.1.1), followed by the division of labour (2.1.2) and the language regime (2.1.3). Forthcoming subchapters will include reflections on the power dynamics, checks and balances, and the potential liability of the EPPO (2.2), the mandate and powers (2.3) and the resources of the EPPO (2.4).

2.1.1 Hybridity and main features of the EPPO's structure

The final structure of the EPPO introduces **foreign elements into the normal structure of a prosecuting body**. This complexity results from negotiations among national representatives to depart from the 2013 Commission's proposal.³ In it, the Commission proposed a hierarchical structure which entailed an upload of the *esprit de corps* characteristic of prosecuting bodies, an example of bottom-up Europeanization resulting from the privileged attention paid by the Commission to the views of national prosecutors and criminal lawyers since the late 1990s.⁴ Eventually, a **collegial model** prevailed at the central level, whereby the European Chief Prosecutor (ECP)⁵ heads up the body with the assistance of two Deputy European Chief Prosecutors (DECPs)⁶ and a college of European Prosecutors.⁷ The proposed changes altered the substance of the proposal, but the Commission considered them instrumental to ensure national support, and therefore accepted them. External observers have been, for the most part, critical with the ensuing hybridity of the EPPO.⁸ It is true, however, that prevailing perspectives in literature are those of criminal lawyers,⁹ with very little contribution from other research fields.¹⁰ Privileged views on the evolution of the EPPO throughout the years have also been provided by a handful of practitioners at the EU and national level.¹¹

In an attempt to square the circle, given the hybrid nature of an EPPO design between a European head and (mostly) national hands and feet, between a presidential body and a collegial one, Article 8 (1) of the EPPO Regulation introduces it as **'an indivisible Union body'**,¹² implemented through a decentralised logic that guides its operations over two levels (European and national). Thus, the EPPO's 'indivisible nature' is good-willed but uncertain as to its interpretation. For the time being, two aspects deserve highlighting. First, endowing national authorities with executive, supervisory and now coercive functions under a European 'hat' is increasingly becoming the norm in varying policy fields (competition, banking, immigration management, etc.).¹³ Second, hybridity complicates further the interpretation of the legal nature of national authorities acting on behalf of the EU, potentially breaching fundamental rights and compromising its responsibility.

The central level: the College, the European Prosecutors and the Permanent Chambers

The EPPO's central level will be located at the headquarters in Luxembourg, where the College, the Permanent Chambers, the European Chief Prosecutor (ECP), the Deputy European Chief Prosecutors

³ The complex evolution of EPPO's structure throughout the legislative process is examined in detail by, among others, Martinez Santos (2018) p.7-9; Naszczyńska K (2016) pp.53-61

⁴ Interviews.

⁵ Art. 14 EPPO Regulation

⁶ Art. 15 EPPO Regulation

⁷ Arts. 9 and 16 EPPO Regulation

⁸ Csúri (2016) p 123 said that the EPPO risked becoming a 'white elephant'; Giuffrida (2017) talked about a 'King without kingdom';

⁹ Seminal research pieces include notably Bachmaier 2018; Geelhoed, Erkelens and Meij 2018;

¹⁰ By way of exception, Diane Fromage (2015) has examined the influence of national parliaments in the negotiations of the EPPO from an EU institutional law perspective;

¹¹ Among others, attention is drawn here on to the contributions by national prosecutors: Conde-Pumpido 2009; national representatives in the Council who participated in the EPPO negotiations: Csonka 2017, Herrnfeld 2018, Franssen 2018, Rashkov 2018, Vilas 2018a and 2018b; seconded officials in criminal cooperation frameworks at EU level: Espina Ramos 2009 and 2011; EU officials: Inghelram 2011, Kessler 2016, Brenninkmeijer 2018, Kuhl 2017

¹² Art. 8 (1) EPPO Regulation

¹³ Vervaele 2018, p.12

(DECP), the European Prosecutors and the Administrative Director will be based.¹⁴ By contrast, the 'decentralized level' is embedded in the national criminal justice systems and composed of European Delegated Prosecutors (EDP), working in and from the national capitals.¹⁵ The institutional design of the EPPO shows strong multi-level governance features, and gives rise to similar concerns as for other accountability mechanisms in the EU, which follow more or less the same logic, as this research will show.

The relative powers and status of the **European Chief Prosecutor (ECP)** were significantly weakened during the negotiations stage, through the introduction of the College of Prosecutors and the shift of the guidance on specific cases to the permanent chambers (see *infra* section 2.2.1 in page 31).

The **EPPO College** consists of the ECP and 22 European Prosecutors (one per participating State).¹⁶ Chaired by the ECP, the College ensures strategic leadership of the EPPO and general oversight of the activities of EPPO, but will not take operational decisions in individual cases,¹⁷ which are the task of the Permanent Chambers.

The **European Prosecutors** emerged when the collegial model replaced the hierarchical one in February 2014. The EPPO regulation endows these national prosecutors with a triple function:¹⁸

- a) to supervise the performance of the EDP from their own State of origin, according to the indications given by the Permanent Chamber to which the EP is subject, ensuring the smooth flow of information between the European and national dimensions of EPPO;¹⁹
- b) to become the privileged channel of communication between the Permanent Chambers and the EDP; and
- c) to serve as an informal liaison officer of their Member State of origin and EPPO, in a similar way to how the national members of Eurojust operate.²⁰

The European Prosecutors will sit at the college of the EPPO, and at **Permanent Chambers** (see *infra* 2.1.2 in page 28) composed of 'two permanent members' and a chair, who may be either the ECP him- or herself, or one of the DECP, or a European Prosecutor appointed as chair.²¹ While the strategic leadership is reserved for the College, the Chambers have key powers as regards the specific handling of cases investigated and prosecuted by the EPPO (see *infra* 2.2.1 page 31). Thus, chambers have been considered the 'beating heart of the EPPO'.²²

By contrast, the **European Delegated Prosecutors (EDP)** are 'the true cornerstone of the EPPO',²³ for they hold the potential performance of EPPO in their hands. The practical articulation of EDPs as part of an 'indivisible European body' seems at first difficult to square with the fact that they are embedded in the national prosecutor's offices. Their origin and workplace is the national prosecutor's office and, as such, it is essential to safeguard their independence to avoid any negative impact on the EPPO's performance. The EPPO regulation leaves it to Member States to decide whether the EDPs will have a 'double hat' (part-time dedication to the EPPO) or a single EU hat (full-time dedication to the EPPO). In the former case, the EPPO cases will take precedence over national ones.

¹⁴ Art. 8 (3) EPPO Regulation

¹⁵ Art. 8 (4) EPPO Regulation

¹⁶ Art. 9 (1) EPPO Regulation

¹⁷ Art. 9 (2) EPPO Regulation

¹⁸ Martínez Santos, A (2018), p. 13

¹⁹ This includes issuing instructions to EDP on particular matters, and also to follow-up on their cases, in view of presenting case summaries and resolution proposals before their respective Chamber.

²⁰ Martínez Santos, A (2018), p. 13

²¹ Article 10 (1) EPPO Regulation

²² Csuris, 2016

²³ Martínez Santos, A (2018), p. 14

An important risk linked to the hybrid nature of the EPPO is that, although the EDPs act as the EPPO's representatives before the Member States' criminal justice systems, their powers will mirror those of national prosecutors as regards PIF crimes. The EDPs will investigate PIF crimes, bring cases before the national courts, and participate in the taking of evidence, as well as the formulating and filing appeals against the decisions of the said Courts when needed. The implications of this are further explored in Chapter 3, *infra* page 51.

- **How many European Delegated Prosecutors?**

Regarding the number of EDP, the EPPO Regulation largely leaves the matter open for Member States to accommodate their national preferences, although there will be a minimum of two per Member State (*or more*, emphasis added).²⁴ Therefore, there will be at least 44 EDPs for 22 Participating Member States. The EPPO Regulation establishes that the European Chief Prosecutor may increase the number of Delegated Prosecutors in accordance with the national authorities. The criteria for increasing the amount of EDP remain undefined.

The interviews supporting this research show that this matter is very much on-going, and far from being decided, even agreed upon, at the national level. Some Member States have expressed their views in favour of a centralised structure for the EDP (e.g. Bulgaria), while the ones where the criminal justice system is decentralised (specifically, Germany, where the Länder hold the greatest power) may attempt at increasing the number of EDPs to replicate their internal structure. In-between, Spain features as a country with centralised prosecution but ground views favour separate EDPs at the level of Autonomous Communities. In Germany, the current estimation of EDPs is at five, although some 16 State Ministries of Justice would rather have up to 10 EDPs.

- **Full-time or part-time?**

Article 13 (3) EPPO Regulation allows the EDPs to 'exercise functions as national prosecutors, to the extent that this does not prevent them from fulfilling their obligations under this Regulation'. Therefore, EDPs may be full-time or part-time. Quite understandably, the EPPO Regulation has attempted at preventing a situation where an EDP sits idly by without any case to investigate or prosecute: expectations as to the case-load awaiting EDPs across Participating Member States are very divergent (see *infra* section 3.2, page 51). However, part-time EDPs raise a number of concerns from a legal perspective. The least of them is the respective allocation of workload to their European or, alternatively, national hat. Relevant issues point to the fact that when the EDPs act in their national capacity, their nature will cease to be that of an European agent, with important implications for the European Union in the field of fundamental rights protection and non-contractual liability (see *infra* section 2.2.3 in page 40 and section 7.3 in page 88). Likewise, part-time EDPs will be bound to different (and potentially contradictory) chains of command and instructions –European and national, depending on the case they are handling. This feature introduces unnecessary complexity.

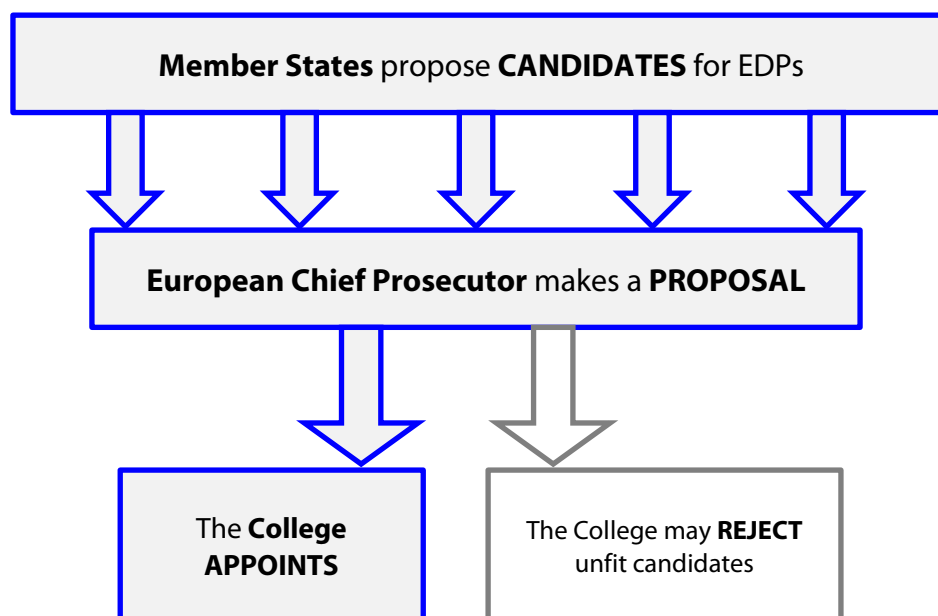
This question is still largely undecided at the national level. Our fieldwork reveals broad national support to full-time EDPs, although national specificities remain. For Germany, it is still uncertain whether they will work full-time or part-time, or even whether they will start as part-time then become full-time. The State Ministers of Justice plan to bundle them into 5 centres foreseen for: Bayern (=Bavaria), Berlin, Hamburg, Hessen (Hesse) und Nordrhein-Westfalen (North-Rhine-Westphalia). In Spain, however, most opinions shared by practitioners and experts favoured that EDPs devote themselves full-time to the post.

²⁴ Art. 13(2) EPPO Regulation

- **Procedures to nominate the EDPs?**

Article 17(1) governs the appointment procedure of the EDPs, stating that '[u]pon a proposal by the European Chief Prosecutor, the College shall appoint the European Delegated Prosecutors nominated by the Member States..' This procedure is illustrated in Figure 3. The European Delegated Prosecutors shall be appointed for a renewable term of 5 years. We consider here three main issues: the role of the European Chief Prosecutor, the option to filter candidates, and the preliminary conditions that EDPs must fulfil.

Figure 3: Appointment of the European Delegated Prosecutors.



The EDPs must fulfil four main conditions:

- active member of the public prosecution service or judiciary (of the respective Member States which nominated them),
- independence beyond doubt,
- possess the necessary qualifications, and
- relevant practical experience of their national legal system.

The option to reject unfit candidates is explicitly foreseen in Article 17(1) EPPO Regulation: '[t]he College may reject a person who has been nominated if he/she does not fulfil the [abovementioned] criteria'. Throughout the years, filtering and supervisory mechanisms have been introduced in the legal frameworks of several appointment procedures for key civil servants in the European Union, in order to prevent national arbitrariness and forced nominations of persons unfit for service. The most relevant example is the panel constituted under Article 255 TFEU, which provides independent expert advice on the candidates for Advocate General or Judge at the CJEU proposed by Member States prior to the nomination by the Council, whose opinions have acquired a *de facto* binding force in recent years (Dumbrovsky et al, 2014).

The legal framework does not clarify the involvement of the ECP in the appointment procedure of the EDPs, and it will vary depending on the profile of the ECP, in our view. It is uncertain whether the College's refusal of a national nomination may originate in a negative proposal by the ECP. It is also uncertain whether the ECP may attempt at influencing the Member States at the time of the nominations. **The European Parliament might use its scrutiny over the ECP to monitor that s/he**

plays a more active role as regards the selection of candidates by Member States, including *ex ante* exchanges with Member States to ensure that the proposed candidates are fit for purpose.

At present, the Member States are still defining the internal procedures to select the nominees, and not enough advances have been disclosed by our interviews in the countries covered by this research. This seems logical, since the ECP must be appointed *before* the EDPs, and that stage has not been accomplished yet. However, states must still make choices as to key issues in relation to the EDPs: who will be allowed as EDP (only prosecutors, or also judges), the precise meaning of expressions such as ‘active member’ (does it include seconded judges to supranational organs such as the ECHR, the CJEU, Eurojust, etc.), ‘necessary qualifications’, and ‘relevant practical experience’.

2.1.2 Division of labour - the number and scope of Permanent Chambers

The Permanent Chambers were not developed in depth in the EPPO Regulation, as a result of their late insertion into the EPPO’s structure during the negotiation stage. Member States added this layer to the original Commission proposal in order to defuse a potential power grab by the European Chief Prosecutor (ECP). Accordingly, the Permanent Chambers become an internal power hub where some of the most important decisions affecting the national dimension of EPPO will be made. The Permanent Chambers are created by the College upon ECP proposal, but their number and scope (the division of competences among them) are referred to future implementing decisions. These decisions will need to specify their number and the division of competences among them. The Permanent Chambers are composed of three members from the central EPPO structure, one of them acting as chair. Certain questions have been deliberately left open in the EPPO Regulation and deserve careful consideration: How will European Prosecutors articulate in Permanent Chambers? In which way will the number of Permanent Chambers affect the EPPO’s internal structure?

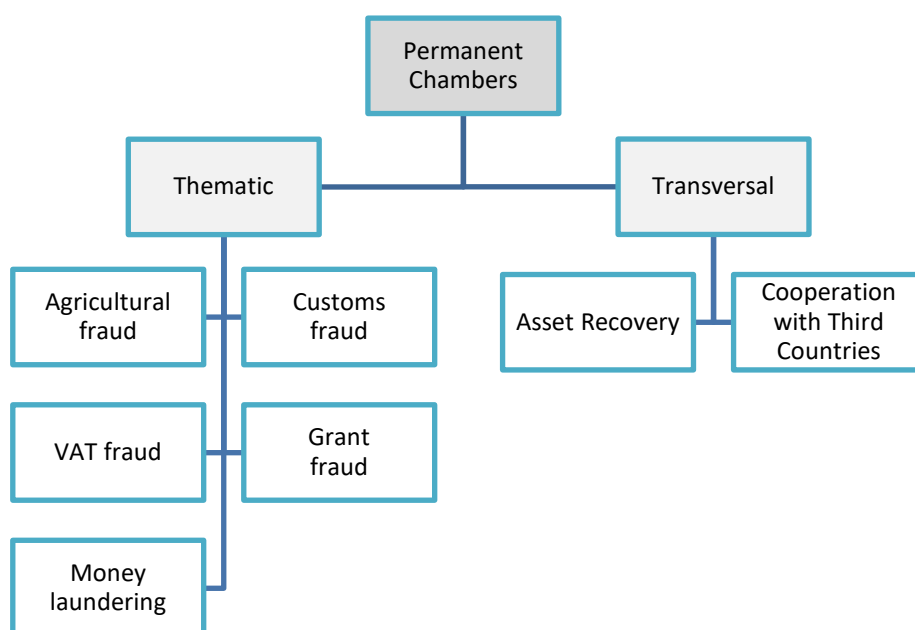
Under the current legal framework, the EPPO Regulation restricts the appointment of European Prosecutors to one per Member State (Article 9(1) EPPO Regulation), and wants European Prosecutors to be assigned to a Permanent Chamber as ‘permanent member’ (Article 10(1) EPPO Regulation). The current EPPO membership yields 22 European Prosecutors (two of them will be appointed as Deputy European Chief Prosecutors, Article 15 EPPO Regulation). That amount (23 with the European Chief Prosecutor) satisfies the requirements of 7 Permanent Chambers (8 if and when Sweden joins in). The creation of more Permanent Chambers would require some European Prosecutors to sit in two chambers. While some interviewees did not see a problem in it, it would certainly represent too loose an interpretation of the EPPO Regulation. Simultaneous assignments may be the general rule in certain public bodies (e.g. MEPs in various EP committees, CJEU judges sit in more than one chamber), but such practice escapes the average watchdog institution (e.g. ECA) and seems foreign to prosecuting bodies.

The criteria governing the creation of Permanent Chambers remain unknown at this stage. Article 10 (1) EPPO Regulation seems to refer this issue to the rules of procedure, establishing as sole principle that the design of the Permanent Chambers takes ‘due account of the functional needs of the EPPO’. Yet, bearing in mind that the tasks assigned to the Permanent Chambers are substantial, it should be possible, for the European Chief Prosecutor, to devise a stable structure in chambers that is both adequate to comprehensively tackle the institutional goals assigned to the EPPO, and flexible enough to adapt their amount and respective remit to future challenges.

The rules of procedure and early decisions of the College of the EPPO should clarify the conditions and criteria under which Permanent Chambers can be rearranged or removed. Moreover, provisions should be inserted to allow for the recast of their material scope. Flexibility will help the EPPO cope with institutional adaptation to new challenges (e.g. ad hoc chambers) or new members (the creation of new chambers might call for a rearrangement of the scope of activity of the existing ones).

Given the complexity and manifold dimensions of the tasks EPPO will implement, as well as the many external actors with whom EPPO will need to interact and coordinate, we would recommend a division be made in the Permanent Chambers, in line with a mixed approach that combines thematic criteria (specialised chambers in policy areas more prone to affecting the EU's financial interests), and functional criteria (specific matters arising). Such systemic features would have the advantage of facilitating communication between the Chamber and specific sets of law enforcement agencies who would, as experts in their respective fields, share the same epistemic community (values, rules, procedures), thus increasing the overall performance of the EPPO. In our view, the Permanent Chambers would be best structured around five thematic chambers to mirror the main sources of PIF damage (customs fraud, agricultural fraud, grant fraud and public procurement, VAT fraud, money-laundering) and two functional chambers (recovery of illegal assets, cooperation with non-participant Member States).

Figure 4: Possible division of labour among the Permanent Chambers.



2.1.3 Working language arrangements

The EPPO Regulation makes little reference to the EPPO's working languages. It postpones the most relevant aspects to a later stage (which might be for the Rules of Procedure, fine-tuned by specific Rules of Application, or decisions by the College). This enhances the risk that internal communication becomes a thorn in the side of the EPPO. For the time being, the only requirements are:

- a) that internal language arrangements are decided by the College by a majority of two-thirds,
- b) that the EPPO's Rules of Procedure, their Rules of Application, and the Annual Activity Report are translated into the official languages of the EU, and
- c) that the EU Translation Centre provides 'the translation services required for the administrative functioning of the EPPO at the central level', unless the urgency of the matter otherwise advises. The relevance of language requirements is twofold, referring to interpretation and translation services.

- **Interpretation.**

Uneven language skills among staff at the EPPO's central level should not become an obstacle to achieving high communication standards and harmonious working environment. Interpretation services may be required at some point on a permanent basis.

- **Translation.**

It is important to ensure the optimal dissemination of information on specific cases (upwards) and guidelines (downwards) within the central level and with, and across, the national levels. This will undoubtedly raise the budgetary requirements for translation services.

Linking languages and leadership dynamics within the EPPO, the starting point is the very loose language requirements established in the EPPO Regulation, as regards the appointment procedures of ECP, European Prosecutors and DECP. Staffing the EPPO adequately will mean striking a balance between language requirements and technical expertise. **The prosecutors who would have the longest experience dealing with PIF cases at the national level are less likely to possess the necessary language skills that would ensure optimal levels of communication at the intra-institutional and inter-institutional level.** Comparative institutional research has shown that language skills directly impact an individual members' capacity to shape the intra-institutional dynamics through influence or leadership. That profile is in stark contrast with those **prosecutors most versed in international cooperation, who display excellent language skills allowing them to foster strong interpersonal relations, in turn enjoy the shortest practical experience in tackling PIF crimes.** Besides, the risk arises that the considerable geographical distance between the EPPO and the locations across Europe, where prosecutors are dealing with the specific challenges of fighting PIF at the national level, negatively affects the EPPO's fulfilment of its mandate.

The notion that such a communications gap might be overcome by using translators and interpreters does not seem convincing on several grounds. Extensive resort to translation might affect the work rate of the Permanent Chambers, and pose difficulties in asserting internal leadership (through strategic guidance, general guidelines, specific instructions, participation in negotiations or exchanges of views) and disseminating leadership among and across internal power hubs (College, Chambers, etc.). **Appropriate language training should therefore be provided to prosecutors.** Having interpreters at the permanent disposal of the European Prosecutors will probably require a permanent team of translators seconded to the EPPO from the Translation Centre, and is something that will have budgetary implications.

From a more operational perspective, **the College should decide on general rules to specify the working language of the Permanent Chambers**, taking into account that their members might be skilled in different languages among themselves, and to a diverging degree. Option for English and French as working languages seems most likely but it does not come without risks in the event of insufficient command by the prosecutors. A theoretical example: a Chamber is composed of a Spanish prosecutor proficient in French, a Dutch prosecutor proficient in English and a Romanian prosecutor with fair command of English and French.

Even more important is the issue of the **general principles governing the translation of individual dossiers to ensure that the Permanent Chambers can follow them up** easily. Generally, PIF dossiers are lengthy (thousands of pages) and contain multiple documents with legal implications (evidences, expert reports, orders, etc.), sometimes worded in one or more languages (particularly for cross-border cases). Ensuring effective supervision by the Permanent Chambers (and the College on general matters) demands careful analysis of the general principles at stake. Translating the whole dossier into the working language(s) safeguards legal certainty but would lead to delays and a waste of resources; at

the same time, translating a mere summary raises the issue of who would be in charge of drafting that summary, specifically when the case unfolds in a Member State other than the state of origin of the European Prosecutors composing the Chamber.

2.2 POWER HUBS AND SAFEGUARDS, INCLUDING LIABILITY

2.2.1 Power hubs at the central level

The collegial model is understood as a check on the EPPO to balance the power of the latter. However, it may impinge on the effectiveness of the institution.

This is best illustrated by the rules on the **adoption of the Rules of Procedure**. According to Article 21 EPPO Regulation, the procedure unfolds as follows: the ECP will prepare a draft that will be submitted to the College, requiring a two-thirds majority vote for its approval. The dangers of collegial bodies not living up to external expectations that they will take a bolder approach to interinstitutional relations have already been observed in other EU institutions.²⁵ Therefore, our view is in line with the assessment of Martinez-Santos (2018:20) on the EPPO:

'That the entire College in its current configuration participates in the decision deserves, at first sight, a favourable judgement, because it seems that in this way the safeguards of the independence will be greater. The fact is, however, that the reinforced majority required, coupled with the specific design chosen for the composition of the College (based on the "Eurojust logic" typical of the model of intergovernmental cooperation which preceded the Lisbon Treaty) can make it difficult to achieve the necessary consensus in the adoption of rules that are useful, clear, and simple enough to be operative.'

The system that the Council adopted presents challenges from the perspective of **ensuring the principle of 'unity of action' by the Delegated Prosecutors**. This principle essentially means that, within the culture of prosecution, clear-cut strategic guidelines are adopted at the central level (General Public Prosecutor, in its national version), which are in turn followed closely by Delegated Prosecutors, down to the finest detail.

Notably, the content of such strategic guidelines may refer to the following aspects:

- Which type of evidence is needed for the EDPs to initiate proceedings?
- When are proceedings to be initiated?
- How are crimes prosecuted? This refers to the penalties sought by the prosecutor, the margin of discretion as to transactional measures (arrangements with the accused persons to reduce the penalty in exchange for cooperation, pleading guilty, or others).

The supranational and collegial character of the EPPO means that other questions must be added to those mentioned above. Among them, the handling of cases features prominently. The College of European Prosecutors should adopt objective criteria to distribute the workload among them, and to decide which EDP will bring the investigation and subsequent prosecution forward. The EPPO's performance will undeniably be affected by which case-handling model is eventually adopted, and whether such criteria used allow for: an even case load among prosecutors; the more effective prosecution and punishment of PIF crimes; and/or the more effective recovery of assets.

²⁵ See Sanchez-Barrueco (2008), on the European Court of Auditors

It is still too early to know the exact internal procedure by which the EPPO will determine its guidelines – this will be the task of the first College of Prosecutors.

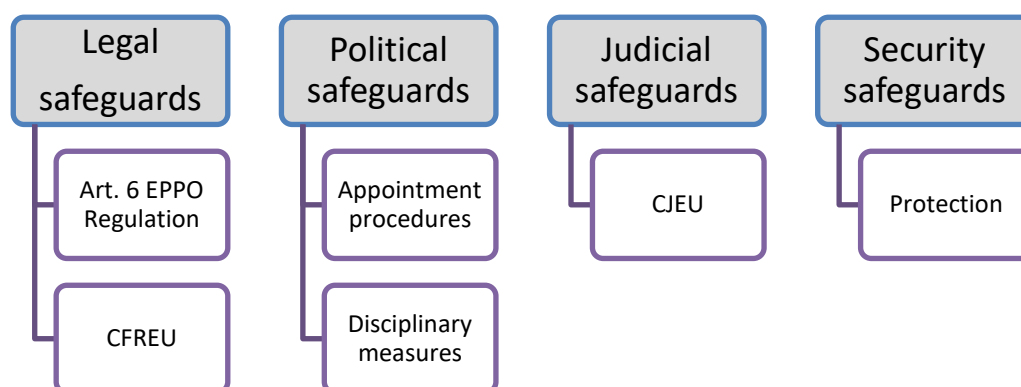
2.2.2 Safeguards to maintain the independence of the EPPO

The independence of the EPPO is a challenging issue, closely linked to both its own institutional legitimacy and, therein, its capacity to deliver.²⁶ From the start, the Commission was aware of the need to introduce adequate safeguards to avoid ‘improper influence’ of any external actor.²⁷ These concerns are reflected in Article 6 of the EPPO Regulation. As far as the EPPO is concerned, potential issues of independence may be twofold:

- Independence as a **shield from external interference**: the unprotected exposure of the EPPO (whichever of its members) endangers the performance of the body and its capacity to deliver. In this sense, all persons working within the EPPO (the ECP, the DECP, the European Prosecutors, the EDP, the Administrative Director, and the rest of the staff) are prevented from seeking or taking external instructions. More detailed provisions should be included to safeguard the integrity of the EPPO’s staff, in both its mental and physical dimensions.
- Independence as **full respect of the rule of law, and fundamental rights**: given the investigating powers of the EPPO, ensuring that the EPPO abides by the legal framework entirely is paramount, to avoid that the EPPO becomes over-zealous in its work, disregarding the rights of individuals, or even an instrument to harass or threaten targeted individuals. Many examples illustrate this idea in countries where democratic land sliding is happening.

Issues of independence might arise at both the central level and at the decentralised level. At the central level, it is key to have a truly independent prosecutor as ECP, capable of shaping its strategic guidelines (in cooperation with the College). However, the **core challenges of the EPPO lie at the national level, where its performance may be delayed or hollowed out if a non-independent EDP takes hold of a case.** In certain cases, the EU may be called upon to defend the independence of EDPs against uncooperative or aggressive national stakeholders of a public or private nature. Those challenges can be addressed through legal measures, political measures, judicial measures, and security measures, as shown and further explored in this section.

Figure 5: Safeguards to the independence of the EPPO



²⁶ On the independence of the EPPO, cf. Kuhl L (2017) ; Martinez Santos, A (2018),

²⁷ Explanatory Memorandum of the Commission’s 2013 proposal for EPPO regulation.

- **Legal safeguards – the general regime of the EPPO's independence**

Individuals working at the EPPO are legally obliged to 'act in the interest of the Union as a whole'. The European identity of the EPPO is a feature that will be built in practice, but it clearly departs from the pre-Lisbon parameters of intergovernmental cooperation, shaping the EPPO as 'an institution endowed with a clear European vocation, aimed at safeguarding genuinely European interests'.²⁸

The independence of the EPPO is thoroughly addressed in Article 6 EPPO Regulation, as it was adopted in 2017, which contains obligations for all sides: EU institutions and Member States' institutions are explicitly refrained from interfering with the EPPO's mandate, and the EPPO staff are explicitly refrained from taking instructions from not only Member States or EU institutions, but also persons, covering both individuals and companies or other legal persons, in accordance with Article 2 (2) of the EPPO Regulation. The legal framework is satisfactory from the first dimension of independence as regards the central level, but additional safeguards should have been included to protect the EDPs from unwanted interference.

From the Chief to the EDPs, all prosecutors are required to act in the interest of the Union as a whole. Only if the 'interest of the Union as a whole' is, first, clearly conveyed in a top-down manner in the strategic guidelines defined by the College and, second, the general instructions are transmitted by the Permanent Chambers to the EDPs, will the EPPO integrate a truly European culture of independence, overcoming the diverging prosecuting cultures that shape the prosecutors' minds and actions at the national level. An enhanced European culture of independence will help to act as a preventive safeguard of independence in its second dimension (preventing the system being used by prosecutors pursuing personal interests or overzealous prosecutors harassing political opponents).

Specific institutional safeguards to the EDP's independence should be adopted at the national level. The challenge in this regard is how to adopt safeguards without encroaching on Member States' exclusive competence for the organization of their own criminal justice systems²⁹. The EPPO Regulation represents the *lex specialis* as regards national laws governing criminal procedures and the organization of criminal justice systems, the former taking precedence over the latter.³⁰ However, the opportunity was missed to include specific provisions on the independence of EDPs beyond the general provision applicable to all EPPO instances, which does not go beyond the general principles (Article 6). After all, the EDPs work from the national criminal justice systems, in the premises of national prosecutors, and are more exposed to external influence than those working in Luxembourg, both in the short-term (regarding a specific case) and long-term (their own professional career may be inevitably linked to the national justice system). It is important to recall that prosecutors are members of a national corps whose allegiances remain in the corps, because in the longer term, they will return to their functions in the general prosecutor's office. In that sense, they depart from the independence model applied by, for instance, ECA members. As Sanchez-Barrueco (2008) analysed, the composition of the ECA reflects diverging professional backgrounds: auditors from the Supreme Audit Institutions at the national level, from the private sector, or former members of the EP. The auditors are proposed by the political power at the national level, but enjoy a broader array of professional prospects than the prosecutors – the option not to return to the national Courts of Auditors remains open.³¹ Conversely, career prospects for

²⁸ Martinez Santos (2018), p. 6

²⁹ Recital 15 of EPPO regulation.

³⁰ Art. 5 (3) EPPO regulation.

³¹ Cf. Sanchez-Barrueco, 2008

the EPPO members are too bound up with national prosecutors' offices, unless the EPPO represents the last step in their career, for age reasons.

Furthermore, **adequate training should be provided for the prosecutors on the Charter of Fundamental Rights of the EU (CFREU)**, as interpreted by the CJEU's case law. In fact, as 'an indivisible Union body', **European prosecutors (specifically European Delegated Prosecutors) will be subject to the Charter for each and every move they take.**³² This represents a clear departure from the current mind-set, whereby, as national prosecutors, they are only bound by the CFREU when substantial or procedural aspects of the case they are handling fall within the boundaries of EU law. There seems to be a gap in Article 5 (1) EPPO Regulation, where sole reference is made to the CFREU as the key legal act for fundamental rights protection, whereas the recently revised legal framework of national competition authorities (for infringements of Articles 101-102 TFEU), Article 3 (1) Directive 1/2019³³ refers to both the 'general principles of Union law and the Charter of Fundamental Rights of the European Union'. By reference to the 'general principles of Union law', Directive 1/2019 covers a broader scope of legally binding texts protecting fundamental rights, including the European Convention of Human Rights by the intermediation of the Court of Justice of the European Union, as permitted now under Article 6(3) TEU: 'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.' The lack of reference to the general principles of EU law in the EPPO Regulation would not represent an exception but an oversight. **Future revisions of the EPPO Regulation should make explicit that the members of the EPPO are also subject to the ECHR, as general principles of EU law.** In conclusion, **members of the EPPO should receive in-depth training as to the obligation to respect fundamental rights as guaranteed by both the CFREU and the ECHR.**

Finally, respect for the EPPO's independence should be replicated in any accountability arrangement concluded with third countries that benefit from EU funds.

- **Political safeguards - the appointment procedures**

In this section we examine the appointment procedures for the European Chief Prosecutor (ECP) and the European Delegated Prosecutors (EDPs). The appointment procedures ensure the participation of a multitude of actors, thus increasing the democratic legitimacy of the EPPO beyond the normal standards currently applicable at the national level.

The appointment procedure for the ECP is new within the EU's institutional framework, because the EPPO Regulation establishes that the EP and the Council appoint him or her 'by common accord'.³⁴ At the time of drafting, we have only begun to comprehend the implications of this new procedure, which is highly regulated by the EPPO regulation, in view of securing the highest independence possible for such sensitive roles, such as the one the ECP is set to play in the future. As a result, every single step in the process has a clear procedure (with detailed and legally binding rules) in a way that guarantees mutual checks and balances among the EU institutions – something that should be praised. The EPPO Regulation calls for the publication of an open call for candidates in the Official Journal,³⁵ and the

³² Pursuant to Art. 5(1) EPPO regulation, with regard to Art. 52 (1) and (2) CFREU

³³ Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14.1.2019

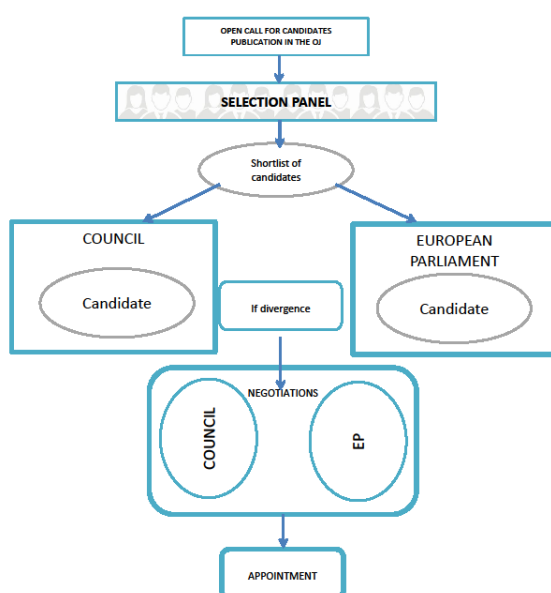
³⁴ Art. 14 (1) EPPO Regulation.

³⁵ Art. 14 (3) EPPO Regulation.

setting-up of an independent expert panel.³⁶ The panel must shortlist the candidates according to their qualifications,³⁷ following detailed rules.³⁸

The precise features of the 'common accord' between Council and EP have been developed in practice on first reading. They ranked the candidates according to their own Rules of Procedure. The lack of agreement in the two institutions on the best candidates led to bilateral negotiations being held. Within both institutions, the vote was cast by secret ballot, an evidence of the sensitivities raised by this dossier. Within the Council, the Member States ranked their preferred candidates in a COREPER meeting on 13 February 2019, behind closed doors. As for the Parliament, the LIBE and CONT committees have taken up the role to represent the EP in the appointment of the European Chief Prosecutor. Both committees have followed the process closely through joint meetings. Following a well-established practice, a hearing of the three candidates was held on 26 February 2019, followed by a separate vote by secret paper ballot in both committees, which was convergent: both LIBE and CONT supported the same candidate. The hearing of candidates, the joint meeting, and the vote were broadcast by live stream, following common practice in the EP. An important feature of the internal procedure of the EP is that the EP resolution resulting from the hearings departs from the average resolution adopted in the appointment of other EU bodies, such as, for instance, the Commissioners or the members of the ECA. EP resolutions in the latter cases have no legally binding value, even though they have occasionally nudged the candidates into withdrawing their bids. Because the appointment of the ECP is to be decided 'by common accord', the EP's choice of a different candidate legally binds the Council, if only because it forces it into bilateral negotiations.

Figure 6: Appointment of the European Chief Prosecutor.



³⁶ (E)

the members of the selection panel provided for in Article 14(3) of Regulation endorsed the list of eleven persons drafted by the Commission, with careful attention to the gender and geographic balance, as well as the competence requirement. The members of the selection panel are appointed for 4 years. Among them, there are one former member of the Court of Justice (Jan Mazák), a former president of the Court of Auditors (Vitor Caldeira), one former national member of Eurojust, five high-level prosecutors (M^a Angeles Garrido, Jean-Claude Marin, Peter Frank, Martine Solovieff, Raija Toiviainen), two members of national supreme courts (Marin Mrčela, Saale Laos) and one lawyer of recognised competence (Theodoros Ioannides). The European Parliament also designated Antonio Mura as panel member.

³⁷ As required by Art. 14 (3) EPPO Regulation, the committee was composed of 12 members, chosen among former members of the CJEU, ECA, Eurojust, national supreme courts, high level prosecutors and lawyers of recognised competence. The EP proposed a candidate.

³⁸ The rules are established by the Council on a Commission proposal, following Art. 14 (3) EPPO Regulation.

Attention should also be paid to the **appointment procedure of the EDPs**, because one of the risk scenarios arising from the hybrid nature of the EPPO, with a negative impact on the independence and performance of the EPPO as a whole, is the role played by national governments in the appointment of the EDPs in their Member State. A significant concern is that an EDP too close to the government deliberately delays the national prosecution of PIF crimes. Given the fact that imbalances in prosecution rates across Member States were one of the reasons for creating the EPPO, this new body would be rendered ineffective and irrelevant if certain Member States adopted a reluctant and recalcitrant attitude towards the cases assigned to its EDP(s). Thus the need arises for strong independence filters, applicable both at the appointment stage, and for strong disciplinary regimes in case of deviation.

Article 17 (1) EPPO Regulation foresees that the College of the EPPO “shall appoint the European Delegated Prosecutors nominated by the Member States”. This provision calls for an automatic link between state nominations and appointment by the College of the EPPO, with the sole exception of the preliminary check that the candidate fulfils the requirements imposed by Article 17 (2): “to be active members of the [national] public prosecution service or judiciary”, “independence beyond doubt” and “to possess the necessary qualifications and relevant practical experience of their national legal system”. If a person fails to meet one of these conditions, the College of the EPPO may reject him or her. In saying that the College “shall appoint” the candidates, the alternative scenario in which the College of the EPPO gets to choose among candidates proposed by each state seems to have been discarded. This would have been useful to avoid delays in the composition of the EPPO in case of rejection (such as those experienced in the Commission, for instance) but would have also represented an unwanted shift of power from the state to the College of the EPPO. Following a well-established custom in EU institutional law, each state remains free to proceed with nominations as it wishes, in a way that allows that some EDPs are nominated following an open call, or directly by the national government; the extent of democratic scrutiny over nomination procedures will also feature sharp differences across Member States. However, the College may reject a person who has been nominated if he/she does not fulfil the legal criteria (prosecutor in active, independent, competent, and experienced).³⁹ The system resembles – but fails to reproduce – the CJEU model, where an independent body established under Article 255 TFEU can and does reject candidates.⁴⁰ The internal rules of the EPPO should however introduce safeguards (such as the required majority to take such a decision) to avoid that this preventive mechanism is hollowed out in practice. Indeed, the College of the EPPO does not feature as much independence as the monitoring body under Article 255 TFEU. Therefore, the internal rules of the EPPO should ensure (through majority rules or other) that the College effectively fulfils its filtering role as regards candidates to EDP nominated by Member States with regard to their competence and independence, to avoid the effectiveness of this preventive mechanism being hollowed out in practice.

- **Political safeguards – specific instructions and disciplinary measures**

EDPs are statutorily obliged⁴¹ ‘to comply with the orders and instructions of the Permanent Chamber entrusted with the case, as well as the instructions of the European Prosecutor, who acts as its supervisor’.

The consequences of the EDPs’ ‘double hat’ on the chain of command are uncertain and may create inconsistencies, as opined by our interviewees. EDPs are placed under the supervision of the ECP and subject to the orders and guidelines issued by the Permanent Chamber entrusted with the case. However, this is only to the extent that they act in their EPPO capacity, remaining subject to the

³⁹ Art. 17 (2) EPPO Regulation

⁴⁰ On 4 March 2019, Article 255 body rejected the 4th candidate proposed by Slovakia for the General Court. No other Member State has had more than 2 candidates rejected to date.

⁴¹ Article 13(1) EPPO Regulation

national chain of command whenever they act in their national capacity. Practical inconsistencies between the two sets of rules are likely to arise and the EPPO regulation does not put forward solutions or provide clarity in these grey areas, which is of particular issue where national law governs the activity of the EDP (under Article 5(3) EPPO regulation).

In the Member States where EDPs serve the EPPO on a part-time basis, clashes may arise between the strategic guidelines issued by the ECP and the national General Prosecutor. Common law Member States (who do not participate in the EPPO) tend to have fully independent prosecutors (Ireland, United Kingdom). By contrast, in continental Member States, tradition features prosecutors as part of a highly hierarchical structure where orders and instructions flow top-down, and where all prosecutors are answerable to the General Prosecutor (Germany, Spain, also Poland who is a Non-Participating Member State in the EPPO). However, the independence of individual prosecutors in certain Member States is safeguarded through legal provisions restricting the capacity of the General Prosecutor to interfere with individual prosecutors in specific cases (France). In Spain, for instance, the General Prosecutor can call any prosecutor to its presence to issue specific instructions, which do not legally require them to be established in writing.⁴² Thus, the need arises to specify the extent to which the instructions (to which individual prosecutors are subject) must rely on objective, general criteria, and in writing, as compared to cases where the General Prosecutor enjoys sufficient powers to direct and shape the way in which the individual prosecutor handles a specific case.

It is uncertain whether internal safeguards will be provided to allow for EDPs to challenge the instructions when an attempt to interfere is perceived or real, and how that would work out in practice.

Likewise, a comparative perspective might shed light on the powers of the General Prosecutor to reassign the predetermined prosecutor to a case. That option might be used to prevent a prosecutor from leading a specific case, for political reasons. Reassignment may be a straightforward disciplinary measure, or be applied in a more subtle way. In Germany and Spain, such situations may and do occur in practice, but if evidence was offered that the actual purpose was to protect someone from being prosecuted would be a crime punished with prison.⁴³

Finally, attention should be paid to the extent to which disciplinary regimes at the national level allow for the **complete removal or dismissal of a prosecutor**. Without prejudice to the applicable rules on the termination of contracts enshrined in the Staff Regulations, the Administrative Director may be removed by the College (2/3 majority).

It is worth noting that the EDPs are not protected by 'irrevocability'. Causes for removal are considered in a rather general way, both in cases where the initiative of the dismissal comes from the College, and in those where it is the Member State of origin who seeks to remove the Delegated Prosecutor from his or her position.

- **Judicial safeguards to the independence of the EPPO**

The best way to safeguard the European prosecutors' independence is to do so from within, that is, to ensure a scenario whereby all individuals working at the EU body embrace and apply the highest standards of professional integrity. On a general note, it is important to highlight that **the abuse of power by a European Prosecutor would itself represent a criminal offence of malfeasance (prevarication), and should be prosecuted**. For example, in the German criminal law system, serious punishment is reserved for judges and any other state official in charge of a legal matter at a particular point (and prosecutors are included here), if they 'bend the law' (*Rechtsbeugung*) in favour of one party or the other. Likewise, in Spain, the criminal offence of *prevaricación* (prevarication) is applied when a

⁴² Art. 26 of the Statute of the General Prosecutor

⁴³ § 258a Strafgesetzbuch (criminal code): Strafreitelung im Amt, 6 month to 5 years of imprisonment

judge or other public servant dictates an arbitrary resolution in an administrative or judicial matter, knowing that the said resolution is unfair and contrary to the law. This is, of course, without prejudice to the most serious offences of trading in influence and passive corruption (if a prosecutor requests or receives a bribery to act or refrain from acting in the exercise of its functions in breach of its official duties). Certainly, such cases will be of utmost rarity, but the scores of certain Member States' prosecuting bodies in international rankings do not allow lowering the system's guard.

Common law justice systems distinguish between nonfeasance (as failure to act when obliged by law, wilfully or in neglect), misfeasance (wilful inappropriate action or intentional incorrect action or advice), and malfeasance (wilful and intentional action that injures a party). Both misfeasance and malfeasance serve as grounds for civil law actions under tort law (reparation of damages); however, malfeasance in public office entails a maximum penalty of life imprisonment. Such models depart from other criminal justice models that tend to shield state officials from liability for conduct in their official capacity (for instance, the American system).⁴⁴ Table No. 1 below shows the great diversity on this matter across the EU Member States.

Table 1. Judicial redress against prosecutors in comparative perspective

COUNTRIES	CRIMINAL OFFENCE	PENALTY
Austria	Missbrauch der Amtsgewalt (302 StGB)	6 months - 5 years imprisonment
Bulgaria	Престъпления против правосъдието (286 НК)	3 years imprisonment
France	Prévarication (432-10 CP)	5 years imprisonment and fine
Germany	Rechtsbeugung (339 StGB)	1-5 years imprisonment
Ireland	Drochúsáid oifige	
Italy	Abuso d'ufficio (323 CP)	1-4 years imprisonment
Netherlands	Misbruik van openbaar gezag (258 sw.)	Fine (200-500 Euro) and disqualification
Poland	Nadużycie uprawnień (231 KK)	3 years imprisonment
Spain	Non-judges: Prevaricación (404 CP) Judges: Prevaricación (446 CP)	9-15 years special disqualification 1-4 years imprisonment
United Kingdom	Misconduct in public office	Maximum penalty of life imprisonment

Therefore, in the future, the need might arise for the EPPO to defend the 'European' nature of one of its European Prosecutors or European Delegated Prosecutors, in the face of national governmental or judicial harassment, through an EU means of judicial redress. In this regard, the recent landmark CJEU rulings in two recent cases involving the removal of the Latvian central bank governor⁴⁵ are of paramount importance. In this case, the background was a criminal probe on wide-scale money laundering in Latvia. The national government enforced the most restrictive disciplinary measures against the Central Bank Governor, suspending him from office, alongside a series of criminal indictments for bribery that seemed to lack substance and form part of a strategy of judicial harassment

⁴⁴ Dubber, M. and Hornle, T. (2014), p. 633

⁴⁵ CJEU Judgement (Grand Chamber) of 26 February 2019, in joined cases C-202/18 Rimsevics v. Latvia; C-238/18 ECB v. Latvia, ECLI:EU:C:2019:139

against uncomfortable officials. In a first-ever move, both the Governor and the ECB itself referred the case to the CJEU in an attempt to defend the status of central bank governors against national interference. This is the first time that the CJEU has exercised its jurisdiction to review decisions, dismissing the governors of the central banks of the Member States from office.⁴⁶ The rationale of that jurisdiction is the safeguard of the 'independence of the governors of the national central banks, who have the particular status of being national authorities but ones who act within the framework of the ESCB. Where governors sit at the head of a central bank of a Member State whose currency is the euro, such as Latvia, they also sit on the Governing Council of the ECB and enjoy voting rights'.⁴⁷ It is by referring to the Opinion issued by AG Kokott on 19 December 2018 that one can best understand the implications for members of the EPPO. As the AG stated, 'whether it is permissible to relieve a governor of a national central bank from office must be assessed *solely by reference to EU law* and in particular the conditions laid down in (the statutory rules applicable to the member)' (emphasis added). Those conditions are 'for the [CJEU], where appropriate, to assess'.⁴⁸ The EPPO Regulation lacks a provision similar to Article 14 (2) ECB Statute.

The difference between the regimes applicable at the ECB⁴⁹ and at the EPPO⁵⁰ lies in the fact that the Statutes of the ECB make explicit reference to the CJEU jurisdiction, whereas the EPPO Regulation does not. This would preclude the applicability of the action for annulment *specialis* as applied in the Latvian case to the EPPO. Yet, the CJEU might still step in. Article 17 (4) EPPO Regulation refrains the Member State from taking disciplinary action against EDPs 'for reasons connected to [their] responsibilities under this Regulation without the consent of the European Chief Prosecutor'. Failing that consent, 'the Member State may request the College to review the matter'. The EPPO Regulation does not contain any provisions regarding the implications of a rejection by the College to endorse national disciplinary measures. In our view, should a Member State override the view of the European Chief Prosecutor and the College to impose disciplinary measures on the EDPs, an action for infringement might be sought against that state, under Articles 258 and 260 TFEU. This legal remedy provides the Union (through the intermediation of the Commission and the CJEU) with the necessary means to defend the European nature of the EDPs, as well as their mandate, against non-cooperative national authorities. Analogy could then be drawn with Case C-539/09, where the CJEU supported the ECA's claim to have the legal mandate to access national information on VAT collection, which the German Ministry of Finances refused to provide.⁵¹

The European Parliament might wish to stress that the possibility to align Article 17(4) EPPO Regulation with Article 14(2) ECB Statute is considered by the Council in future revisions of the EPPO Regulation. The fact that the EU enjoys a shared competence in judicial cooperation in criminal matters (as compared to the exclusive competence in monetary policy), does not seem a sufficient argument to justify the diverging regimes safeguarding the independence of the national branches of the ECB and the EPPO, given the paramount importance of the supervisory functions they both fulfil.

⁴⁶ Under Art. 14 (2) subpara 2 of the Statute of the European System of Central Banks and of the European Central Bank

⁴⁷ CJEU Press release 27 February 2019, <https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-02/cp190018en.pdf>

⁴⁸ Opinion by AG Kokott, of 19 December 2018, ECLI:EU:C:2018:1030, para 156 and 157.

⁴⁹ Art. 14 (2) Statutes of the ECB and of the ESCB

⁵⁰ Art. 17 (4) EPPO Regulation

⁵¹ CJEU Ruling of 15 November 2011 in case C-539/09 Commission v Germany, ECLI:EU:C:2011:733 (Opinion by AG Kokott, ECLI:EU:C:2011:345)

2.2.3 Liability of the EPPO

The liability of EPPO members is examined below across various dimensions: non-contractual, financial, and criminal, respectively.

- **Non-contractual liability.**

The general rule of non-contractual liability enshrined in Article 113(3) EPPO Regulation creates the obligation for the EPPO to compensate for damages: ('make good any damage caused by the EPPO or its staff in the performance of their duties, insofar as it may be imputed to them'), by reference to 'the general principles common to the laws of the Member States of the EU'. The CJEU shall have jurisdiction in disputes over compensation for damages. It is assumed that general EU law on compensation for damages will apply, in accordance with Articles 268 and 340 TFEU.

- **Financial liability.**

The rules of procedure of the EPPO should establish safeguards to ensure the sound financial management of the funds allocated to the EPPO. In that sense, it is assumed here that the Administrative Director, as authorising officer responsible for the implementation of the EPPO budget, will be endowed with the power to request the reimbursement of funds unduly spent by the members, including resorting to the CJEU whenever needed.

- **Criminal liability.**

The criminal liability of EPPO members in the performance of their duties is not sufficiently regulated in the EPPO Regulation. It is assumed here that **the immunity of the incumbent shall be waived, allowing him/her to be prosecuted under the national law of his/her state of origin.** The internal rules of the EPPO should establish who is charged with the task of waiving any such immunity, and whether this power lies with the ECP, acting on its own or within the College, or, alternatively, with the Administrative Director. The EPPO might replicate the system applied in the ECA (also a collegial body).⁵² In that sense, the College of the EPPO would decide on an immunity waiver applicable to its own members, upon a proposal by the ECP, after examination of the motivation of the request put forward by the national prosecutor, and on the basis of a simple majority. The fundamental right to a fair trial would imply hearing the investigated individual.

Furthermore, emphasis should be put on the need to adopt specific rules to establish jurisdiction over a criminal offense committed by an EPPO member. The principle whereby Member States will prosecute offences committed by their nationals leads to an uneven treatment when two EDPs from two different Member States are involved in the same criminal offense, as far as they would be prosecuted according to different laws. Future provisions on this subject might consider referring to the 1997 OECD Convention on the Fight Against Corruption, whose Article 4 establishes that when more than one state party has jurisdiction over an alleged corruption offence, they shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.

⁵² Interview with Eduardo Ruiz-García.

2.3 MANDATE AND POWERS - WILL THE EPPO CONTRIBUTE TO A MORE EFFICIENT PIF PROTECTION?

2.3.1 Protecting the EU's financial interests through criminal prosecution: Criminal prosecution in the context of the protection of the EU's financial interests

Complexity, even if unintended, belongs in the EPPO's DNA, resulting from the combination of the (already intricate) policy and legal fields of criminal justice and protection of financial interests. The legitimate goal of effectively defending the legal order, or public funds, through a well performing prosecuting system must be pitted against the need to ensure that there are adequate standards of fundamental rights protection in place for any investigated and accused persons. All individuals enjoy a right to a fair and independent prosecution, not only those persons who are innocent and ultimately acquitted, but also those eventually found guilty. The varying approaches in place across Member States to respond to these concerns expose certain 'existential sensitivities' that are raised by deeper integration in the field of criminal justice and EU budget management.

Since one of the main purposes of this study is to identify the shortcomings in the institutional design of the EPPO, and to propose potential solutions, it seems fitting to briefly recall the main challenges the EPPO seeks to address or improve.

- **Criminal prosecution (and the EPPO) as the last resort in PIF**

The sound financial management of the EU budget may be jeopardized by various circumstances, but the protection of EU's financial interests through criminal law is the last resort to address those threats. As explained below, strategies to tackle PIF offences are by no means restricted to criminal law, because irregular activities threatening the sound financial management of the EU budget come in all sorts of guises and meet different criteria.

First, potential threats to the EU's financial interests stem from varying circumstances and policy responses meant to address them vary accordingly. Some PIF threats remain within the boundaries of legality and are best tackled through policy or legislative fine-tuning. For instance, the Gross National Income (GNI) revenue stream is arguably harmed by the erosion of the tax base, but only economic measures can address it. Likewise, an improved, harmonised legal framework for Value Added Tax (VAT) can redress a weak VAT revenue stream.

By contrast, where threats to the EU's financial interests fall outside the criterion of *legality*, adequate responses might entail administrative measures (e.g. interruption of payments, financial corrections) or criminal prosecution, depending on the seriousness of the conduct. **Criminal prosecution is subject to heavy procedural conditions.** Thorough investigation and judicial interventions will be required from public prosecutors to prove it before it can be punished. The EPPO will only contribute to improving PIF protection as regards the most serious harmful activities affecting the EU's financial interests. Also, **in the absence of highly hierarchical and minutely developed rules** and instructions, the decentralised structure of the EPPO may **give rise to differences in treatment of identical situations among EDPs** based in different participating Member States, as further discussed below.

Secondly, a negative effect on the EU's financial interests may stem, alternatively, from a reduction in EU revenue or a diversion of EU funds in the expenditure side. **There are all kinds of potentially damaging activities, just as there are the number and type of national and EU bodies involved in their prevention and oversight.** These (damaging activities) may stem from different sources, happen at different places, and be caused by different conducts. Taking EU revenue as an example, its 2017 composition featured GNI resources (60%), traditional own resources (customs duties and sugar levies) (15.65%), VAT resources (13%), the recovery of expenditure (8%) and competition fines (3.6%). **There is**

great diversity in the type of potentially damaging scenarios. For example, a reduction in the amount of customs duties collected might be caused by a porous national border, which in turn makes smuggling easier; poor assurances against bribery of customs officers, or illegally obtained waivers through counterfeit documents. Similarly, the VAT revenue stream may be reduced as the result of a broad 'black market' (VAT not collected), fraudulent schemes affecting intra-EU VAT (VAT refunds abused). Finally, the poor recovery of erroneous expenditure may result from under-performing administrative enforcement where fraud is not usually present. Each of these threats to EU's financial interests is governed by a different set of rules, administrative bodies, and policing bodies.

The EPPO is not designed to address the whole array of circumstances negatively affecting the EU's financial interests, only those deriving from intentionally fraudulent activity defined by EU criminal law as a criminal offence.

- **The challenge of diversity: national rules governing the investigation and prosecution of PIF crimes**

EDPs take direct responsibility for the investigation and prosecution of PIF crimes, under the EPPO Regulation. This includes exercising investigative powers, bringing cases before the national Court of the State where the trial will take place, participating in collecting evidence, and following up on the adjudication through appeals, where relevant. However, EDPs will remain subject to the instructions and orders of the Permanent Chamber entrusted with the case, and remain under the supervision of a European Prosecutor in the state of origin.

- **The challenge of redressing damage to the EU budget: asset recovery**

While some of these challenges benefit both the EU and the Member States, some others are EU-specific and will not forcefully entail significant improvement from a national perspective.

Effectively, implementation of the EPPO will need significant effort to communicate the boundaries of the EPPO's remit. As noticed in many of our interviews, there is still great confusion among national stakeholders as regards EPPO's remit. Some of them see EPPO as a window of opportunity to modernise the fight against national fraud. Ensuring a fair assessment of the EPPO's future performance requires the management of expectations on its powers and capabilities.

2.3.2 The boundaries of the EPPO's mandate

The competence of the EPPO is not exclusive, but rather, preferential, with respect to that of the national authorities. Accordingly, the EPPO's exercising of its legal competence obliges national prosecutors to refrain from exercising their own competence. Such exercise of competence may be carried out by initiating an investigation, or by making use of the right of avocation in investigations already initiated by a participant member state.

As introduced above, Article 4 EPPO Regulation defines an EPPO's mandate as mirroring the material scope of Directive 2017/1371.

The personal scope of EPPO's powers targets not only the perpetrator of PIF crimes, but also the accomplices (aiding and abetting the former).

Our interviews established **non-mainstream explanations for the low rate of prosecution of PIF crimes** at the national level (follow-up of OLAF recommendations), which point to different reasons than purely a lack of political will. It is generally **appreciated that the EPPO will enhance coordination** and communication among law enforcement agencies and the prosecuting bodies, thus increasing the likelihood that PIF crimes are effectively tackled.

- Lack of harmonization of the quantitative thresholds drawing the line between administrative investigation and criminal prosecution. If the PIF crime is linked to a Member State where the threshold is higher than average, the investigation would be stopped without indictment to prosecute by the national prosecutor. It would stay in the national administration watchdog agencies.
- Short time limits. The bodies involved in the investigation must strike a balance between preparing a sound case (investigating longer to ensure that the prosecutor/judge is convinced to prosecute) and securing prosecution at all, if they lag behind in the conduct of the administrative investigation (e.g. tax inspection, police), the case might be close to expiry by the time it reaches the national prosecutor. In this case, “the best is the enemy of the good”, i.e. priority should be given to bring ‘good’ cases before justice instead of gathering more and more evidence to achieve the ‘best’ possible case. In delaying the action until the ‘best’ case is prepared, the prosecutor risks losing it all, due to short time limitations. For example, a criminal offence such as “grant fraud” decays after 5 years, as enshrined in the Criminal Code. **The EPPO will facilitate faster investigations.** Prosecution in Spain is subject to time limitations of 6 months, meaning that prosecutors must investigate quickly, otherwise the case will be dropped.⁵³ The need to involve judge-investigators represents a delay judged unnecessary from the viewpoint of efficiency in case-handling.
- Lack of preparation, means, or interest at the national level. This is explored further in Chapter 3.

2.4 RESOURCES - BUDGETARY AND STAFF REQUIREMENTS

Much of the decision-making activity regarding the establishment of the EPPO has focused, at EU level, on the necessary steps to facilitate the effective start of the new body's operations in the second half of 2020. Here we refer to the adoption of the rules governing the selection committee,⁵⁴ charged with appointing the European Prosecutor and Delegated Prosecutors; the appointment of the selection committee members themselves,⁵⁵ and the adoption of the Rules of Procedure of the selection panel.⁵⁶

2.4.1 Budgetary matters

Financial independence is a key issue in the independence of an institution such as the EPPO. Safeguards for the financial autonomy of EPPO are in place by way of a separate budget and an autonomous system of management.⁵⁷

Budgeting in the EPPO follows the general lines applicable to the institutions and bodies of the EU.⁵⁸ It is the ECP's task to propose a draft budget estimate (upon a proposal by the Administrative Director), which is in turn submitted to and approved by the EPPO College. That budget estimate covers staff remunerations, infrastructure costs, and the operational expenditure, where applicable. Once approved

⁵³ The possibility exists, however, to extend the time limitation up to 36 months in complex investigations, ex Art. 324 (2) of the Law governing criminal procedure.

⁵⁴ Council Implementing Decision (EU) 2018/1696 of 13 July 2018 on the operating rules of the selection panel provided for in Article 14(3) of Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018D1696&rid=1>

⁵⁵ Council Decision (EU) 2018/1275 of 18 September 2018 appointing the members of the selection panel provided for in Article 14(3) of Regulation (EU) 2017/1939,

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018D1275&rid=2>

⁵⁶ Commission Decision (EU) 2018/1220 of 6 September 2018 on the rules of procedure of the panel referred to in Article 143 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018D1220&rid=18>

⁵⁷ On the budgetary provisions of the EPPO, cf. Martínez Santos, (2018), p.18 ff

⁵⁸ Arts 91 and 92 EPPO Regulation

by the EPPO College and sent to the Commission, the draft budget enters the budgetary mainstream of the Union's institutions and bodies, and thus subject to the general procedure for adoption.⁵⁹

Budgetary implementation is the task of the Administrative Director, who authorizes those expenses to be incurred within the limits set by the budget.⁶⁰ Resourcing the EPPO through the EU's general budget poses the problem that not all Member States participate in this body, due to the enhanced cooperation framework. This is further developed below.

Following similar frameworks of *variable geometry* in the EU, the general budget will cover administrative expenditure, whereas the costs of operational measures linked to specific cases investigated or prosecuted by the EPPO (investigative measures) will be covered by the national authorities who carry them out. The logic of 'costs lie where they fall' is typical in other EU policy areas, and has been applied in, among others, the ESDP operations and missions for years.

Martinez Santos (2018: 18) argues that 'the chosen model ensures that the most delicate aspects related to the funding of the EPPO are removed from the direct control of the Member States.' It is perhaps too early to judge whether the model ensures that the EPPO has all the means at its disposal for an adequate performance of its mission. By contrast, we believe that the EPPO Regulation should have included more stringent provisions, as well as review procedures, aimed at ensuring that Member States provide a minimum threshold of resources to the EDPs. The duty of *sincere cooperation* does seem too general a legal basis in this regard. Article 96 (6) EPPO Regulation orders national authorities to '*facilitate the exercise of the functions of European Delegated Prosecutors under this Regulation and refrain from any action or policy that may adversely affect their career or status in the national prosecution system. In particular, the competent national authorities shall provide the European Delegated Prosecutors with the resources and equipment necessary to exercise their functions under this Regulation, and shall ensure that they are fully integrated into their national prosecution services.*' It is too early to assess whether these provisions are enforced in an adequate way in practice.

The EPPO will face imbalances in its resources when assisting the EDPs across the participating Member States because the financial means provided by the Member States will invariably diverge across Europe. A clear risk arises – in our view – in that some EDPs do not have the necessary means to ensure that all operational costs are covered at the decentralised level. Such a situation is not new in the Union. Comparison might be drawn with the European Asylum Support Office (EASO), which – like the EPPO – is a multi-location Union body with headquarters in Malta but with operational support on the ground in Italy and Greece. As the ECA has concluded, the EASO has suffered from major shortfalls that have hindered its operations due to insufficient resources being provided by certain Member States.⁶¹

Against this backdrop, we advise the European Parliament to regularly scrutinise the Member States to ensure that they adequately resource the EDPs, in the framework of the annual activity review and accountability procedure, and in so doing, to resort wherever possible to independent sources of information.

The budget granted to EPPO in the 2019 Draft General Budget is EUR 4.9 million. In a Letter of Amendment to the Draft General Budget for 2019, the Commission proposed the recruitment of two additional prosecutors to take into account the unforeseen participation of Malta and the Netherlands in the EPPO. However, the number of the EPPO staff remains unchanged, due to expectations of a low case-load in the newly participating Member States.

⁵⁹ Art. 314 TFEU

⁶⁰ Art. 93 EPPO Regulation

⁶¹ European Court of Auditors (2017), Special Report 6/2017 'EU response to the refugee crisis: the "hotspot" approach'; European Court of Auditors (2018) Annual report on EU agencies for the financial year 2017 (Section 3.20. - European Asylum Support Office (EASO)), p.3.20.11

The Commission took advantage of the Letter of Amendment to fix the salary for the ECP and EDP, who would be recruited as grades AD15 and AD13, respectively, with the aim of attracting highly qualified candidates able to carry out the prosecutorial functions, and in light of the high standing and substantial responsibility of the positions, and hence, post holders.

Figure No.6 shows the budgeted human resources for EPPO for the 2019 Annual Budget, as of January 2019.

Figure 7: Budgetary allocation of the EPPO (2019)

S 03 01 31 — European Public Prosecutor's Office (EPPO)						
Function group and grade	Draft Budget		Letter of amendment No. 1/2019		Revised Draft Budget	
	Permanent posts	Temporary posts	Permanent posts	Temporary posts	Permanent posts	Temporary posts
AD 16						
AD 15				1		1
AD 14		1		-1		
AD 13				22		22
AD 12		20		-20		
AD 11		1				1
AD 10		2				2
AD 9		2				2
AD 8						
AD 7		3				3
AD 6						
AD 5						
<i>AD Subtotal</i>		29		2		31

Source: European Commission. Amendment letter N.1 to Draft General EU Budget (Annex)

Covering the EPPO's administrative expenditure from the EU budget has raised unease among non-participating Member States. Non-participating Member States have informally complained that they will be indirectly contributing to the EPPO through the EU's general budget. **This is not an unsurmountable obstacle and the resort to other existing models may be pondered in order to avoid the budgetary imbalance, or, if need be, to redress it accordingly.** It is safe to assume that procedures to redress the budgetary imbalance as regards these countries will be put into place once the EPPO is operational. Similar models are already being applied in comparative perspective:

- **Reimbursing Non-Participating Member States (the EASO model).** Member States enjoying JHA opt-outs are reimbursed, according to their share of the EU budget, for the budgetary coverage from the EU budget of administrative, infrastructure, and certain operational costs incurred through EASO operations.⁶²
- **Setting-up a funding mechanism (the ESDP model)** to cover the operational costs of the EPPO, paid for by national contributions of the participating Member States. Such is the case for the Athena mechanism applied in the ESDP, although this is probably a step too far for the EPPO that will need careful assessment.

⁶² Interview with David Vilas.

2.4.2 Staff matters

Filling the EPPO positions might turn out to be more difficult than foreseen by the creators of the EPPO. Logically, the successful candidates for EDP should prove to have sufficient experience in at least two fields: prosecuting cases before the national courts (ideally, linked to the fight against fraud or corruption), and international judicial cooperation. These preconditions reduce the number of potential profiles to three, mainly: national representatives in Eurojust, liaison prosecutors for international cooperation, and specialized prosecutors for anticorruption or antifraud, etc. Arguably, it would not be surprising if most prospective candidates were highly respected civil servants in their countries of origin, with +20 years of experience, and an existing privileged position in the national prosecution system.

As for the employment status of the EPPO's staff, the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the EU applies⁶³ (as well as the Protocol on the Privileges and Immunities of the Union),⁶⁴ but the specific labour conditions of the different subjects involved may vary. According to Martinez-Santos (2018:19), the ECP, the European Prosecutors, and the Administrative Director shall have the status of 'temporary agents',⁶⁵ while the EDPs will be hired as 'special advisers'.⁶⁶ The College will be the hiring authority when it comes to signing employment contracts, which will be subject to delegation to the Administrative Director for all administrative staff.

Some interviewees voice the concern that the incentives to join the EPPO are not sufficient to encourage the best candidates to leave their national positions. Shortcomings may arise due to the choices made when drafting the EPPO Regulation, or the ambiguities thereof, which may in turn create shortfalls in the EPPO's staff, or cause delays if the appointing processes are challenged in European or national courts.

According to our sources,⁶⁷ prospective candidates have legitimate concerns pertaining to a number of issues related to the future working conditions of European prosecutors, as summarised below:

- **Seat in Luxembourg.** The choice of Luxembourg was highlighted by several sources as a drawback, as compared to the initial expectations of the EPPO in The Hague (let down when NL decided initially not to participate, only to join at a later stage). Additional incentives might prove key to convince the best minds to leave their current status for Luxembourg (due to the cost of living, as well as the distance from other capitals).
- **Salary** was informally criticised by some sources as not being much higher than their current salary, whereas Luxembourg is considered a more expensive city than most capitals in participating Member States. Will there be provisions in place to compensate the cost of living?
- **Working languages:** This issue has been dealt with in depth (*supra* page 29). The call for candidates does not stipulate the working conditions as regards language and this creates uncertainty among prospective candidates. On the one hand, an informal reference to English as the *lingua franca* does not disregard French or German when it comes to interpersonal relations. Most importantly, no reference has been made so far to the language used in the permanent chambers. A source pointed out that the specific circumstances linked to antifraud cases make it simply impossible to have the whole of a dossier translated into the mother tongues of all chamber members: the investigation of an average case of VAT fraud might extend to 40 volumes. Another source backed up this concern on the grounds that the bulk of long dossiers would contain accountancy statements or analysis (i.e. figures) that need to be readable by anyone. Be that as it may, the current situation creates uncertainty and, in turn, might result in delays for the EPPO's early operational activity.

⁶³ Staff Regulations of Officials of the European Union ('the Staff Regulations') and the Conditions of Employment of Other Servants of the European Union, laid down in Council Regulation (EEC, Euratom, ECSC) No 259/68, OJ L 56, 4.3.1968, p. 1.

⁶⁴ Art. 96 (5) EPPO Regulation

⁶⁵ Art. 2(a) Staff Regulation and art. 18 (1) and art. 96 (1) EPPO Regulation

⁶⁶ Art. 5 Staff Regulation and 96(6) EPPO Regulation

⁶⁷ Interview with Rosana Morán.

- **Length of mandate of first College:** this issue has given rise to serious doubts among prospective candidates. The EPPO regulation organises a system of renewal by thirds, whereby the first College will comprise successful candidates standing for 3, 6 and 9 years, respectively. However, the Commission has resisted external pressure to decide on “who will last how long”, to avoid any imbalance in the quality of candidates across participating member states. Should the Member State know in advance that their candidate would run for a 3-year term, they would arguably put forward a lower profile bid than if the candidate were mandated for 9 years. Accordingly, the Commission has decided that successful candidates will resolve the issue, once elected, by drawing lots. The incumbents, however, do not agree with that solution, which obliges them to take an important decision to leave their privileged position – most of them will be at the top of their careers – without knowing whether it will be for a 3-year or a 9-year period. European prosecutors appointed for a 3-year period will spend their mandate organising the internal set-up of EPPO, unable to prosecute and/or close any substantial case in such a short time frame.
- **Age limit.** It has been fixed at 60, which is lower than the age of retirement for most prosecutors. Interestingly enough, a lower age limit plays in favour of the independence of the EPPO, in the sense that becoming the ECP, DECP, European Prosecutor or even EDP might be the last step in the career of national prosecutors, releasing them from national allegiances. Our sources, however, complained that the age limit was surprisingly low.
- **Requirement for prospect candidates to be “active”.** The EPPO Regulation requires candidates standing for office to be “active prosecutors” (probably meaning ‘not retired’). A Spanish source highlighted the fact that interpreting that expression could cause problems for the selection process, because Spanish legislation is restrictive and excludes those seconded to international courts (International Criminal Court) or EU agencies (Eurojust) from the category of ‘active’ prosecutors. It is unclear, however, whether this means that they are precluded from standing for ECP, European Prosecutor or EDP. As long as this issue is not resolved, any EU or national decision accepting or rejecting the admissibility of potential bids put forward by the Eurojust liaison prosecutors might be challenged in the courts. Decisions taken at the European level might face an action for annulment under Article 263 (4) TFEU, whereas national decisions might be challenged before national courts, the risk arising that a national judge or tribunal refers the matter to the CJEU for interpretation, in the framework of a preliminary ruling, in accordance with Article 267 TFEU. Any such case will create unforeseen delays in the procedure to staff the EPPO satisfactorily.

3 THE DECENTRALISED LEVEL OF EPPO: ENSURING INDEPENDENCE, PERFORMANCE AND SWIFT COOPERATION WITH NATIONAL LAW ENFORCEMENT BODIES

KEY FINDINGS AND POSSIBLE SOLUTIONS

- Cooperation between the EPPO and national authorities is governed by the duty of sincere cooperation, which represents a significant step forward from the traditional 'mutual independence' typical of cooperation in Justice and Home Affairs. It also departs from the way in which multilevel governance relations are articulated between the ECA and the SAIs, based on 'mutual trust'. The extent to which national authorities provide support to the activities of the EPPO may be assessed by the Commission in the framework of an action for infringement. However, excessive optimism should not be advised as to the applicability of that legal remedy, whose impact will be more likely in the face of outright refusal by Member States to cooperate, much less when they put insufficient resources at the disposal of the EPPO. Hence the need for the EP to remain vigilant in the framework of its scrutiny power.
- The EPPO's counterparts at the national level are manifold and have diverging views, needs and expectations around this new body. Establishing fruitful cooperation with them will need significant effort in the short and medium term.
- At the national level, the EPPO will have as many powers as the national prosecutors. The existence of significant divergences among Member States will modulate the activity of the EPPO in several countries.
- Other factors affecting the effectiveness of the EPPO, to a diverging extent, across Member States are the levels of corruption of executive bodies at the national level, as well as the credibility of the judiciary.
- From a technical perspective, the establishment of the case-management system will probably represent one of the most significant challenges in the early stages of the EPPO.

3.1 SECURING THE ASSISTANCE OF NATIONAL LAW ENFORCEMENT IN PIF PROTECTION - OPERATIONAL CHALLENGES

3.1.1 The obligation to 'actively support' and the 'duty of sincere cooperation' as applied to national authorities involved in PIF investigations

Among the Basic Principles governing the EPPO, the last one in Article 5 (6) EPPO Regulation states that 'competent national authorities shall actively assist and support the investigations and prosecutions of the EPPO' and places mutual relations under the remit of the 'principle of sincere cooperation', which will guide any action, policy, or procedure.

We commend the fact that the EPPO Regulation contains more stringent obligations governing the relationship with national law enforcement agencies than the rule in other instances (e.g. relationship between ECA and the SAIs, see below). The general obligation 'to actively assist and support' the EPPO reflects afterwards in several provisions of a more specific nature. Furthermore, there are other instances in the EPPO Regulation where the wording avoids clear legally binding obligations, but an implicit obligation to cooperate remains, in the sense that any contrary view taken by national authorities would probably be interpreted as a breach of the principle of sincere cooperation. Box 4 below contains a comprehensive overview of these various types of obligations.

Box 4: Obligations of the national authorities as regards the EPPO.

General obligation

- To 'actively assist and support the investigations and prosecutions of the EPPO' [Art. 5(6)]

Explicit specific obligations

- Report without undue delay any criminal conduct that might fall within the EPPO's remit. [Art. 24(1)]
- Obligation to refrain from exercising their competence if the EPPO has decided to exercise its own [Art. 25(1)], even when competence over a file is acquired by evocation [Art. 27(2)].
- Obligation not to take decisions (e.g. submit an indictment to a court) that would prevent the EPPO from exercising its right of evocation and to transfer the file to the EPPO when it exerts that right. [Art. 27(5)]
- Obligation to keep the EPPO informed of new facts which could give the EPPO reasons to reconsider previous decisions not to exercise its competence in a given case. [Art. 27(7)]
- Follow the instructions given by the EDP handling a case, and notably undertake the investigation measures assigned to them. [Art. 28(1)]
- To take urgent measures to ensure the effectiveness of the EPPO's investigations, even in the absence of specific instructions from the handling EDP, [Art. 27(2)] and inform her/him of such measures without undue delay. [Art. 28(2)]
- To allow access to relevant national criminal investigation and law enforcement databases [Art. 43(1)].
- To cover the costs of investigative measures carried out by law enforcement agencies when so instructed by the EPPO. [Art. 91(6)]
- To facilitate the exercise of the functions of the EDPs, specifically by putting at her/him disposal the necessary resources and equipment to operate. [Art. 96(6)]
- To refrain from any action or policy that might adversely affect the career or status of EDPs in the national prosecution system. [Art. 96(6)]
- To keep the EPPO informed of the relevant national law applicable to its mandate and functions. [Art. 117]

Implicit specific obligations under the duty of sincere cooperation

- To provide the EPPO the relevant information requested [Art. 24(9)]
- To accept the jurisdiction of the CJEU when there is a conflict of competence over a case. [Art. 42(2)]
- To lift the immunity of a national upon reasoned opinion by the European Chief Prosecutor. [Art. 29]
- To issue a request for Mutual Legal Assistance as regards countries with which the EPPO has not concluded a bilateral agreement, upon the EPPO's request. [Art. 104(5)]

Source: EPPO Regulation

The explicit reference to the principle of *sincere cooperation* may be interpreted in the light of the principle of *subsidiarity*. Indeed, most crimes under the EPPO's remit feature a link to the EU budget. This link is direct in cases of bribery (in public procurement) and grant fraud, while it is assumed in VAT fraud. In such matters, the legislative authority unilaterally establishes the threshold above which the damage to the EU's financial interests is pre-supposed. It should be noted that such a link is non-existent in the case of money-laundering, save as regards the underlying crimes attached to money-laundering.

Referring to the principle of *sincere cooperation* represents a warning to national authorities. The current framework overly relies on the national framework for cooperation between law enforcement bodies and prosecution. As a result, there is a risk that national cooperation with the EPPO is ineffective (within

Member States) and/or uneven (across Member States). The current framework for action on infringement seems ill-conceived to tackle that risk adequately.

- *Sincere cooperation* as a relative departure from *mutual independence*

The principle or duty of sincere cooperation, as enshrined in Article 4(3) para 2 TEU, obliges national authorities to ‘assist’ the EPPO (as a Union body) in ‘carrying out tasks which flow from the Treaties’. In particular, national authorities ‘shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union’. The principle of *sincere cooperation* is thus a step forward towards ensuring the better enforcement of the 2017 PIF directive, departing from other principles governing, at times, the relations between EU and national authorities in the Treaties as far as the financial management and accountability of EU funds is concerned. Suffice it to mention that relations between the ECA and the Supreme Audit Institutions (SAI) at the national level are governed by the principles of mutual trust and mutual independence. Such a framework does not lay down any obligation to cooperate, but stresses that all parties should demonstrate a willingness to cooperate, meaning that, in fact, no liability can ensue from a lack of cooperation, and thereafter, that no infringement procedure can be triggered against a Member State. By contrast, the lack of *sincere cooperation* by national authorities with EPPO, theoretically at least, represents a failure to comply with the obligations derived from the treaties, which might in turn form the basis for an infringement action, as further explored below.

- *Sincere cooperation* as a warning of potential infringement procedures

Introducing a reference to the principle of *sincere cooperation* signals a warning to national authorities that they must take orders from the EPPO seriously, at the risk of engaging the State’s responsibility if they do otherwise. The principle of sincere cooperation is the root cause of many declarations of infringement by national authorities brought to the CJEU, where the latter are accused of refusing EU bodies’ access to documents.

- The action for infringement is ill-adapted as a redress mechanism for this risk

The duty of sincere cooperation has certain limits. The first is enshrined in Article 4 TEU, through an oft-forgotten expression in its first paragraph. Indeed, the Treaty obliges both EU and Member States bodies to mutually assist each other in their tasks that stem from the treaties, but it does so ‘in full mutual respect’.

Failure to comply with the duty of sincere cooperation represents a frequent ground for the CJEU to find the Member States guilty. **Then action for infringement will offer effective judicial redress for breaches of the duty of sincere cooperation in the face of outright refusal by national authorities** (as was the case in *Commission v Germany*, where the German Ministry of Finance argued that ECA was acting *ultra vires* when requesting information on inter-administrative cooperation in the field of VAT).⁶⁸ By contrast, whenever the lack of cooperation is not straightforward and is obscured by arguments linked to insufficient capabilities, conflicting agendas, etc., the Commission is more likely to accept national explanations or excuses throughout the administrative stage of infringement proceedings and not follow through with an infringement procedure. To our knowledge, Case 539/09 is the only one where national authorities were found guilty of refusing to cooperate with EU bodies acting in their law enforcement capacity.

⁶⁸ CJEU Ruling of 15 November 2011 in case C-539/09 *Commission v Germany*, ECLI:EU:C:2011:733 (Opinion by AG Kokott, ECLI:EU:C:2011:345)

3.1.2 Multiple legal frameworks, actors and cultures

The EPPO's counterparts are manifold, following the approach to its mandate that we have called 'the jigsaw mandate'. Views greatly vary across epistemic communities.

Among **police bodies**, overwhelming support for the EPPO was conveyed to us during the interviews. The rationale of EPPO would be to "give a boost to investigation". When police corps get the information on a potential crime, and they take the decision to launch an investigation, they usually face concerns about who will – within the Prosecutor's Office or the judiciary – provide shelter for the investigation. It is almost impossible for police agencies to conduct an investigation without judicial support.

Police investigation groups may learn hints that the crime has been committed through intelligence agencies/bodies or whistle-blowers but this evidence does not stand up in a court if they are not 'objectivised' through formal gathering of evidence – these require all the most often prosecutor/judge's indictments. Therefore, when police officers ponder launching an investigation a key question arises: "with whom shall I launch this investigation?" They are well aware that, sooner or later, the investigation will stop until judicial backup or endorsement is obtained, in order to hunt for evidence of the crime. Indeed, their activity is highly procedural, the national law on criminal procedure provides lists of very specific activities that can or cannot be carried out without a prosecutor's indictment or a court's order (the latter applies when there is an impact on fundamental rights of the suspect). The principle of mandatory jurisdiction is clearly an asset for them.

Additionally, police officers are heavily constrained by the legal requirement that they have just one opportunity to make the case go through judicial filters. If they happen to put forward the case to the wrong prosecutor/judge and it gets dismissed, the law precludes presenting it before a second, different jurisdiction. They have the feeling that EPPO will provide the shield they need, due to its high specialization (usually lower courts get stressed when confronted with highly technical cases – there is a high risk of dismissing them to avoid work overload) and that a greater amount of cases will get investigated than is the case now. Plus they whole-heartedly agree that EPPO will have a deterrent effect on the legal professions that earn their livelihoods from organized criminals, it will have a backlash in the reputation of the big law firms whom they confront in the course of large cases.

Therefore, EPPO features clear advantages which are essentially twofold: high specialization, and a mandate over the whole territory of the Member State. Police investigation groups will feel more supported under the new system.

The counterparts of the EPPO also cover law enforcement agencies in grant fraud, VAT fraud, customs fraud, agricultural fraud, and money laundering.

3.2 INSERTING THE EPPO IN THE NATIONAL JUDICIAL SYSTEMS - CHALLENGING DIVERGENCE

In this section, we examine selected issues that may affect the performance of the EPPO when it starts operating. They go back to existing diversity among national criminal legal frameworks and justice systems across EU Member States

3.2.1 General features of criminal procedure, prosecuting models and basic principles

It seems fitting to approach the EPPO's operative tasks by recalling **the foundations of criminal procedure law**. Criminal proceedings unfold in two stages: the pre-trial stage (investigation) and the trial stage. Most often, these stages follow the investigation activities carried out by administrative law enforcement or policing bodies, which may lead nowhere, or else, to the identification of a merely

administrative irregularity; when the police (or other investigating bodies) consider they possess enough sound evidence of a criminal offence as defined by the Criminal Law in force, they will involve the criminal justice system, be it in the form of a prosecutor or a judge-investigator (see the accusatorial model below).

As is often the case, judicial investigation in criminal matters starts *ex officio* or by complaint. The former happens through an order issued by the prosecutor (again, see the accusatorial model below), often following the presentation of sufficient evidence by law enforcement agencies. Spanish criminal procedure law admits that a group of concerned citizens lodge a criminal proceeding (popular action), but this is certainly one of a kind.⁶⁹

The principle of mandatory prosecution means that the prosecutor's discretion to bring the case to justice is limited, if sufficient evidence has been gathered, and in accordance with the guidelines issued by the general prosecutor. This requirement sets limits to transactional justice (also known as plea bargaining), which represents however the general rule in the United States.

Two **prosecuting models** exist. In the so-called **investigatory model**, public prosecutors carry out the investigation themselves, although some safeguards are established to ensure that the prosecutor investigates in an impartial fashion, that is, seeking evidence beneficial to both the plaintiff and the defendant sides. Most participating Member States in the EPPO fit in that model, a feature that the EPPO Regulation replicates in Article 5 (4): 'The EPPO shall conduct its investigations in an impartial manner and shall seek all relevant evidence whether inculpatory or exculpatory.'

Spain remains a prominent exception to that model, because the Spanish prosecutor does not own the investigation. Under the **accusatorial model**, the main role of the prosecutors is limited to the trial stage; whereas an independent judge (the judge-investigator *juez de instrucción* / *juge enquêteur*) takes over the investigation stage. The judge orders the collection of all relevant evidences and filters evidences provided by both the law enforcement bodies and the prosecutor's office. The role of the prosecution during the investigation stage is constrained by the need to seek the endorsement from the judge-investigator at all stages, and specifically in the indictment to bring the case to court. The fact that this model is the current rule in Spain makes it challenging for this Member State to adapt its national system to the investigatory model applied in the EPPO. While national prosecutors would prefer a thorough and long-awaited reform, the unstable political situation does not make it very likely.⁷⁰ In March 2019, preparation works are taking place behind closed doors (at the Committee for Codification of the Ministry of Justice) and it remains unknown whether the reform will be merely cosmetic or else substantial. In the latter case, delays in the Spanish implementation of EPPO-led cases should be expected.

Federal prosecutors in Germany. The structure of the prosecution in Germany depicts a justice system revolving under the authority of the 16 German States (Länder). The *Generalbundesanwalt* (the Federal General Prosecutor) has only very limited competences, especially in the area of terrorism and for the revision of judgements by lower courts heard before the Federal Court (*Bundesgerichtshof*). He will have little to do with the EPPO. By contrast, the main laws governing the justice system are federal. Each of the 16 States has one or several *Oberlandesgerichte* – all lower civil and criminal courts depend upon them. Currently there are 24 *Oberlandesgerichte* – and each of them has one General Prosecutor who is the superior of all prosecutors working in his district. The General Prosecutors are appointed by

⁶⁹ Vilas 2018b

⁷⁰ In July 2018, a first-ever successful motion of censure ousted the conservative government, then replaced by a socialist one. However, the lack of a working majority to ensure governability in key areas (e.g. the annual budget) led to the dissolution of the Parliament and the call for a snap election in April 2019. As one of our interviewed prosecutors said, 'we desperately need a reform to align with our European colleagues, but political parties do not help. Before, they did not want to own the reform, but nowadays they don't want the other party to own it.'

the State Government, the Federal General Prosecutor by the Federal Government). It is suggested here that this will be the most relevant level for cooperation with the EPPO.

Some other countries follow a **mixed model**. For instance, in Austria, judges-investigators exist; however, the scope of these functions does not cover corruption-related offences, therefore, Austria would count as following the inquisitorial model.

Against this backdrop, the **general principles of the EPPO** gain a new relevance. First, considering the **EPPO Regulation as *lex specialis*** means that national criminal laws and criminal procedure laws will only play a complementary role, under Article 5 (3) EPPO Regulation. The applicable national law shall be the law of the Member State whose European Delegated Prosecutor is handling the case in accordance with Article 13(1). Should a conflict between the EPPO Regulation and national law arise, the former will prevail.

In practice, the national legal framework governing the case handled by an EDP will apply to every single matter not covered by EU law, which essentially includes here the EPPO Regulation (and future implementing measures), the Directives harmonising substantial Criminal Law, and the Directives on procedural safeguards. However, national discretion cannot be at the expense of the EPPO's performance, given that criminal proceedings on PIF crimes will fall *'within the scope of application of EU law'* and, in that sense, the general principles of EU law will apply, *even when the applicable legal framework is the national one*. The CJEU might enforce such consistent case-law through references for a preliminary ruling under Article 267 TFEU or through an action for infringement under Articles 258 and 260 TFEU. It is important to make clear the mechanisms at the disposal of the EDPs to be able to refer to the Commission any instances of a non-cooperative attitude by the national authorities, be it the law enforcement bodies or members of the judiciary, either directly (probably not advised) or through the intermediary of the Permanent Chambers and the ECP. As will be developed in Chapter 8 on the rights of individuals, it is important to recall that the CFREU is applicable to all activities conducted by the EPPO, and possibly to all activities conducted by national authorities upon a legally binding order from the EDPs.

Article 30(1) EPPO Regulation now spells out a number of **specific investigation measures** that European Delegated Prosecutors should be able to order or request. The conditions for their use are still mostly left to national law, although Member States are obliged to make sure that these investigation measures can be triggered by the EDPs when the investigated offence is punished by a maximum penalty of at least 4 years of imprisonment:

- (a) **search measures:** the EPPO's reach includes premises, land, means of transport, private home, clothes and any other personal property or computer system
- (b) **conservatory measures** necessary to preserve the integrity or to avoid the loss or contamination of evidence;
- (c) **production orders:** aiming at obtaining the production of any relevant object or document;
- (d) **digital production orders:** aiming to obtain the production of stored computer data, encrypted or decrypted. This includes any data format, also banking account data and traffic data;⁷¹
- (e) **freezing orders:** covering instrumentalities or proceeds of crime, including assets, pending their confiscation by the trial court, where there is reason to believe that the owner, possessor or controller of those instrumentalities or proceeds will seek to frustrate the judgement ordering confiscation.

⁷¹ Save data specifically retained in accordance with national law pursuant to the second sentence of Article 15(1) of Directive 2002/58/EC of the European Parliament and of the Council

3.2.2 Diverging national environments awaiting the EPPO: governance and corruption.

Divergent approaches on the fight against corruption and fraud represent, probably, the main challenge for the future performance of the EPPO once it becomes fully operational in 2021. This section illustrates the overall environment awaiting for the EPPO at the national level, through resort to general indicators on the quality of governance and the salience of corruption. Drawing on the annual or multiannual indexes built and disseminated by several independent entities, of public and private nature, it is possible to offer a more or less accurate picture of the extent to which Member States fare on good governance and corruption. These indexes do not take into specific account the EU's financial interests, but refer to overall issues of public governance in the targeted countries.

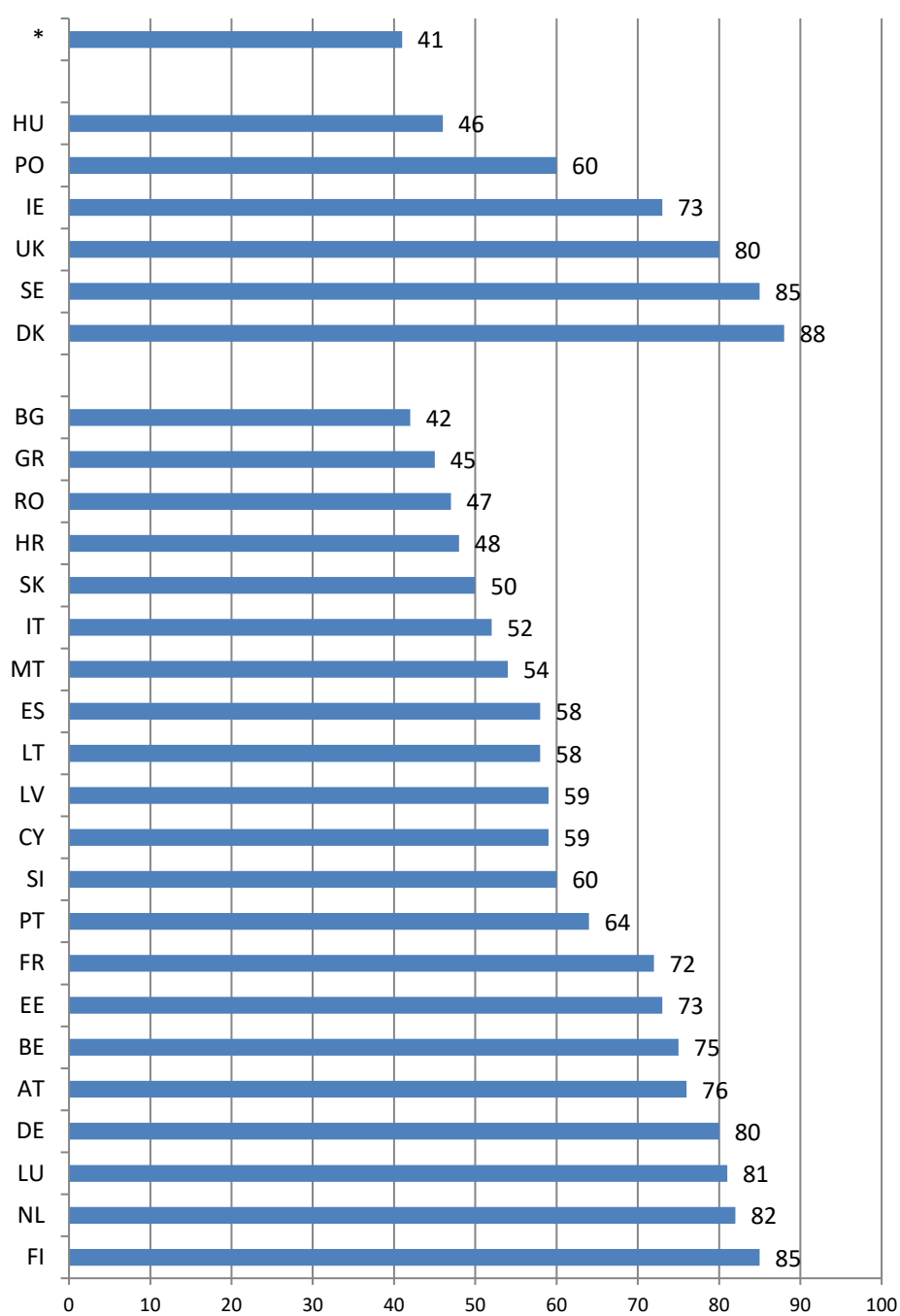
From a general perspective, it is useful to examine national perceptions on corruption, which is best shown by the Corruption Perceptions Index published on an annual basis by the international NGO Transparency International. As is often recalled, this index is formed based on questionnaires submitted to citizens that assess their views on national levels of corruption; it should thus not be confounded with actual level of corruption in the targeted countries. Countries are ranked 0-100, the lower the level, the higher perception there is among the population on the salience of corruption. Figure 8 is organised in three blocks. First, a third country showing similar corruption perception levels as the lowest levels in the European Union, marked with (*), in this case it is Burkina Faso. The second block reflects perceptions in EU Member States who have chosen not to participate in the EPPO. Finally, the scores of participating Member States are shown in the third block. Here, it strikes as surprising that no less than 12 states have similar perceptions on national levels of corruption as Poland.

Attention is then drawn to the Worldwide Governance Index prepared by the World Bank. Figure 9 shows a ranking of EU Member States regarding the 'control of corruption' indicator. Drawing on multiple sources, states are assigned a score between 0 and 5. For each country, we indicate the values of 2007, 2012, and 2017 (in black bars). The first line, as control, shows the score of the country scoring the lowest in the 2017 Index (in this case, Equatorial Guinea). The block below represents the non-participating countries in the EPPO, where a clear gap is appreciated between the lower scores obtained by Poland and Hungary, on the one hand, and those of the other four states.

When examining the scores of Participating Member States, the situation of the 6 states at the bottom (Bulgaria, Greece, Romania, Italy, Croatia and Slovakia, in reverse order) becomes a source of concern, for the first four fare worse than the worst of non-participating states (Hungary), and all of them are net recipients of EU funds. It must be said, however, that their scores experience an improvement trend in the last five years, with the exception of Bulgaria.

Regarding the remaining states, a clear decline in the levels of corruption control is detected in Cyprus, Malta and, above all, Spain, with a whole point down in the last 5 years.

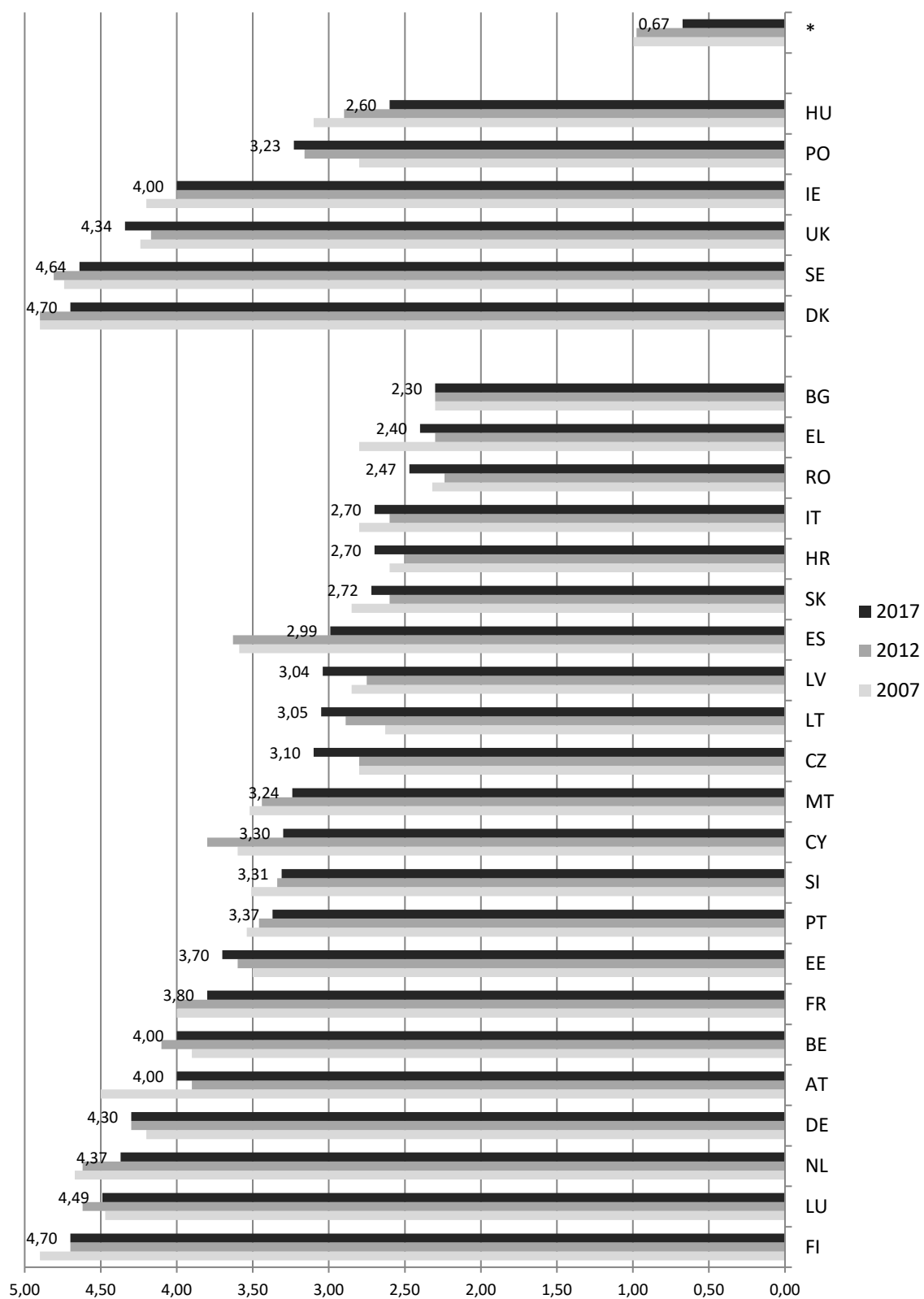
Figure 8: Perceptions on corruption at the national level (CPI 2018)



Source: Transparency International (2018)⁷²

⁷² Transparency International 2018, <https://www.transparency.org/cpi2018>

Figure 9: Control of corruption (WGI 2007-2012-2019)



Source: Authors' elaboration based on World Bank's databases.⁷³

⁷³ World Bank, Worldwide Governance Reports, <http://info.worldbank.org/governance/wgi/#reports>

Along the same lines, we have revised dominant trends on political corruption in the Member States, drawing on the Rule of Law Index, published on an annual basis by the World Justice Project, an independent non-profit organization that seeks to advance the knowledge on and the quality of the rule of law worldwide, from its multiple headquarters in America and Asia.⁷⁴ We focus first on Sub-factor 2.1, which measures the level of political corruption, defined as 'government officials in the executive branch do not use public office for private gain'. This indicator measures the 'prevalence of bribery, informal payments, and other inducements in the delivery of public services and the enforcement of regulations. It also measures whether government procurement and public works contracts are awarded through an open and competitive bidding process, and whether government officials at various levels of the executive branch refrain from embezzling public funds. We assume that the level of political corruption will affect not only the level and quality of PIF protection in the EU Member States (thus the expected case-load of the EPPO in each country), but also the likelihood that the EDPs may carry out their tasks in an independent way.

Data from selected EU Member States is presented in Figure 9 from the highest corruption level (Bulgaria) to the lowest one (Denmark). As in previous cases, we first include a control country featuring the highest levels of political corruption (here, Russia), followed by the EU Member States who do not participate in the EPPO, finally the participating Member States. All countries score between 0 (highest levels of corruption) and 1 (lowest levels of corruption). Participating Member States show great disparity: while Finland, the Netherlands, Germany and Austria feature very low levels of political corruption, the fair or failed score of Greece, Croatia, Romania and Bulgaria suggest very high levels of political corruption.

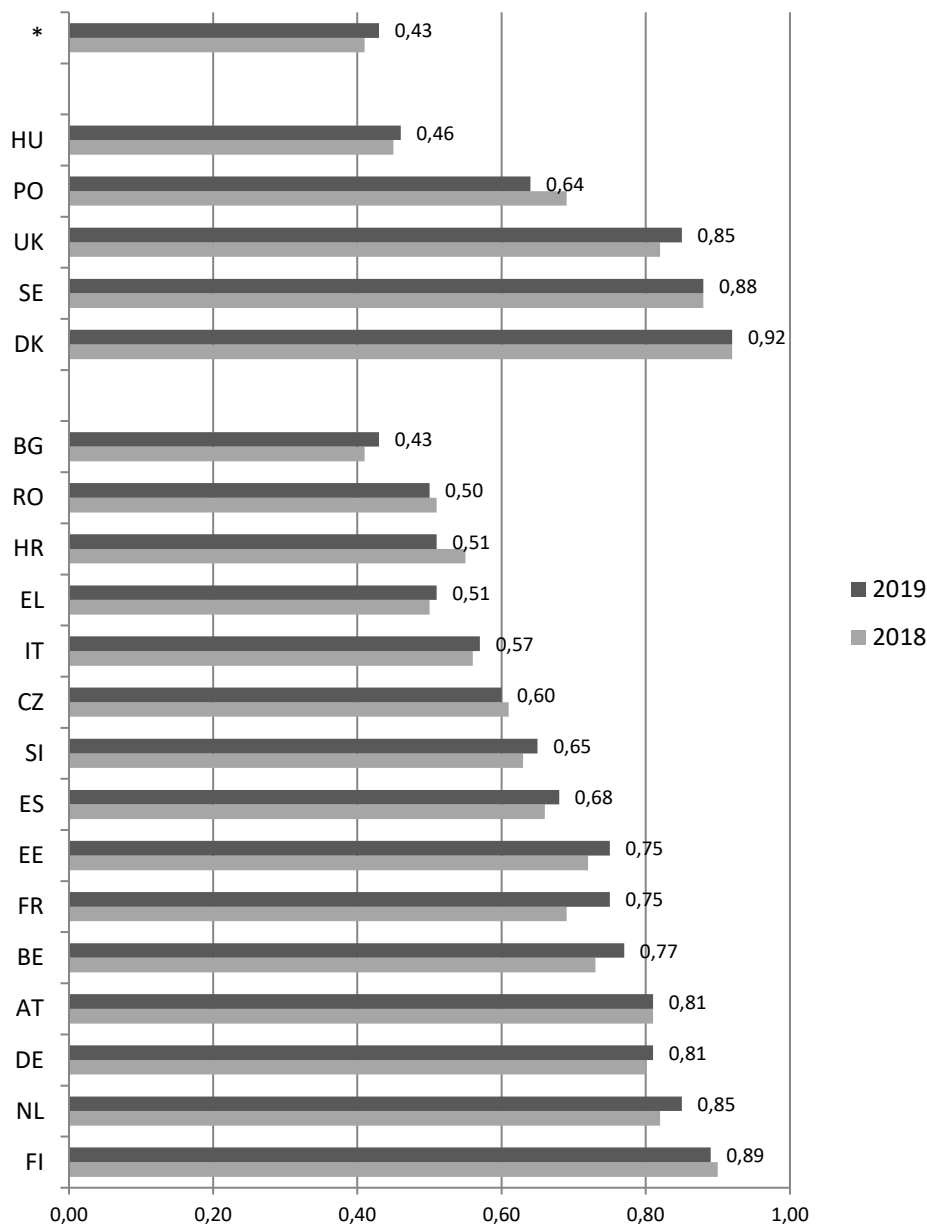
The salience of corruption in a country is directly related to the level of tolerance prevalent among the population of that country. This is one of the multiple indicators contained in the Evaluation Reports of the Group of States against Corruption (GRECO, in its French acronym).⁷⁵ GRECO is a state-led initiative embedded in the Council of Europe which seeks, since 1999, to advance the awareness, prevention, control and repression of corruption in the member states of the Council of Europe. Its innovative methodology draws on successive rounds of peer-reviews among select experts from the participating member states. Each round develops a distinct thematic approach. Following on-site visits and interviews with multiple stakeholders at the public and societal level, the Greco Expert Team draws a report whose information, conclusions and recommendations will be made publicly available, with the agreement of the targeted country. When several years have elapsed, another team evaluates the degree to which the state has adopted redressing measures and these are efficient to tackle the challenges previously detected. As a result, the team issues a compliance report, which is also publicised.

When examining Bulgaria, GRECO assessed public tolerance as regards corruption and concluded that 'efforts to prevent and fight corruption are not being perceived as important for improving everyday lives of ordinary citizens' and recommended that further awareness-raising activities and programmes were implemented to progress towards zero-tolerance attitudes among the general public.⁷⁶

⁷⁴ World Justice Project, Rule of Law Index 2018, https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition_0.pdf

⁷⁵ GRECO website <https://www.coe.int/en/web/greco/evaluations>

⁷⁶ GRECO, Greco Eval II Rep (2004) 13 E of 17 October 2005.

Figure 10: Corruption in the Executive (WJI 2018-2019)

Source: Rule of Law Index, 2018 and 2019

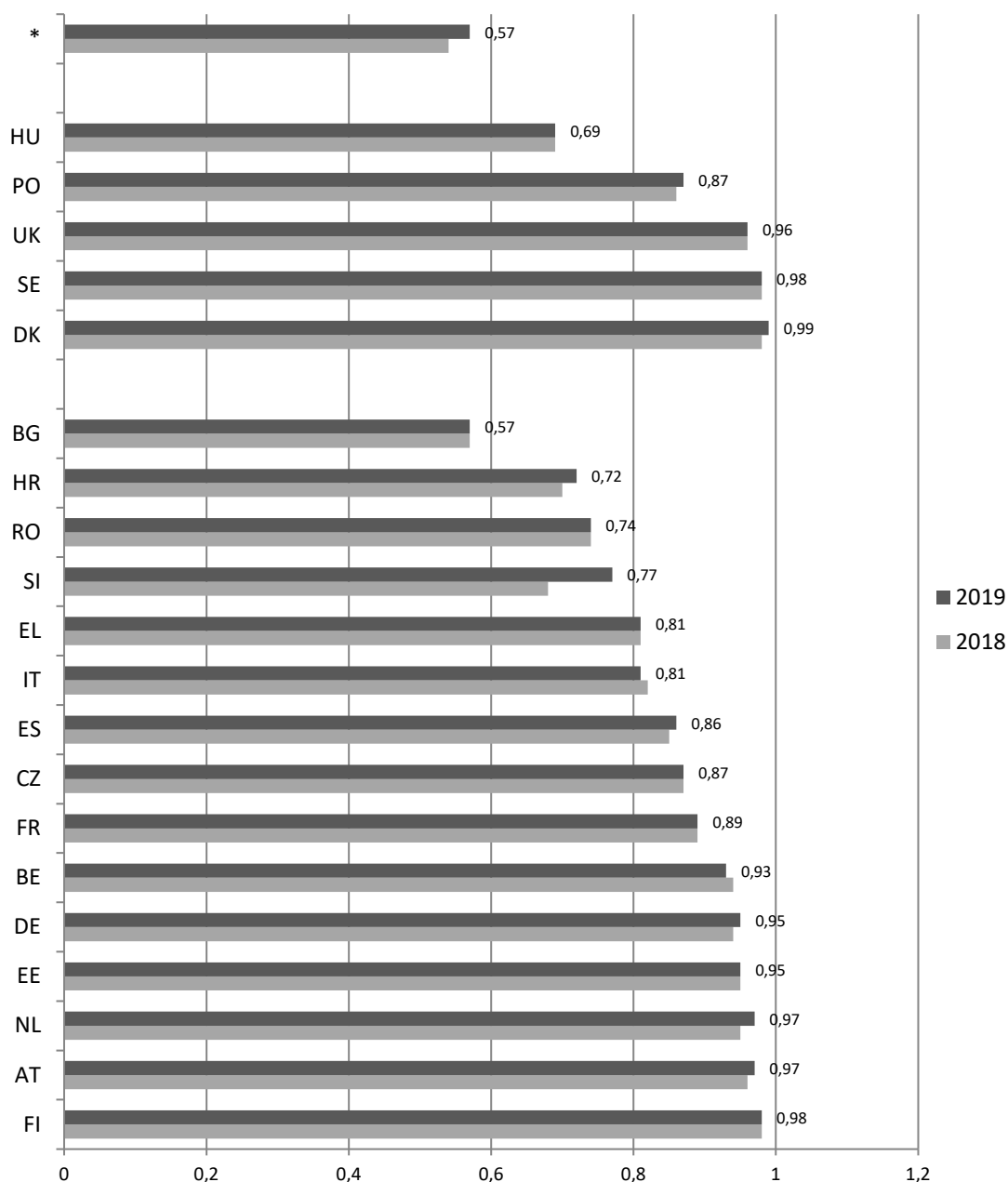
The Rule of Law Index of the World Justice Project also provides a rank of states according to the credibility of the judiciary. Undoubtedly, indicators on the quality of the criminal justice systems will be linked to the expected performance of the EPPO in those countries. No matter how hard the EPPO aims at achieving excellent standards in the investigation and prosecution of PIF crimes, the whole process risks being useless if inserted in a criminal justice system prone to corruption. Therefore, it may be relevant to look at Sub-factor 2.2 in the Rule of Law Index.⁷⁷ This indicator is defined as ‘government officials in the judicial branch do not use public office for private gain,’ and aims to measure ‘whether judges and judicial officials refrain from soliciting and accepting bribes to perform duties or expedite

⁷⁷ World Justice Project, Rule of Law Index 2018, https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition_0.pdf

processes, and whether the judiciary and judicial rulings are free of improper influence by the government, private interests, and criminal organizations.'

Figure 11 shows the scores of EU Member States in that sub-factor. The control country displaying levels of corruption in the judiciary similar to the Member State with the lowest score is again Russia. Credibility levels in most EU Member States are very satisfactory.

Figure 11: Credibility of the Judiciary (WJI 2018-2019)



Source: Rule of Law Index, 2018 and 2019

The very last reference in this section is reserved to the salience of corruption in the recommendations issued by the Commission to the Member States of the EPPO in the framework of the European Semester. Commission recommendations cover multiple issues with an impact on the economic growth in the targeted country. Issues compete in relevance for a space in the relatively short document, no more than 10-pages long on average. The fact that attention is attached to the level of corruption, the independence of the judiciary, translates genuine concern regarding the state of the matter in that Member State. Table 2 below shows the main remarks that the Commission deemed necessary to include in its country assessments. Whereas in most cases references were made in the explanatory motives, in others they made their way up to the recommendations, indicated by (R). Reference is made solely to Member States regarding which the Commission expressed concern in 2017. Hence the absence of certain Member States participating in the EPPO, such as Austria, Belgium, Estonia, France, Germany, Luxembourg.

Commission's recommendations clearly show that, save a handful of exceptions, most participating Member States in the EPPO show deficiencies in the quality of their judiciary or in their policy strategies against corruption.

Table 2. Salience of corruption in the Commission's Recommendations within the European Semester

	CORRUPTION	PUBLIC PROCUREMENT	JUDICIARY
BG	<ul style="list-style-type: none"> High Shadow economy is prevalent Poor tax collection 	-	<ul style="list-style-type: none"> Weak track record in prosecution of high level cases Poor independence and quality of the judicial system
CY	<ul style="list-style-type: none"> High 	-	<ul style="list-style-type: none"> Inefficient court procedures and limited capacity (R)
CZ	<ul style="list-style-type: none"> High Lack of systematic prosecution (R) 	<ul style="list-style-type: none"> Problematic Lack of sufficient competition (R) 	
ES	<ul style="list-style-type: none"> Relevant, despite progress No tailor-made preventive strategies to mitigate corruption risks at regional/local level Low collection of VAT revenue 	<ul style="list-style-type: none"> Lacking a clear and consistent policy framework that ensures legal compliance (R) 	<ul style="list-style-type: none"> Protracted judicial procedure for corruption cases resulting in impunity due to time-limits
HR	-	<ul style="list-style-type: none"> Shortcomings in the transparency and accountability of the Bank that plays key role in the implementation of EU financial instruments 	<ul style="list-style-type: none"> Slow judicial proceedings in criminal cases in the lowest courts. (R) Not up-to-date in electronic filing and delivery of court documents Case-management reforms not introduced at first instance courts
IT	<ul style="list-style-type: none"> Major problem Time limitations lead to high number of cases time-barred (R) National anti-corruption authority has limited resources Fragmented legal framework 	-	<ul style="list-style-type: none"> Long-overdue reform of statute of limitations in corruption cases (R) Judicial reform not yet performant – lengthy procedures (R)
LT	<ul style="list-style-type: none"> Still a drawback for the business environment Prevention of conflicts of interest too formalistic and lacking verification (R) 	-	-
LV	<ul style="list-style-type: none"> Improvements (e.g. conflicts of interest) but still source of concern Continued monitoring is needed 	<ul style="list-style-type: none"> Prone to high-level corruption Insufficient transparency, especially at local level 	<ul style="list-style-type: none"> Increasing rise in corruption cases brought to courts
MT	<ul style="list-style-type: none"> Financial system features high number of foreign institutions attracted by tax environment. Banking supervisory authority under pressure. (R) 	-	<ul style="list-style-type: none"> Further improvements needed as to the efficiency of the justice system
PT	<ul style="list-style-type: none"> No overarching strategy to curb corruption. Corruption prevention plans in each public institution have been largely formalistic. No tailor-made to specific needs in each administration level. 	<ul style="list-style-type: none"> Competition in public procurement remains limited. Shortcomings as regards the transparency and reliability of public procurement data and procedures 	<ul style="list-style-type: none"> improvements needed in final conviction rates for high-level corruption and the application of penalties that provide stronger deterrents
RO	<ul style="list-style-type: none"> Widespread corruption affects the independence and effectiveness of public administration Tax evasion is prevalent Anti-corruption repressive measures are pending 	<ul style="list-style-type: none"> Improved public procurement needed to address key challenges and strengthen citizens' trust in public authorities & democracy. 	<ul style="list-style-type: none"> Efforts needed for greater judicial independence; to complete reform of criminal code; to increase ensuring efficiency in the implementation of court decisions.
SK	<ul style="list-style-type: none"> High perception Tax evasion and tax avoidance falling, efforts to increase voluntary compliance Public administration under modernisation but corruption remains challenging. Control mechanisms and the enforcement of anti-corruption rules still appear inadequate, and policy initiatives on whistleblowing and letterbox companies may not be enough to resolve the problem 		<ul style="list-style-type: none"> Persistent weaknesses in public procurement
SL	<ul style="list-style-type: none"> High perception despite zero-tolerance programmes 	-	-

Source: European Commission, 2017, https://ec.europa.eu/info/publications/2017-european-semester-country-specific-recommendations-council-recommendations_es

3.2.3 Comparative approaches on the expected status and powers of the European Delegated Prosecutors

This section puts forward several indicators that might help measuring the independence of prosecutors at the national level. This allows drawing conclusions as regards the level of independence that may be expected from future EDPs, who will act on behalf of the EPPO in those states.

- **A structure that relies in European Delegated Prosecutors with diverging powers**

According to Article 26 (1) of the EPPO Regulation, only a European Delegated Prosecutor may open criminal investigations in those cases falling within the competence of the EPPO. By contrast, in most Member States, police officers can also launch criminal investigations (e.g. Austria, Germany). In the case of Germany, they are even obliged to do so according to the *legality* principle. In most cases, police officers do the investigation work autonomously and only inform the public prosecutors when the investigation is accomplished. Only in certain categories of cases (e.g. death cases) do public prosecutors have to be involved at an early stage. The wording of Article 24 (2) of the EPPO Regulation takes into account the fact that criminal investigation might be initiated by police officers. However, police officers are now obliged to inform the EPPO in all cases that might fall under the Regulation. This will require close cooperation not only between the EPPO and prosecutors at decentralised levels, but also between the EPPO and police agencies across all participating countries.

In numerous cases, criminal offences falling within the EPPO's competence will be combined with offences falling under the remit of national criminal investigation, leading to the need for parallel investigations. According to Article 24 (8) of the EPPO Regulation, EPPO will have to inform the Member States' authorities in such cases.

Additionally, Articles 22 (1) and 25 (2) of the EPPO Regulation define thresholds for the EPPO's competence: 10,000 Euros for regular PIF cases and even 10 million Euros for cases falling under Article 3 (2) (d) of the PIF Directive, namely Value Added Tax (VAT) fraud. This raises complex questions as to how to calculate these thresholds and how national law enforcement agencies should deal with cases below these thresholds.

3.3 RISKS RELATED TO THE EPPO'S CASE MANAGEMENT SYSTEM

According to Article 44 EPPO Regulation, the "EPPO shall establish a case management system, which shall be held and managed in accordance with the rules established in this Regulation and in the internal rules of procedure of the EPPO" (Article 44 (1) EPPO Regulation). The system is meant to include all information and evidence from the EPPO's case files that may be stored electronically (Article 45 (3)).

3.3.1 Complexity deriving from divergent systems operating at Member States' level

As the Delegated European Prosecutors will use the working environment as it is established in their Member State prosecution institution and wider framework, the case management system should ideally have an interface with national (or in some cases sub-national) case management system for criminal investigation. This would make it easier to bring up and link cases (Article 27 EPPO Regulation) and help foster cooperation with police agencies and other national bodies that Delegated European Prosecutors can instruct for investigation measures (Article 28 (1) EPPO Regulation). This would also promote cooperation with competent national courts where national law requires them to authorise investigation measures. A uniform case management system would also make cooperation with Delegated European Prosecutors easier in other Member States in cross-border cases.

However, the establishment of the EPPO's case management system will have to start from a highly divergent IT infrastructure in the Member States' criminal prosecution systems. While in some cases, files are already largely held electronically, other national criminal justice systems still primarily rely upon paper-based files. Therefore, the case management system cannot be a "one fits for all" solution, but it will have to be adapted to the IT environment in each participating Member State.

3.3.2 Risks related to the implementation of the EPPO case management system

The data to be stored and shared in the EPPO's case management system will be highly sensitive personal data. A high level of confidentiality will, therefore, be required, which is also in the interest of effective investigation.⁷⁸

The long history of delays in the introduction of the first and second generation Schengen Information System (SIS) demonstrates that the establishment of a multilevel IT infrastructure is complex and risk prone. Even if technology is more advanced compared to the establishment of the SIS II between the early 2000s and 2013, practical problems and ballooning expenditure are likely to occur for the establishment of the EPPO's case management system.

Thus far, even the basic requirements that the case management will have to fulfil are not entirely clear. Member States that already use electronic investigation files would like the Delegated European Prosecutors to use those systems existing at Member States level for their case files. This would mean that EPPO files would have to be mirrored in a centralised system in order to allow the central EPPO services to fulfil their supervision and coordination tasks. By contrast, the Commission seems to prefer a cloud storage system for the EPPO, to be established exclusively in Luxembourg. Some Member States fear that this solution may hamper the immediate availability of the files for the Delegated European Prosecutors in the Member States. It would also make communication with the courts more difficult where investigation measures require court authorisation, once the case is ready to be brought before the competent court.

Consequently, less than two years before the EPPO is supposed to become operational, no consensus has been reached on the general characteristics of the case management systems. In a worst case scenario, the absence of a well-performing case management system may lead to additional expenditure and hamper the EPPO's work for many years.

⁷⁸ Cf. Aden 2018b on the role of secrecy and confidentiality in cross-border criminal investigation.

4 THE RIGHTS AND RESPONSIBILITIES OF NON-PARTICIPATING MEMBER STATES IN THE EPPO

KEY FINDINGS AND POSSIBLE SOLUTIONS

- At least for some Member States – especially Denmark – the end of enhanced cooperation for the EPPO is not a perspective for the near future. Brexit and the relationship with criminal justice institutions in third countries where the beneficiaries of EU countries may reside deserve particular attention.
- The rules laid down in Articles 99 (3) and 104 EPPO Regulation allowing working arrangements and international agreements on the cooperation of the EPPO with non-participating Member States and third countries might risk a further fragmentation of the legal rules to be applied by the EPPO. More standardised rules for non-participating and third countries could be a solution. The participation of non-EU countries in the Schengen instruments might be a model to shape the more standardised cooperation of the EPPO with non-participating EU Member States and third countries.
- The practical application of Article 105 (3) EPPO Regulation should be closely observed as part of any follow-up on the adequacy of these rules allowing the EPPO to represent the participating Member States in cross-border cases involving suspects in non-participating Member States. Adjustments should be initiated by law-making rather than waiting for cases to be decided by the Court of Justice.
- Given the negative impact that enhanced cooperation may have on the capacity of the EPPO to deliver, the regulations laying down the legal rules for future funding schemes should consider linking payments – at least in high-risk areas – to the recipient country's membership and to cooperation with the EPPO.
- New political initiatives should be taken in order to overcome the broader opt-outs for Denmark and Ireland in Justice and Home Affairs cooperation that could lead to greater unnecessary complexity and limit the practical usefulness of JHA instruments, for the EPPO and other bodies.

The resort to enhanced cooperation has been received as a complex development in the launch of the EPPO, showing the extent to which 'political unwillingness to pursue the goal set by the Commission had an even more criticisable result.'⁷⁹ Getting a grip of the exact relationship between the EPPO and non-participant Member States led to lengthy discussions among key players throughout the negotiation stage for the EPPO Regulation. Some Member States would have preferred to regulate relations with non-participant states by means of an additional EU Directive, but other Member States and the European Commission succeeded in quickly defusing such a move, before it even reached the draft proposal stage. As the EPPO Regulation does not include detailed provisions on the relationship between the EPPO and non-participating Member States, the format that cooperation eventually takes remains uncertain at this stage. If the Commission does not propose further rules, details will be left over, to be clarified by the CJEU and national courts.

This chapter casts a spotlight on the challenges that enhanced cooperation poses for the EPPO's capacity to deliver.

⁷⁹ Cf. Allegrezza, S. and Mosna, A, 2018. Also on the resort to enhanced cooperation: Di Francesco Maesa, EUCRIM 2017; Satzger (2015); Schutte JJE (2015);

4.1 NON-PARTICIPATING MEMBERS STATES AND THE UNION'S FINANCIAL INTERESTS

EU institutions have repeatedly made efforts to encourage the remaining non-participant states to join the EPPO framework. However, there is little room for manoeuvre to achieve that goal in the near future.⁸⁰

At present, six Member States remain outside the enhanced cooperation framework for varying reasons: Denmark, Hungary, Ireland, Poland, Sweden and the United Kingdom. The non-participating Member States can be classified in two main groups: those with general opt-outs for Justice and Home Affairs and those not participating for other internal reasons (Table No. 2). Denmark, Ireland and the United Kingdom do not fully participate in Justice and Home Affairs cooperation. The three cases differ regarding the extent of the opt-out and, therefore, the consequences for the Union's financial interests and for the EPPO.

Table 3. Arguments of Non Participant Member States in the EPPO

Denmark	Broader JHA opt-out
Hungary	Internal political reasons
Ireland	Broader JHA opt-out
Poland	Internal political reasons
Sweden	Internal political reasons
United Kingdom	Broader JHA opt-out and Brexit

Comparative data shows that the reason for the six Member States' non-participation and the associated risks for the Union's financial interests vary considerably among these Member States. Table 3 below shows the EU funds stream towards these countries.

Table 4. EU expenditure in Non-Participating Member States

	Denmark	Hungary	Ireland	Poland	Sweden	United Kingdom
EU funds in total and % GNI in 2017⁸¹	Total: € 1,458.8 M % of GNI: 0.50	Total: € 4,049.1 M % of GNI: 3.43	Total: € 1,818.3 M % of GNI: 0.75	Total: € 11,921.3 M % of GNI: 2.67	Total: € 1,503.7 M % of GNI: 0.31	Total: € 6,326.3 M % of GNI: 0.28

Source: European Commission (DG Budgets)

A relevant source of information is also the rate of fraudulent activities reported by OLAF in those countries and how many of them were followed-up by the national judiciaries, as shown in Table No. 4.

⁸⁰ On the persistence of enhanced cooperation for the EPPO: Franssen, NJECL 2018.

⁸¹ European Commission (Budgets), Interactive Funds by Member States, http://ec.europa.eu/budget/biblio/multimedia/interactive/index_en.cfm

Table 5. OLAF findings on non-participating Member States and rate of judicial review

	Denmark	Hungary	Ireland	Poland	Sweden	United Kingdom
Fraudulent and non-fraudulent irregularities detected by OLAF in 2013-2017 under shared management (number and % of total payments)⁸²	205 (= 0.30 %)	2.808 (= 1.20 %)	1.432 (2.41 %)	5.461 (1.74 %)	224 (0.21 %)	3.062 (0.75 %)
Decisions taken by national judicial authorities following OLAF's recommendation in 2010-2017 and indictment rate (%)⁸³	3 (67 %)	17 (47 %)	2 (0 %)	11 (82 %)	2 (50 %)	14 (36 %)

Source: OLAF⁸⁴

Thirdly, the stark contrast between those Member States is best illustrated by reference to the Transparency International Corruption Perception Index, as shown in Table No. 5 below.

Table 6. Perceptions on corruption in Non-Participating Member States

Transparency International Corruption Perception Index	Denmark	Hungary	Ireland	Poland	Sweden	United Kingdom
2012	Rank 1 Score: 90	Rank 46 Score: 55	Rank 25 Score: 69	Rank 41 Score: 58	Rank 4 Score: 88	Rank 17 Score: 72
2017	Rank 2 2017: Score 88	Rank 66 2017: Score 45	Rank 19 2017: Score 74	Rank 36 2017: Score 60	Rank 6 2017: Score 84	Rank 8 2017: Score 82
2018	Rank 1 2018: Score 88	Rank 64 2018: Score 46	Rank 18 2018: Score 73	Rank 36 2018: Score 60	Rank 3 2018: Score 85	Rank 11 2018: Score 80

Source: Transparency International. Corruption Perception Index.⁸⁵

The data on OLAF's activities cannot be used directly to make expectations for the EPPO's workload, were these six Member States to join the EPPO. On the one hand, OLAF's mandate not only includes cases that constitute criminal offences. On the other hand, the establishment of the EPPO may lead to a considerable increase in the number of detected criminal offences against the Union's financial interests, because some of the cases that remain undiscovered under the current system may be prosecuted in the future due to the new prosecution infrastructures established with the EPPO.

Nevertheless, the OLAF data⁸⁶ shows that financial management in the six non-participating Member States creates uneven risks for the Union's financial interests. In Denmark and Sweden, OLAF has only detected small numbers of irregularities in the period 2013-2017. Both countries also perform well

⁸² OLAF 2018, p. 41.⁸³ OLAF 2018, p. 43.⁸⁴ OLAF 2018, p. 41.⁸⁵ Transparency International 2018a.⁸⁶ OLAF 2018.

according to Transparency International's Corruption Perception Index – with worldwide rank 2 for Denmark and rank 8 for Sweden in 2017. With regard to these two cases, any OLAF recommendations to the judicial authorities to prosecute criminal cases were rare.

By contrast, the percentage of irregular payments detected in the UK and Hungary is much higher – and particularly high in Poland and Ireland.⁸⁷ The number of decisions taken by national judicial authorities in these four countries is somewhat higher, but still low in relation to the higher percentage of irregularities. The indictment rate was low in the UK (36%) and in Hungary (47%), but interestingly particularly high in Poland (82%). Transparency International's Corruption Perception Index confirms that particular attention should be paid to Hungary that is only ranked number 66 worldwide, and alas, the score has deteriorated considerably since 2012. In this respect, Poland (rank 36) and Ireland (rank 19) perform somewhat better, with the UK (rank 8) much better.

It should not be overlooked, however, that some of the Member States that participate in the EPPO have not performed very well when it comes to the financial management of EU funds in the recent past. Under shared management, the percentage of payments with fraudulent or non-fraudulent irregularities identified by OLAF for the period 2013-2017 was above the average in Lithuania (2.21%), Malta (2.42%), Greece (2.76%), Latvia (2.89%), Spain (3.13%), Romania (3.21%), the Czech Republic (3.4%) and very high in Slovakia (11.39%).⁸⁸ Once the EPPO is fully operational, further research will be needed to examine the impact taking part in the EPPO has had on the management of EU funds in these Member States.

4.1.1 Member States with general Justice and Home Affairs opt-outs: Denmark, Ireland and the United Kingdom

Denmark, Ireland and the UK have specific opt-out and opt-in arrangements for Justice and Home Affairs (JHA) policies that preclude their participation in the EPPO.

Denmark

Denmark has not been taking part in JHA activities fully since the Treaty of Maastricht. This opt-out was initially part of a "deal" concluded after Danish citizens rejected the Treaty's ratification.⁸⁹

Under the Treaty of Lisbon, according to Protocol no. 22 on the position of Denmark,⁹⁰ the country "shall not take part in the adoption by the Council of proposed measures pursuant to Title V of Part Three" of the TFEU, including Articles 67 to 89 and therefore the establishment of the EPPO regulated in Article 86. While the protocol includes an opt-in clause for measures related to the *Schengen acquis*, this is not foreseen for other JHA issues.

Therefore, Danish participation in the EPPO would only be possible after a general revision of the JHA opt-outs by referendum. Criminal investigations related to the Union's financial interests are likely to be aggravated by the ongoing transfer of former "third pillar" issues to new EU instruments.⁹¹ With the recent adoption of the revised Eurojust Regulation (EU) 2018/1727, Denmark is no longer part of Eurojust.⁹² In addition to the Danish non-participation in the EPPO, this will complicate judicial cooperation between Denmark and the other Member States, as the advantages of direct cooperation in the Eurojust framework in complex trans-border cases will no longer be available.

⁸⁷ OLAF 2018, p. 41.

⁸⁸ OLAF 2018, p. 41.

⁸⁹ Cf. Tekin 2012, p. 201-207 on the political implications.

⁹⁰ OJ EU C 326 of 26.10.2012, p.299.

⁹¹ Cf. Aden 2018a for an overview.

⁹² Recital 72, Regulation (EU) 2018/1727 of the European Parliament and the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA.

Even if the Danish management of EU funds, and public funds in general, has met with high standards in the past, Denmark's non-participation in the EPPO – and in Eurojust – not only makes cooperation more complex, but also brings the added risk that offences affecting the Union's financial interests might be less effectively detected and prosecuted in Denmark in future.

Ireland

For Ireland⁹³ and the UK, JHA opt-outs and opt-ins are regulated by Protocol no. 21 to the Treaty of Lisbon.⁹⁴ According to these rules (Article 1), similar to Denmark, Ireland shall not take part in the adoption by the Council of proposed measures related to Articles 67 to 89 TFEU, including the establishment of the EPPO according to Article 86. However, by contrast to Denmark, Ireland has the right to opt-in any time after the adoption of such a measure (Article 4). The Irish broader JHA opt-out therefore does not prevent the country from joining the EPPO.

Participation in the EPPO rests on a decision of the Irish government. Arguably, the Irish government did not opt-in to the EPPO for a number of reasons. The Irish Director of Public Prosecution is completely independent of government. The perception was perhaps that joining the EPPO would jeopardise independence. It might be that the common law system applicable to the UK and Ireland make any future synergies between investigation and prosecution bodies at the EU level are unlikely.

At present, there are no special preparations ongoing to work with the EPPO. The exact mechanisms are not yet worked out. There is no sense that non-participation in the EPPO is an obstacle for prosecution or cooperation. The Irish Office of the Director of Public Prosecutions (ODPP) will consider EPPO case files as and when they are presented. It has in place a system for combating VAT fraud.

Brexit does, however, present a challenge for Ireland with regards to the European Arrest Warrant, should the UK opt-out and/or not put in place an agreement that covers UK-Ireland cooperation in this area. To this extent, some 80% of European Arrest Warrants that Ireland issues are to the UK whereby it seeks the extradition of individuals from abroad who have committed crimes in Ireland. Moreover, in the case of Northern Ireland, there may be financial risks for monitoring and recouping revenue, customs and excise.

Ireland cooperates well in Eurojust and recognises the added value of participation. It is also active in Mutual Legal Assistance (for obtaining evidence from partner Member States but does not take part in the European Investigation Order. The Irish police force (Garda Síochána) has a representative at Europol and cooperates with OLAF.

The Irish ODDP's case management system (CMS) is digital and fairly bespoke since it was designed and implemented in 2005-2008. Extensive tests were done to ensure the CMS was fit for purpose. The current system could potentially be adapted to be compatible with the EPPO, but this is purely hypothetical.

Ireland's Department of Justice also has a project ongoing to improve horizontal coordination and the exchange of information between judicial and police cooperation bodies such as courts, prosecutors, police stations and prisons.

⁹³ Cf. Tekin 2012, p. 195-200 on the backgrounds of the Irish JHA opt-out.

⁹⁴ OJ EU C 326 of 26.10.2012, p.295.

The United Kingdom

Protocol no. 21 to the Treaty of Lisbon⁹⁵ applies not only to Ireland, but also to the United Kingdom.⁹⁶ However, the Brexit referendum in June 2016 and the uncertainties about the way in which the UK will leave the EU – it might take part in some future EU cooperation initiatives – have positioned the UK clearly outside the framework established for the EPPO. Joining the EPPO has been a very contentious issue in political debate in the past. It is not an issue that is debated at present.

Paradoxically, recent developments of a constitutional nature in the run-up towards Brexit have made the possibility for the UK to join the EPPO much easier, were the Government to wish to do so, as long as it remains a Member, obviously. The Government is no longer obliged to seek approval (by both Act of Parliament and a public referendum), as was the case before the European Union Act 2011 was, for the most part, repealed. This is, however, a purely hypothetical scenario since the Government has repeatedly said that it has no intention of exercising its opt-in right in this area.⁹⁷

There is still much uncertainty as to whether the United Kingdom will eventually withdraw from the Union on 29 March 2019, or at a later stage (with an extension of the 2-year period provided for in the Treaties), and on which terms (comprehensive withdrawal agreement, sectorial agreements, unilateral extension of targeted provisions, or no deal at all). There is, nonetheless, widespread agreement that the transitional period will last several years until 'the dust has settled'.

A UK 'transitioning' towards Brexit does not fit any of the legal categories used by the EU to define how the EPPO and EU institutions interact with Member States and third countries.⁹⁸ As from the 29 March 2019 (or shortly after depending on potential extensions), the UK would formally be a third country. Yet the UK is likely to remain completely integrated within the legal framework of the EU until 2021, and possibly much longer, but stripped of decision-making powers in the EU's main institutional framework, with little or none of the room for manoeuvre currently enjoyed by a small number of third countries (e.g. Norway, Ukraine).

During the transitional period, the UK will still be bound by the OLAF Regulation and, therefore, remain within the body's jurisdiction during the transitional period. That period might be until 31 December 2020, enshrined in the Withdrawal Agreement, if ratified. The revised OLAF Regulation would enter into force immediately, altering the extent of binding commitments for UK authorities regarding their obligations to cooperate with OLAF, taking into account its additional powers of investigation.⁹⁹

If the UK and the EU sign an exceptionally close customs and VAT agreement during the proposed post-Brexit transitional period — currently scheduled to last until December 2020 — the UK would remain subject to OLAF. Under the so-called 'Chequer's Plan', the UK would remain closely aligned to the customs union and the single EU VAT area. Since customs duties and the VAT base constitute an EU "own resource" affecting the revenue side of its budget, any such arrangement could require the UK authorities to work with OLAF, under conditions which remain undefined to date.

Post-Brexit, the UK will most likely wish to continue taking part in a number of EU funding programmes like the Framework Programme for Research and the Euratom nuclear research programme. To that extent, the UK will continue to fall under the competence of the ECA and OLAF. When non-Member States sign a legal agreement to be involved in EU programmes, their access to EU funds is made conditional upon accepting a Memorandum of Understanding (MoU) which includes provisions

⁹⁵ OJ EU C 326 of 26.10.2012, p.295.

⁹⁶ Cf. Tekin 2012, p. 186-195 on the backgrounds of the British JHA opt-out.

⁹⁷ Cf. UK House of Commons 2018, para 5.12

⁹⁸ This idea is owed to Alexander Clarkson

⁹⁹ Cf. UK House of Commons 2018, para 5.8

enabling the ECA and OLAF to carry out investigations, including on-the-spot inspections, “with a view to establishing whether there has been fraud, corruption or any other illegal activity affecting the financial interests of the Union”. The role the EPPO could play under any ‘association’ agreement as a third country allowing for financial involvement in EU spending programmes remains unclear.¹⁰⁰

This option will hinge on the UK government’s acceptance of OLAF’s jurisdiction to investigate potential irregularities with EU funding in the UK. However, whether or not it chose to pursue its findings through the national criminal justice system would remain an autonomous decision for British law enforcement agencies.

In view of defining the best options for future cooperation with the UK, attention should be given to the **administrative structure supporting the fight against fraud in fields related to the EPPO’s mandate in the United Kingdom.**

The **Crown Prosecution Service** is the principal public prosecuting agency for conducting criminal prosecutions in England and Wales. Headed by the Director of Public Prosecutions, this non-ministerial government department is accountable to the Attorney General for England and Wales. It provides legal advice to the police and other investigative agencies during the course of criminal investigations, and decides whether a suspect should face criminal charges following an investigation. The Crown Prosecution Service’s mandate extends beyond that of the EPPO, covering threats to national security too. It has a high conviction rate in the Magistrates’ Courts and Crown Courts. Its departments of interest are the Specialist Fraud Division and the Serious Fraud Office.

The **Specialist Fraud Division** handles cases that are complex, sensitive or have a value of more than 1 million pounds sterling. Other cases are handled by local Crown Prosecution Service’s prosecutors. The **Serious Fraud Office** was established by the Criminal Justice Act 1987 as the main investigative body in the UK for investigating fraud and the most serious types of economic crime. Nearly all its cases involve an international dimension and the team liaise with foreign authorities to secure cooperation. The team also handles incoming enquires for assistance. Its multidisciplinary staff is worth mentioning. Most important for OLAF and the future EPPO will be the International Liaison and Investigations Adviser (Seconded) who assists with building and consolidating relationships with authorities in other jurisdictions, participates in case reviews and advises on engagement with corporate and compliance issues.

Future relations with the EPPO will need to take into account the three key divisions inside the Serious Fraud Office:

Casework Divisions (responsible for following up on reasonable grounds to suspect complex or serious fraud, bribery or corruption, with a view to bring charges if sufficient evidence of criminal behaviour is uncovered during the investigation and a prosecution is found to be in the public interest);

Proceeds of Crime & International Assistance (endowed with tasks as regards illegal assets recovery, including mutual assistance requests – of interest for the EPPO); and

International and Law Enforcement Liaison (to develop and strengthen constructive working relationships with law enforcement partners at home and overseas).

Finally, **the EPPO should take into account the role of devolved administrations, particularly Scotland, in the fight against corruption and fraud, and build relationships accordingly.** The above investigating bodies do not have jurisdiction in Scotland, where fraud and corruption are

¹⁰⁰ Cf. UK House of Commons 2018, fn 24

investigated by Police Scotland through their Specialist Crime Division, and prosecutions are undertaken by the Economic Crime Unit of the Crown Office and Procurator Fiscal Service.

4.1.2 Member States not participating for other internal reasons: Hungary, Poland and Sweden

Hungary, Poland and Sweden are three Member States that have not joined the EPPO so far for internal political reasons. However, there are no general constitutional hurdles or opt-outs that would prevent them from joining.

- **Hungary**

Hungarian non-participation can be seen in the context of broader scepticism on the part of the current Hungarian government towards European integration. Alongside EPPO negotiations, constitutional reforms in Hungary and the respect of fundamental rights have become issues of conflicts between the Hungarian government and EU institutions.

Hungary has not been a serious candidate for participation in the EPPO thus far. In this specific case, non-participation **constitutes serious risks for the Union's financial interests**. Given the substantial value of EU funds paid to this country and the risks related to corruption detected by Transparency International,¹⁰¹ Hungary can be identified as a high-risk non-participating Member State when it comes to safeguarding the financial interests of the Union.

- **Poland**

Similar to Hungary, Polish non-participation in the EPPO can be explained in the context of a broader scepticism on the part of the current government towards European integration and of conflicts between Polish governments and EU institutions over rule of law standards and the need for them to be respected.

It is unlikely that Poland will join the EPPO in the near future. According to a statement of the Deputy Prosecutor General, Łukasz Piebiak, the EPPO cannot be established in Poland as it would put in danger the independence of the of the national prosecutors' offices. The Ministry of Justice does not like the idea that it would also take over the competence to conduct proceedings in VAT-fraud cases, which is a specific interest of the Ministry in the recent times. According to the Ministry, the VAT-revenue belongs to the State and should be dealt with by national agencies. Our interviewees highlighted the red lines of the Polish government:

- a) a filter for the EPPO's jurisdiction limiting its exclusive competence to conduct proceedings in crimes affecting the Union's financial interests (not possible);
- b) shaping a structural link between the EPPO and the general prosecutor's office, allowing for greater participation of national authorities in the prosecution of PIF crimes;
- c) maximum procedural autonomy of the Member States; and
- d) scope of procedural guarantees in the course of EPPO-led proceedings, at least equivalent to that provided for by the Constitution of the Republic of Poland.

The same concerns were expressed in the "Sejm commission on EU affairs" of September 12, 2013, and the "Senate committee on EU affairs" of October 9, 2013. The latter, supporting the project of establishing the European Public Prosecutor's Office as the body appointed to prosecute offences to the detriment of the financial interests of the European Union, opposed to granting of "absolute

¹⁰¹ Transparency International 2018a.

exclusive competence" to the European Public Prosecutor's Office (Article 11 (4) of the draft regulation). In addition, it did not agree to grant the European Public Prosecutor's Office exclusive jurisdiction in a situation where the offence against the financial interests of the Union is inextricably linked to other offences that are outside this scope (Article 13 (1) of the draft). In the Senate's opinion on the European Union, such a solution would be incompatible with the principle of proportionality, because measures applied too deeply interfere in the legal systems of the Member States and are not necessary to achieve the goal of effectively prosecuting crimes against the Union's financial interests. The Commission also found that in respect to offences detrimental to the financial interests of the Union not related to other offences, the European Public Prosecutor's subsidiary jurisdiction would suffice". The Committee also pointed out that the character of the EPPO should be more collegial, in order to allow the MS to participate in taking the key decisions. The Committee also supported the solution aimed at maximum retention of Member States' procedural autonomy and giving to delegated prosecutors such powers as arise from the law and the national procedure.

The prosecutors (on the pages of judicial journals) also express an anxiety that the prosecutor's office may be likely to be replaced by the EPPO in their sole competence to conduct all preparatory proceedings concerning offences against the financial interests of the EU, instead of focusing on the most serious crime of a cross-border character. The obligations of the national prosecution should be restricted to transferring the relevant information when a suspicion of such a crime appears.

Since the Law and Justice Party took power in 2015, there have **been changes to the judiciary in Poland, which have prompted concern across Europe for the medium-term impact they may have on national implementation of EU Law**. A legislative change, introduced in July 2018, imposed the early retirement of Supreme Court judges when they reach 65 years of age. The Commission lodged an infringement procedure on 2 October 2018¹⁰² accusing Poland of violation of Article 19 TFEU in conjunction with Article 47 Charter of Fundamental Rights. Through an expedited procedure, the Commission obtained a CJEU Order on 15 November 2018¹⁰³ with the effect that the judges were returned to their posts. Poland implemented the order immediately, even though it required a law to be passed by the lower chamber to be able to do so. The CJEU was forced to defuse an attempt by the Polish Disciplinary Chamber to withdraw the referrals for preliminary ruling. This aspect is very important with regards to judicial cooperation, given that a CJEU ruling declaring that judicial independence in Poland infringes EU standards might become sufficient ground for the remaining Member States to one day refuse judicial cooperation with Poland.

The **appointment of judges** can also be discussed. Following the 2018 legislative change, every judicial candidate for the Polish Supreme Court must now be endorsed by the Polish Judicial Council. Additionally, bids can be submitted upon the recommendation of 25 fellow judges. However, the latter's identities remain hidden (despite external pressure by NGOs). Partly due to this, the Polish Judicial Council was suspended from the European Network of Judicial Councils in September 2018. The new Disciplinary Chamber within the Supreme Court is composed of recently appointed judges who earn significantly higher salaries than their fellow Supreme Court Judges. This situation risks a negative effect on the performance of EU law enforcement in Poland.¹⁰⁴

The public functioning of **financial management and accountability in Poland** is also worrisome, just as the pluralistic character of media in Poland is also a source of concern. A 2016 ruling by the Constitutional Court considered their legal status as unconstitutional but this remains unenforced.

¹⁰² Case C-619/18, Commission v Poland, pending.

¹⁰³ ECLI:EU:C:2018:910

¹⁰⁴ Cf. Kovács and Scheppele 2018 pp.6-10

Poland fares above average in the Global Corruption Perception Index by Transparency International. Perceptions on Corruption score rather well 60/100, placing the country 36/180 in the global index, and 15/28 if only EU Member States are considered.¹⁰⁵

According to Nowak and Blachucki (2017:168), Poland has not adopted general rules on horizontal and vertical cooperation within the EU. A recent amendment to the Code of Administrative Proceedings has introduced a chapter on 'European administrative cooperation'; in practice, however, the lack of rules pushes authorities to apply general or specific rules of a national and EU origin. All the constitutive acts of the law enforcement authorities mentioned earlier state an obligation of cooperating at the horizontal (other MS) and vertical (EU) level; but these general acts do not create a sufficiently strong legal basis for any legal actions. Even though Polish administrative law statutes generally recognize the competences and obligations of the relevant authorities to cooperate with their European counterparts, they hardly ever provide for detailed rules for such cooperation and they usually refer to applicable European acts.

As a result, **Poland can be identified as high-risk case** among the Member States not participating in the EPPO.

Most PIF cases in Poland concern petty fraud in EU expenditure from the EU budget, nearly 90% being linked to grant fraud and agricultural fraud. There are also proceedings regarding the custom fraud, including smuggling, particularly of cigarettes¹⁰⁶.

Sweden

Sweden has not joined the EPPO thus far for internal political reasons. The national parliament (Riksdag) adopted a reasoned opinion on the 2013 Commission's proposal on EPPO on 24 October 2013. The underlying motives were twofold: on the one hand, the far-reaching scope of the proposal was negatively appraised, given that Member States should relinquish their prosecution right for certain offences to a European prosecutor with special powers; on the other, Parliament concluded that there was not enough added value for Sweden in joining the EPPO, given that prosecutions of that type worked well in the state. Accordingly, the government decided not to join the EPPO, even if the position was never considered final, as proven by subsequent parliamentary debates on this issue (three times between 2013 and 2016).

Even if Sweden can be considered a low-risk Member State for the Union's financial interests, non-participation in the EPPO will make cooperation in cross-border cases more complicated.

The Commission's intention to extend the EPPO's remit to terrorism, made public in September 2018 pushed the government to make a new attempt at turning the tables on the parliament's position on the EPPO. On 3 April 2019, Swedish Prime Minister Stefan Löfven stated before the EP Plenary in Strasbourg that he would put forward a proposal to join the EPPO to the Parliament (Riksdag). A debate was held two days after at the Riksdag committee on Justice, which maintained its position unchanged¹⁰⁷. The committee does not find the Commission's arguments convincing for two main reasons. First, it stated that 'any extension of EPPO powers is so far-reaching that one can question whether the measures go beyond what is necessary to achieve the goal of the initiative.' The committee believes that the powers of intergovernmental cooperation bodies such as Eurojust or Europol should

¹⁰⁵ Transparency International, 2018a.

¹⁰⁶ Data received during "a monitoring" (control and supervision) of preparatory proceedings related to cases of detriment of financial interests of the EU led by the Pre-trial Department of the General Prosecutor's Office. These elements of crime are constituted in particular in art. 297, art. 286, art. 284 of the Criminal Code and art. 82 Criminal Fiscal Code (violation of subsidy or subsidy rules) and art. 270-273 of the Criminal Code and more rarely corruption crimes – as cited by G. Stronikowska.

¹⁰⁷ Riksdag, Justitieutskottets utlåtande 'An EU that protects: an initiative to extend the powers of the European Public Prosecutor to also cross-border terrorism. 4 April 2019, <https://data.riksdagen.se/fil/22DAC7B2-39BB-4186-AD70-8D256911F5E2>

be bolstered first, and only look forward to an extension in the EPPO's mandate upon sufficient evidence of the former's underperformance in the fight against terrorism. Besides, the committee considers this debate untimely, given that the EPPO has not even become operational yet. However, the Swedish committee reinstates that this does not preclude that Sweden joins the EPPO at a later stage.

4.2 POTENTIAL STATUS FOR THIRD COUNTRIES BENEFICIARIES AND ASSOCIATES

4.2.1 Third countries as beneficiaries of EU funds

It is not only the non-participation of six Member States in the EPPO that constitutes a challenge for the Union's financial interests, but also the EU's relationship with criminal justice institutions in third countries where beneficiaries of EU funds reside.

Cross-border cases are likely to occur where there are suspects from some Member States who joined EPPO and some who didn't. As such, **the EPPO will have authority to investigate these cases in the participating Member States, but not in the third countries involved.** Such cases might lead to complex legal and practical issues, due to often highly divergent criminal justice systems. Articles 99 (3) and 104 EPPO Regulation open up the possibility for **working arrangements or international agreements** in accordance with Article 218 TFEU for these purposes.

Priority should be given to multilateral agreements with third countries to preserve coherence and avoid the challenges and additional complexity derived from multiple specific arrangements and agreements.

4.2.2 Third countries as 'associated countries' with the EPPO in the pursuit of criminals

Third countries might take part in the EPPO as 'associated countries'. In this regard, **the possibility could be explored to disaggregate the EPPO's mandate, so as to allow for the conclusion of targeted agreements with third countries.** We consider here three potential themes covered by the mandate of the EPPO: protection of EU revenue, protection of EU spending, and money-laundering. **Targeted agreements would allow for fine-tuning the involvement of third countries around matters of common interest.** For example, Norway could join the EPPO on money-laundering, countries with a customs union with the EU should have to make arrangements for their participation in the EU's mechanisms for law enforcement cooperation in the context of the collection of EU revenue.

Interestingly, **a comparison may be drawn with targeted agreements already entered into by the EU in the field of the European Security and Defence Policy.** For instance, in the framework of EU-led military operations to counter piracy off the coasts of Somalia, agreements with third countries provided for the transfer of suspects to those third countries, including commitments to prosecute them. An Exchange of Letters with Kenya applies since 2010, which contains the explicit provision that they would 'submit such persons and property to its competent authorities for the purpose of investigation and prosecution'.¹⁰⁸ Likewise, an Exchange of Letters with the Republic of Seychelles (still pending notification) foresees that the 'Attorney General shall have at least 10 days from the date of transfer of the suspected pirates or armed robbers to decide on the sufficiency of the available evidence in view of prosecution.' The applicability of such frameworks to the potential agreements between the EPPO and third countries should be carefully explored, bearing always in mind the requirements

¹⁰⁸ Exchange of Letters between the European Union and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union-led naval force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer, OJ L 79, 25.3.2009, p. 49–59; Exchange of Letters between the European Union and the Republic of Seychelles on the Conditions and Modalities for the Transfer of Suspected Pirates and Armed Robbers from EUNAVFOR to the Republic of Seychelles and for their Treatment after such Transfer, OJ L 315, 2.12.2009, p. 37–43

connected with the fundamental rights of those persons, in the light of the international treaties that bind both the Member States and the EU, notably the European Convention for Human Rights.

Along similar lines, comparison can be drawn with the framework applicable in the European Asylum Support Office (EASO), where the EU has concluded agreements with Norway, the Swiss Confederation and the Principality of Liechtenstein, also referred to as 'associate countries'. Associate countries participate fully in the work of the Office and are entitled to receive support actions from EASO.¹⁰⁹

4.3 ENHANCED COOPERATION - ITS IMPACT ON THE EPPO'S CAPACITY TO DELIVER

The non-participation of six EU Member States in the EPPO and the relationship between the EPPO and the criminal justice institutions in third countries will make EPPO's tasks more complex and more difficult to fulfil for cross-border cases that involve suspects from these countries. This calls for specific provisions to ensure that *variable geometry* does not become a stumbling block in the EPPO's performance. Despite the few dissonant voices (for whom the current state of cross-border judicial cooperation is fully satisfactory), the dominant view among external observers is that the inclusion or exclusion of certain Member States is likely to be an obstacle to effective counter-fraud operations.

The starting point is that the current framework of judicial cooperation in criminal affairs will apply to the relationship with non-participating Member States, for which EU rules on judicial cooperation will apply as far as they do not fall under the JHA opt-outs. For the countries in the Council of Europe, the agreements on mutual legal assistance passed within this framework will apply.¹¹⁰ This will also be the case of the UK after Brexit, as long as the UK remains a Council of Europe member. As the additional EU instruments largely intend to accelerate cooperation, going back to *mutual legal assistance* in the Council of Europe framework may lead to delays in certain cases.

According to Article 105 (3) EPPO Regulation, the participating Member States shall notify the EPPO as a competent authority for judicial cooperation with non-participating Member States in cases falling within the competence of the EPPO. The European Commission and some Member State representatives have argued that this clause should be sufficient to allow for the EPPO to work effectively in cases involving suspects from non-participating Member States, referring to the principle of *sincere cooperation* for all Member States as it is laid down in Article 4(4) TEU. This principle binds national bodies in their relationship with European authorities, at least to those standards applied in current judicial cooperation.

Should the above argument be accepted, the EPPO's current legal framework within enhanced cooperation would not offer valid grounds for a non-participating Member State to treat two requests coming from the same participating Member State differently, one forwarded by a prosecutor acting as Delegated European Prosecutor for the EPPO, and the other forwarded by a prosecutor acting in their national capacity. CJEU intervention will undoubtedly be key to interpreting the legal boundaries of that argument, possibly through references for preliminary rulings (under Article 267 TFEU). Other Member States representatives, by contrast, would have preferred more specific rules to be integrated into a separate piece of EU legislation.¹¹¹

¹⁰⁹ECA annual report on EASO, .point 20.32

¹¹⁰ Cf. Aden 2018a for an overview of these instruments and the additional instruments for intensified and accelerated judicial cooperation available in the EU.

¹¹¹ Cf. Franssen, NJECL 2018, p. 293-299.

5 THE EPPO, OLAF AND AUDIT INSTITUTIONS

KEY FINDINGS AND POSSIBLE SOLUTIONS

- The tasks of the European Anti-Fraud Office OLAF will overlap with the EPPO's tasks for criminal offences affecting the Union's financial interests.
- For the Member States that have joined the EPPO, both OLAF and the EPPO will have to closely coordinate their work in order to avoid duplication.
- OLAF's responsibility will de facto increase for the Member States that do not intend to join the EPPO. OLAF should increase its monitoring capacities especially for Hungary and Poland where the Union's financial interests are particularly at risk, not least given the extent to which these countries receive EU funds.
- OLAF should also concentrate on risks related to Brexit and to ongoing EU expenditure in the UK.
- The European Court of Auditors should carry out a **comprehensive review** of the dimensions of its activity likely to be affected by EPPO.
- Some interinstitutional scenarios would be best tackled through some sort of **interinstitutional agreement** between ECA and EPPO.
- The Commission should verify that **template agreements with recipients of EU funds** of every kind integrate the EPPO to facilitate access to data and investigations whenever and wherever required. **Art. 129 (1) FR should be amended accordingly.**
- With due respect to its institutional independence, the European Court of Auditors might valuably contribute to EPPO-led investigations, either with **seconded officials** on a general level, **or within targeted investigations** conducted in the framework of **Joint Investigation Teams**.
- The EPPO might **request specific audits from ECA in generic risk areas** where clashes among the mandate of audit institutions creates opportunities for fraud. The underlying conditions are not yet established (e.g. sufficient evidence of fraud), but any such request should accommodate the competences and interests of both the ECA and the EPPO. A thin line should be threaded between the duty of institutional loyal cooperation and the principle of organizational autonomy.
- The **EPPO's access to ECA's databases** should, at least, replicate the reach currently enjoyed by OLAF.
- During trials conducted by EDPs in Participating Member States, ECA's audit reports may be presented as **evidence**. Likewise, ECA's auditors may be called on to the national court to provide as **forensic expertise**.

5.1 THE EPPO AND OLAF

The establishment of the EPPO will greatly impact the future role of the European Anti-Fraud Office (OLAF). Among the existing EU institutions and bodies in the area of financial accountability, OLAF will be most affected by the establishment of the EPPO. For the six Member States not participating in the EPPO, OLAF will remain the main investigative body in cases that impact upon the Union's financial interests. OLAF, as it is conceived in the draft revised OLAF Regulation published by the European

Commission in May 2018,¹¹² will continue to be an administrative body inside the Commission's services with a broader administrative mandate. To this point, the mandates of the EPPO and OLAF will continue to 'differ significantly, both, in terms of the scope and nature'.¹¹³ As far as relations with OLAF go, Article 101 EPPO Regulation and the draft revised OLAF Regulation lay down the key aspects for cooperation between the two bodies based on mutual cooperation within their respective mandates.¹¹⁴

Some cases investigated by OLAF that raise suspicions of a possible criminal offence will overlap with the EPPO's mandate and require coordination. Recitals 100 and 103 of the EPPO Regulation therefore state: "Cooperation with Europol and OLAF should be of particular importance to avoid duplication and enable the EPPO to obtain the relevant information in their possession, as well as to draw on their analysis in specific investigations." Likewise, "The EPPO and OLAF should establish and maintain a close cooperation aimed at ensuring the complementarity of their respective mandates, and avoiding duplication. In that regard, OLAF should in principle not open any administrative investigations parallel to an investigation conducted by the EPPO into the same facts. This should, however, be without prejudice to the power of OLAF to start an administrative investigation on its own initiative, in close consultation with the EPPO."

5.1.1 OLAF's role in Member States not participating in the EPPO

Compared to the current situation, OLAF's legal authority in the Member States not participating in the EPPO will remain basically unchanged with some potential changes that may derive from the adoption of the amended OLAF Regulation.¹¹⁵

Nevertheless, OLAF's responsibility for the non-participating Member States will *de facto* increase. If the expectation becomes reality that the establishment of the EPPO might lead to the detection of many more criminal offences in the participating Member States, leaving criminal offences affecting the Union's interests undiscovered in the non-participating Member States, it would create a situation of considerable injustice. Therefore, OLAF would be better to concentrate its work on the Member States that do not take part in the EPPO, especially Hungary and Poland, identified as particularly risk-prone in this study,¹¹⁶ and for as long as these Member States do not join the EPPO.

The risks related to a potential negative impact of Brexit upon the Union's financial interests will require OLAF's increased attention in the upcoming years. The EU institutions should make sure that OLAF retains sufficient authority in the treaties yet to be concluded in order to regulate the future relationship between the UK and the EU.

5.1.2 OLAF's role in Member States participating in the EPPO

OLAF's role will change considerably in the Member States participating in the EPPO. Synergies are likely to occur where both bodies may rely upon evidence generated by the other.

- **Potential synergies**

A number of synergies and complementarities between OLAF and the EPPO can be identified where the tasks of the two bodies overlap. There may be numerous scenarios in which the EPPO "cannot investigate [...], does not wish to investigate, cannot yet investigate, or no longer investigates".¹¹⁷ OLAF

¹¹² European Commission 2018c.

¹¹³ Csonka et al. 2017: 131.

¹¹⁴ European Commission 2018c, 18.

¹¹⁵ European Commission, 2018c.

¹¹⁶ Cf. Chapter 4.

¹¹⁷ Kuhl 2017, 140-141.

will also keep the responsibility for preventive measures, while the EPPO's authority is concentrated on the repressive side.

Recital 105 of the EPPO Regulation states: "In cases where the EPPO is not conducting an investigation, it should be able to provide relevant information to allow OLAF to consider appropriate action in accordance with its mandate. In particular, the EPPO could consider informing OLAF of cases where there are no reasonable grounds to believe that an offence within the competence of the EPPO is being or has been committed, but an administrative investigation by OLAF may be appropriate, or where the EPPO dismisses a case and a referral to OLAF is desirable for administrative follow-up or recovery. When the EPPO provides information, it may request that OLAF considers whether to open an administrative investigation or take other administrative follow-up or monitoring action, in particular for the purposes of precautionary measures, recovery or disciplinary action [...]".

In short, the relationship aims at complementarity and avoiding duplication of work. The Regulation provides that "where the EPPO conducts a criminal investigation, OLAF cannot open any parallel administrative investigation into the same facts".¹¹⁸ The proposal for the revision of the OLAF Regulation takes this into account as well.¹¹⁹

- **Challenges**

The more critical challenge for cooperation will arise when the EPPO opens the investigation of a case and calls on OLAF for support in the form of technical and administrative assistance. Will OLAF be able to do more than at present, in accordance with instructions from the EPPO, for example, in terms of information gathering? As Kuhl states¹²⁰ "in some cases effective and swift prosecution will depend on an efficient investigation partner at the EU level during the criminal procedure run by the EPPO", or rather, "a great challenge for EPPO to be efficient therefore results from the criminal investigation and enforcement function of OLAF (at the request and the service of EPPO), in addition to and distinct from OLAF's administrative investigation function". This function may be entrusted to a specific and distinct unit inside OLAF.

5.2 THE EPPO AND AUDIT INSTITUTIONS

Fraud is generally detected upon police intervention (e.g. tapping phones or tracking movements), following up a lead provided by victims or whistle-blowers. 'Fraudulent reports are the most perfect ones'¹²¹ and auditors are ill-equipped to detect fraudulent activities involving some sort of criminal conduct. Fraud can be embedded in forged documents, for which auditors lack detection equipment, and on-the-spot missions are usually the best tool to unearth a mismatch between reported activities and fraudulent reality.¹²² The European Court of Auditors will, therefore, not be a privileged counterpart for EPPO on a daily basis; however, there will be occasions for bilateral cooperation, which will be more successful and mutually strengthening if adequate interinstitutional arrangements are in place. The current EPPO Regulation fails to establish general principles; therefore, building a working relationship between EPPO and ECA is left to future interinstitutional practice.

ECA should carry out a comprehensive review of the dimensions of its activity likely to be affected by EPPO. We identify below several potential scenarios in which EPPO may benefit from synergies with

¹¹⁸ Csonka et al. 2017: 131.

¹¹⁹ European Commission 2018c, 26 (draft Article 12d).

¹²⁰ Kuhl 2017, 141.

¹²¹ As suggested by the ECA's Secretary-General, Eduardo Ruiz-García, Master Class 'El nuevo paradigma del control público – El papel del Tribunal de Cuentas Europeo', Deusto Law School, 19 February 2019.

¹²² On the difficulties of auditors to detect fraud, see Albrecht, W. S., & Hoopes, J. L. 2014, 12. On exploiting audit for fraud detection, see Beecken, C.A. and Beecken, W. 2017.

ECA in carrying out its tasks. No account is taken of EPPO as ECA's auditee: the financial accountability of EPPO is adequately dealt with in the EPPO Regulation, alongside the general rules applicable to IBOAs.¹²³

Some interinstitutional scenarios would be best tackled through some sort of interinstitutional agreement between ECA and EPPO. The precise format and implications of such agreement hinges on the scope for mutual cooperation and parties' respective willingness to engage in it.¹²⁴

5.2.1 Interinstitutional relations during the investigation stage.

The following scenarios may be identified:

a) ECA triggers an EPPO-led investigation. On a general basis, ECA's audit reports will feed into EPPO's work plan.¹²⁵ If auditors come across an instance of fraud, they must forward the case to OLAF¹²⁶ and they will do so equally to EPPO when it is operative. To safeguard the integrity of evidence, the ECA is refrained from mentioning suspicions of fraud in the course of audits, the contradictory procedure, or in the ensuing report. Beneficiaries of EU funds implemented in direct management (grants, procurement or prices) relinquish their personal data to the Commission's IAS, ECA, OLAF, in accordance with the Financial Regulation.¹²⁷ The Commission should verify that **template agreements with recipients of EU funds** of every kind **integrate the EPPO to facilitate access to data** and investigations whenever and wherever required. These obligations should be broadened to cover the EPPO in the future, just as is the case of funds which are managed by national bodies. Under shared management, the principle of assimilation applies to PIF protection by national authorities¹²⁸ who are requested, additionally, to cooperate with the Commission, ECA, OLAF, and EPPO (participant Member States, obviously). In their current form, Articles Art. 129 (1) FR (recipients in EU Member States) and 220 (5) FR (recipients in third countries) do not make reference to the right of access of EPPO. **The Financial Regulation should be included to ensure that the beneficiaries are aware that they might be subjected to the EPPO's investigations in the future.**

b) ECA member or staff becomes the target of an EPPO investigation. The general framework of immunities of EU staff would apply in such case. Immunities are granted in the sole interest of the EU and to the extent that it is necessary for the performance of Union's tasks.¹²⁹ Following this argument, if and when the immunity of a member becomes a stumbling block in the protection of the (financial) interests of the Union, the College of Auditors would agree to lift it, clearing the way to national¹³⁰ or European prosecution of the incumbent. Simple majority is sufficient to waive the immunity of a member by the college.

¹²³ The financial accountability of EPPO is governed by Art. 94 Reg, in line with Art. 287 (1) para 1 TFEU (ECA's audit powers), 287 (3) para 2 (ECA's right of access), and Art. 148 FR (discharge procedure). Additionally, Art. 110 Reg extends ECA's reach to EPPO's contractors and subcontractors. The legal framework seems satisfactory.

¹²⁴ Interinstitutional arrangements feature great diversity as regards their denomination (Joint Declaration, Declaration, Agreement, Decision, Exchange of Letters, Code of Conduct, Modus Vivendi, Gentlemen's agreement, Interinstitutional agreement, etc.). The most important issue to determine is the substantial content and the legal value of political commitments enshrined in the interinstitutional arrangement. For a thorough review of existing options, see Hummer, W. (2007). From 'Interinstitutional Agreements' to 'Interinstitutional Agencies/Offices'?. European law journal, 13(1), 47-74.

¹²⁵ Art. 19 (4) f Reg. EPPO's Action Plan is prepared under the responsibility of the Administrative Director.

¹²⁶ Article 7 (4) of Decision No 38-2016 laying down the rules for implementing the rules of procedure of the Court of Auditors (Version of 13 December 2018. This provision refers to ECA Members.

¹²⁷ Article 57 FR (Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, OJ L 193 of 30.7.2018) establishes the obligation to provide information to individuals on the transfer of their personal data among EU bodies for audit purposes by reference to Regulation (EC) No 45/2001.

¹²⁸ Reflected in Art. 63 (2) c) FR

¹²⁹ Art. 343 TFEU and Art. 17.1 of Protocol No. 7 on the privileges and immunities of the European Union.

¹³⁰ Art. 18 of Protocol No.7 obliges EU institutions to cooperate with public authorities of the state of origin of the former institution member or staff whose immunity has been waived. See generally Wessel, R. A. (2014). Immunities of the European Union. International organizations law review, 10(2), 395-418.

c) ECA is requested to second expert staff to EPPO in a given area. As an investigating body of a technical and administrative nature, ECA might be requested by EPPO to second specific officials with targeted expertise, to join EPPO-led joint investigating teams in a certain, narrow, and highly technical area, alongside staff from police bodies or law enforcement agencies.

d) ECA is requested by EPPO to conduct targeted audits in risk areas. Current cooperation between ECA and Supreme Audit Institutions is built on the principle of mutual trust and respect for the mutual independence.¹³¹ The legal framework does not allow the ECA to impose upon SAIs, not even to pursue an allegedly higher goal of protecting the EU's financial interests from gaps and shortcomings in financial accountability at the national level. Gaps stem from diverging legislative approaches to mandates (some institutions follow the money, others follow public institutions), although conflicting work plans or schedules play a significant role as well, lack of a political will to cooperate probably remaining at the bottom of the list. The question arises whether the **EPPO may request specific audits from ECA in generic risk areas, and under which conditions** (e.g. sufficient evidence of fraud). It is also clear that **any generic request by EPPO in the framework of an investigation should be accommodated by ECA, threading a thin line between the duty of institutional loyal cooperation and the principle of organizational autonomy**. Our expectation is that the EPPO entertains close contacts with the ECA, from which suggestions for prospective audits may arise, which the ECA may or may not follow up when drafting its work programme, along similar lines to what is the rule with the EP committees or OLAF

e) Access to ECA's databases by EPPO. EPPO holds powers to request access to ECA's files and databases, in the framework of specific investigations. Such a scenario should at least replicate the current status enjoyed by OLAF, which visits the ECA every now and then to consult files supporting audit reports in the framework of specific cases.¹³² Consultations are made on-site, given the absence to date of integrated databases, which EU bodies with powers in the protection of the EU's financial interests would be able to consult. An interinstitutional agreement or protocol will probably be signed in this regard, to facilitate bilateral cooperation.

5.2.2 Interinstitutional relations during the trial stage.

ECA offers judicial assistance to EPPO in the framework of a specific criminal proceeding, which may take several forms.

a) ECA's reports are accepted as evidence in judicial proceedings before the CJEU,¹³³ and one would safely expect that the creation of EPPO leads to an increase in these calls from the national level, promoted by EDPs.

b) ECA staff called on to provide forensic evidence. ECA auditors may be called on by EDPs to provide forensic audit evidence in the framework of a specific criminal proceeding. They would appear as witnesses before the national court

¹³¹ Art. 287 (3) TFEU.

¹³² Interview with Eduardo Ruiz-García

¹³³ See, among others, Case C-46/97, Hellenic Republic v Commission, Judgement of 13 July 2000, ECLI:EU:C:2000:393; ECLI:EU:C:1999:399; Case C-64/98 P, Petrides v Commission, Judgement of 9 September 1999

6 THE EPPO AND POLICE AND JUDICIAL COOPERATION BODIES

KEY FINDINGS AND POSSIBLE SOLUTIONS

- The EPPO Regulation calls on to partner agencies and bodies to cooperate and provide active support to the EPPO in the conduct of its tasks. However, the shape of bilateral relations is still undefined.

The EPPO Regulation, in recital 69, calls 'the relevant bodies of the Union, including Eurojust, Europol and OLAF Eurojust' to 'actively support the investigations and prosecutions of the EPPO, as well as cooperate with it, from the moment a suspected offence is reported to the EPPO until the moment it determines whether to prosecute or otherwise dispose of the case'.

EU partner agencies and entities are called on to cooperate and coordinate their efforts with the EPPO.¹³⁴ Although the approach is still undefined, sufficient mechanisms are in place to ensure that they all cooperate towards strengthened investigation and prosecution of criminal activities, while retaining their respective roles and competences. If all bodies interact in good faith, we remain confident that the existing tools will facilitate effective coordination and active support to EPPO.

However, certain authors consider that, 'in the absence of clear rules [governing inter-body coordination] may lead, in practice, to a situation where prosecutions may be impeded in practice by possible conflicts of jurisdiction – both positive and negative ones'.¹³⁵ The need thus arises to assess future cooperation between the EPPO, on the one hand, and Europol and Eurojust (or the future EU Agency for Criminal Justice Cooperation, EUACJC), respectively.

6.1 COOPERATION WITH EUROPOL (EUROPEAN UNION AGENCY FOR LAW ENFORCEMENT COOPERATION)

The European Union Agency for Law Enforcement Cooperation (Europol)¹³⁶ operates as a coordinating body among national police corps. Its tasks encompass the collecting, storing, processing, analysing and exchanging information (including criminal intelligence data). As such, it supports and strengthens the action by national authorities of the Member States and their mutual cooperation in preventing and combating serious crimes affecting two or more Member States, terrorism and forms of crime that affect a common interest covered by a Union policy¹³⁷. Europol features key differences with regard to OLAF: the material scope of its powers is much broader, covering a large number of crimes (such as kidnapping, illicit trafficking in cultural goods or xenophobia); secondly, Europol is a police law enforcement body acting in the criminal area, whereas OLAF remains in the administrative sphere; thirdly, Europol is devoid of autonomous investigating powers, whereas OLAF can initiate proceedings *ex officio*.¹³⁸

Further to coordination efforts, Europol improves the exchange of information between police authorities through, notably the serious and organised crime threat assessment (commonly referred to as SOCTA). Under the 2016 Regulation, Europol can request the competent authorities of the Member States concerned (via the national units) to initiate, conduct or coordinate a criminal investigation on

¹³⁴ Rashkov 2018, p. 114

¹³⁵ Di Francesco Masea, 2017, p. 159

¹³⁶ Regulation 2016/794/EU of the European Parliament and of the Council of 11 May 2016

¹³⁷ Art. 3 (1) Regulation 2016/794/EU

¹³⁸ De Amicis, G. and Kistoris, R. 2018,

a crime falling within the scope of its objectives.¹³⁹ However, the operational powers of Europol are limited to its coordinating functions over the competent authorities, unless exercised in the framework of a Joint Investigation Team.¹⁴⁰ Coercive measures are explicitly excluded;¹⁴¹ therefore, it cannot undertake typical policing activities such as tracking subjects, searches and seizures, or wire-tapping. By contrast, its contribution is key in the exchange of personal data of suspected persons through the Schengen Information System (SIS II), the Visa Information System (VIS), and the system on the use of passenger name record data.¹⁴² Additionally, Europol set up its own Europol Information System, as a central database which is immediately accessible to consultation by duly authorised Europol staff, and national authorities in accordance with the national law.

Europol lacks legally binding authority towards national police corps. The latter cannot be compelled to comply with requests to initiate, conduct or coordinate investigations; their only duty is to duly consider such requests and to inform Europol of their decision and of the reasons therefore, unless such communication would harm essential national security interests or would jeopardise the success of investigations under way or the safety of individuals.¹⁴³ Yet, our interviewed police representatives expressed very positive and consistent views towards the contribution of Europol to swift cooperation across Member States. This reflects, in our view, that a fully-fledged and healthy epistemic community exists across national police corps, that optimises mutual understanding and increases the prospects for fruitful and smooth cooperation in the absence of legally binding commitments.¹⁴⁴ This sets a stark contrast with judicial bodies.

Europol is structured around a college of national representatives including a Commission representative (Management Board); an Executive Director as legal representative and responsible for the daily management of the Agency; single national units created by each Member State, which communicate with the central level through the liaison officers.

6.2 COOPERATION WITH EUROJUST (EU AGENCY FOR CRIMINAL JUSTICE COOPERATION)

Eurojust originally resulted from the need to counter the growing importance of police cooperation through Europol but from a less supranationalist viewpoint than the original EPPO, as conceived by the Corpus Iuris Project in the late 1990s and the Commission (DG Justice, Liberty and Security). The assessment on the articulation between Eurojust and the future EPPO seems to have come full circle.¹⁴⁵ Created in 2002 Eurojust represented the first permanent network of judicial authorities world-wide. Eurojust features a double nature as, on the one hand, a high-level team of seconded national senior magistrates, prosecutors, judges and other legal experts; and on the other, the College of Eurojust is 'a collective organ of European character deciding in principle by majority vote.'¹⁴⁶ The **legal framework of Eurojust** has experienced significant transformation throughout the years. A 2002 JHA Council Decision¹⁴⁷ was recast in 2008,¹⁴⁸ to 'enhance the operational capabilities of Eurojust, increase the

¹³⁹ Art. 6 (1) Regulation 2016/794/EU

¹⁴⁰ Art. 4 (1)c Regulation 2016/794/EU

¹⁴¹ Art. 4 (5) Regulation 2016/794/EU

¹⁴² Council Decision 2008/633/JHA (concerning access for consultation of the Visa Information System (VIS) by designated authorities of Member States and by Europol for the purposes of prevention, detection and investigation of the crimes; Directive 2016/681/EU of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record data (PNR) for the prevention, detection, investigation and prosecution of terrorist offences and serious crimes

¹⁴³ De Amicis, G. and Kostoris, R. 2018, p.214;

¹⁴⁴ Interviews with national police bodies.

¹⁴⁵ Cf. Bures (2010), Vlastnik (2008).

¹⁴⁶ Vlastnik 2008: 37

¹⁴⁷ Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L 63, 6.3.2002, as amended by Council Decision 2003/659/JHA of 18 June 2003 amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L 245, 29.9.2003, p. 44–45

¹⁴⁸ Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up

exchange of information between the interested parties, facilitate and strengthen cooperation between national authorities and Eurojust, and strengthen and establish relationships with partners and third States'.¹⁴⁹ Finally, the 2018 revision takes stock of the impact of the EPPO on Eurojust and becomes a Regulation which provides for the **transformation of Eurojust into a fully-fledged EU Agency for Criminal Justice (EUACJC) from 12 December 2019**.¹⁵⁰ For the purposes of this section, we use Eurojust when referring to the legal framework currently in force and to EUACJC when referring to the new legal framework and EU body, which will be fully operational before the EPPO.

It is well known that Article 86 (2) TFEU conceived originally an EPPO 'from Eurojust' which seems to have turned into an EPPO from OLAF.¹⁵¹ However, that expression is irrelevant for the purposes of shaping EPPO-Eurojust relations, which would have been needed any way. **Both Eurojust and the EPPO are different but should be mutually complementary.** The mandate of the EPPO refers to PIF crimes, whereas the material scope of Eurojust (and EUACJC) is broader (serious instances of crime as foreseen in Annex I of the 2018 Regulation). Also, Eurojust follows a horizontal logic, that of a network of judicial bodies, focused on coordination and improving cooperation to facilitate cases owned by national authorities;¹⁵² whereas the EPPO follows a vertical logic, designed to deal operationally –i.e. at the national level– with investigations and prosecutions in criminal cases.¹⁵³ Therefore, Eurojust goes beyond the EPPO in the –material and geographic– areas covered, and the operational tasks implemented by the EPPO go far beyond Eurojust's coordinating ventures.

The overarching challenge facing the articulation of the relationship between the EPPO and Eurojust is the enhanced cooperation, which further complicates the variable geometry of both EU bodies, making ever more salient the need for improved cooperation:

- a) All Participating Member States in the EPPO also partake in EUACJC
- b) Non-Participating Member States who participate in Eurojust: Poland, Hungary, Sweden
- c) Non-Participating Member States transitioning towards the exit from Eurojust/EUACJC (who desire to remain attached under a privileged partnership): Denmark (once EUACJC applies), and the United Kingdom (upon withdrawal from the EU).
- d) Associated countries in Eurojust who do not participate in the EPPO: Liaison Prosecutors from Norway, Switzerland, the USA and Montenegro are currently posted at Eurojust.¹⁵⁴

Such a situation significantly **increases the important role Eurojust should play** in terms of ensuring coordination, cooperation, and facilitation of the necessary international cooperation, both intra- and extra-EU' not to mention the issue of respective headquarters that were originally designed to coincide but are now subject to the distance between the Hague (Eurojust) and Luxembourg (the EPPO).¹⁵⁵

The current design of Eurojust (2002, as amended in 2009) provides for the following key areas of activity:

- Advice on comparative legal systems.
- Coordination at EU level, bringing together national authorities in coordination meetings

Eurojust with a view to reinforcing the fight against serious crime, OJ L 138, 4.6.2009

¹⁴⁹ <http://www.eurojust.europa.eu/about/background/Pages/history.aspx> (last accessed 4 March 2019)

¹⁵⁰ Council Regulation (EU) 2018/1727 of 14 October 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA, OJ L 295 of 21 November 2018. Whereas the new Regulation is in force, it shall only apply from 12 December 2019, in accordance with Art. 82(2) Regulation (EU) 2018/1727

¹⁵¹ Interviews. On the expression 'from Eurojust', see Ligeti and Weyembergh (2015:69); Spiezia 2018: 132-134

¹⁵² Article 85 TFEU defines the mission of Eurojust as 'to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States [...]'

¹⁵³ Espina-Ramos, J (2018) pp.88-89

¹⁵⁴ Eurojust 2018, p.13

¹⁵⁵ Espina-Ramos, 2018: 89

- Operational support to Mutual Legal Assistance (MLA) (judicial cooperation) arrangements
- Funding and Technical support to Joint Investigation Teams (JITs).

Article 85 TFEU allowed for a deepening of the functions assigned to Eurojust, to transition from a mediating body in view of a performant judicial cooperation (horizontal) into one vested with binding powers (vertical) to further 'integration and a European perspective' in JHA.¹⁵⁶

The 2018 Regulation (note its non-applicability until 12 December 2019) establishes a new governance system, tackles data protection, clarifies the external relations of the EUACJC, improves democratic oversight by European and national Parliaments, and clarifies the relationship with the EPPO. In that sense, the

The **case cycle in Eurojust**¹⁵⁷ may typically start with a request for assistance from a competent national authority through the national member of Eurojust. The national member registers the case at a Level I meeting, before the College of Eurojust. Then, a level II meeting gathers together the National Desks concerned, to clarify the type of coordination activity required. This may refer to a MLA request (an EAW, a search and seizure, etc.), a conflict of jurisdiction, the coordination of parallel investigations or prosecutions in different Member States, or the transfer of proceedings from one state to another. The next step is a Level III meeting to coordinate the action with national judicial and law enforcement authorities. Meanwhile, the Coordination Centre facilitates real-time sharing of information and joint execution of arrests, searches and seizures.

At the request of a Member State, Eurojust may also assist investigations and prosecutions concerning a particular Member State and a non-Member State, if a cooperation agreement between Eurojust and the non-Member State has been concluded or an essential interest in providing such assistance is present. At the request of a Member State or the Commission, Eurojust may also assist investigations and prosecutions concerning only that Member State and the Community.¹⁵⁸

From the EPPO's side, bilateral relations are based on the cryptic expression of '**close cooperation based on mutual cooperation**'¹⁵⁹ whose exact meaning is uncertain and different from the language used as regards other partners of the EPPO.¹⁶⁰ It arguably refers to the need that both EUACJC and the EPPO coordinate among themselves when carrying out operations of mutual interest.

From an institutional perspective, the Spanish liaison judge for Eurojust, Espina-Ramos, has suggested using **Eurojust to link the EPPO and national prosecutors' services**. This could be used in specific cases; for instance, when allowing the appointment of persons to act as points of contact within the EPPO for non-participating Member States¹⁶¹. In a broader perspective, Eurojust could draw on the Consultative Forum of Prosecutors General of the Council of Europe that was launched in Madrid in 2010,¹⁶² Although that forum is not well-known by frontline prosecutors, it plays an important role - alongside its twin Consultative Forum of European Judges - in the process of standard formation, especially in key areas touching upon the credibility of criminal justice systems at the national level, such as ethics in prosecution, the relationship with the media, or the independence of the investigating prosecutor.¹⁶³

¹⁵⁶ Weyembergh, 2018, p.192.

¹⁵⁷ ¹⁵⁷ Eurojust 2018, p.13

¹⁵⁸ Eurojust, 2018, p. 12

¹⁵⁹ Art. 100 EPPO Regulation.

¹⁶⁰ Espina-Ramos, 2018:90

¹⁶¹ Under Art. 105 (2) EPPO Regulation

¹⁶² Cf. Espina-Ramos, 2018:90; Vercher, 2018

¹⁶³ Vercher, 2018

The special situation of **Denmark** deserves mentioning. According to the Danish Protocol to the Lisbon Treaty, Denmark will not participate in any new measure in the criminal justice field and, as a consequence, it will not participate in the new Eurojust Regulation. However, Denmark wishes to continue to work in close cooperation with Eurojust. Currently, Denmark is an active member of Eurojust, which contributes to enhancing security at EU level through its involvement in cooperation with the judicial and law enforcement authorities in other Member States. Its main interests lie in fight against serious cross-border organised crime, especially in the areas of counter-terrorism, cybercrime and migrant smuggling. The **Danish government is specifically concerned that the transition** (from its current status) **towards a special partnership with the EUACJC is as smooth as possible**, through fast-tracked negotiations which allow Denmark to remain a member of the Eurojust family and avoid security gaps.¹⁶⁴

Similar concerns are held by **the United Kingdom**, which add to this country's complicated withdrawal from the EU (see Ch. 4 at p. 74). While the British government looks at Eurojust favourably as 'a positive model of cross-border cooperation',¹⁶⁵ the Government recommended that the UK should not opt in at the outset of negotiations.

¹⁶⁴ Eurojust, Press release 'Danish Foreign Minister visits Eurojust', 10 September 2018, <http://eurojust.europa.eu/press/PressReleases/Pages/2018/2018-09-10.aspx>

¹⁶⁵ House of Commons (European Scrutiny Committee) Forty-eighth Report of Session 2017–19. Documents considered by the Committee on 12 December 2018, including the following recommendations for debate: UK participation in the EU Agency for Criminal: Justice Cooperation (Eurojust): post-adoption opt-in decision,

7 THE EPPO AND THE RIGHTS OF SUSPECTS

KEY FINDINGS AND POSSIBLE SOLUTIONS

- For investigation conducted by the EPPO, the rights of suspects and accused persons are governed by an (over-)complex multi-level setting.
- The level of protection largely depends upon the law of the Member State in which the EPPO conducts an investigation.
- In the perspective of far-reaching effects that criminal investigation can have on the fundamental rights of the individuals concerned, harmonisation of procedural safeguards should rather opt for high standards of protection instead of minimum standards as they are currently laid down in EU directives.
- The European Union's accession to the European Convention of Human Rights, foreseen in Article 6 (2) TEU, could contribute to improving and harmonising the level of protection for suspects and accused persons.

With the EPPO, the EU is establishing a body that contributes to criminal sanctions for individuals. Even if these sanctions, in the end, will be pronounced by the Member States' courts, the involvement of the EPPO, and of other EU bodies that may deliver evidence for a conviction, means that EU law and EU bodies will be involved in measures that potentially include serious restrictions upon individuals' fundamental rights. Therefore, the rule of law safeguards and fundamental rights, as they have been developed at EU level over the past decades, will become even more important with the establishment of the EPPO.

Three layers of legal protection of the rights of suspects and accused persons can be distinguished in the complex multilevel setting established for the EPPO:

- (1) Procedural rights guaranteed by national law, as far as the EPPO Regulation does not include specific rules, and the EPPO's work is therefore based on national law,
- (2) minimum standards for individual rights in criminal proceedings laid down in EU directives since 2010 and
- (3) fundamental rights as they are guaranteed by the Charter of Fundamental Rights and by the Council of Europe's European Convention on Human Rights.

7.1 RISKS FOR INDIVIDUAL FUNDAMENTAL RIGHTS IN CASES INVESTIGATED BY THE EPPO

Criminal investigation leads to restrictions for the fundamental rights of the suspect in numerous aspects. Ongoing criminal investigations are a burden for the individuals suspected to have committed criminal offences. This burden becomes even more intrusive with the duration of an investigation. The right to a speedy procedure has therefore been recognised, not only by the European Court of Human Rights, but also by courts at Member States' level. Therefore, the EPPO will have to make sure that its complex multilevel governance structure does not lead to lengthy investigations.

The presumption of innocence (Article 48 Charter of Fundamental Rights) is crucial in a rule of law system until the end of the trial – and even more so during a criminal investigation. Therefore, the EPPO will have to develop standards in order to double-check any suspicion and not to neglect possible alternative interpretations of evidence.

The collection of personal data is a core element of criminal investigation. Investigations conducted by the EPPO will, therefore, typically lead to serious encroachments upon the right to privacy and data protection (Articles 7 and 8 Charter of Fundamental Rights) and require safeguards for the protection of the often sensitive personal data to be processed. If personal information is collected secretly, without the knowledge of the suspect, investigations become even more intrusive from a fundamental rights perspective.

Investigations conducted by the EPPO may also lead to pre-trial arrests and cross-border surrender (Article 33 EPPO Regulation). This constitutes a far-reaching restriction to the right to liberty (Article 6 Charter of Fundamental Rights), becoming even more intrusive with a longer duration of the detention.

7.2 MULTILEVEL PROTECTION OF THE RIGHTS OF SUSPECTED PERSONS

According to Article 5 (1) and (2) EPPO Regulation, the EPPO shall be bound to the Union's Charter of Fundamental Rights and to the principles of rule of law and proportionality in all its activities. However, here again, the complexity of the multilevel structure to be established is prone to risk. Article 5(3) states that the EPPO Regulation does not include a full set of procedural rules for EPPO investigations. "National law shall apply to the extent that a matter is not regulated by this Regulation." This wording hampers the general objective to harmonise the prosecution of crimes against the Union's financial interests. Where the Regulation does not foresee any specific procedural rules and safeguards, the rights of suspected persons will depend upon the law of the Member State in which the EPPO conducts the investigation and prosecution. This specific multilevel setting creates complex interdependence between the EPPO Regulation and the Member State's law. It goes back to the Commission's original proposal.¹⁶⁶

The procedural rights of suspects in cases investigated by the EPPO will continue to depend mainly upon Member States' laws that are still highly divergent. Thus far, EU law only defines minimum standards for the procedural rights of suspects and accused persons. Since 2010, EU Directives have been passed for this purpose. These Directives build upon Articles 47 to 50 Charter of Fundamental Rights and implement them for criminal proceedings. Directive 2010/64/EU¹⁶⁷ regulates the right to interpretation and translation. Directive 2012/13/EU, on the right to information in criminal proceedings,¹⁶⁸ defines standards for the right of suspects to be informed about their procedural rights and the charges brought against them. Directive 2013/48/EU¹⁶⁹ includes minimum standards for the right to access to a lawyer and for the information of others, including consular authorities. Directive (EU) 2016/343¹⁷⁰ defines minimum standards for the implementation of the presumption of innocence and for the presence of the accused individuals in the trial, while Directive (EU) 2016/1919¹⁷¹ regulates the attribution of legal aid. Article 41 (2) EPPO Regulation refers to these Directives as the standard that suspects will enjoy "as a minimum". This means that the Member State in which the EPPO's investigation takes place may grant further-reaching protection to suspects in accordance with its domestic law.

In addition, according to Article 41 (3) EPPO Regulation, "suspects and accused persons, as well as other persons involved in the proceedings of the EPPO, shall have all the procedural rights available to them under the applicable national law, including the possibility to present evidence, to request the

¹⁶⁶ European Commission 2013 (Article 11(3)).

¹⁶⁷ OJ L 280 of 26.10.2010, 1.

¹⁶⁸ OJ L 142 of 1.6.2012, 1.

¹⁶⁹ OJ L 294 of 6.11.2013, 1.

¹⁷⁰ OJ L 65 of 11.3.2016, 1.

¹⁷¹ OJ L 297 of 4.11.2016, 1.

appointment of experts or expert examination and hearing of witnesses, and to request the EPPO to obtain such measures on behalf of the defence.”

The prohibition to be tried or punished twice (*ne bis in idem*), guaranteed in Article 50 Charter of Fundamental Rights, is another right of suspects and accused persons that is particularly important for trans-border criminal investigation. As criminal investigation of cases that fall under the EPPO’s authorities will be better coordinated in the future, the establishment of a European investigation body may facilitate the implementation of this principle. However, as Recital 83 of the EPPO Regulation mentions, “ne bis in idem may require, in certain cases, an extension of the investigation to other offences under national law, where these are inextricably linked to an offence affecting the financial interests of the Union.” Indeed, cases are likely to occur in which criminal investigation goes beyond offences against the Union’s financial interests. These offences will be, in many cases, combined with other criminal offences punishable under domestic law, such as fraud or tax evasion.

7.3 REVIEW BY MEMBER STATES’ COURTS, THE CJEU AND THE EUROPEAN COURT OF HUMAN RIGHTS?

The incompleteness of the EPPO Regulation not only leaves many procedural questions to sometimes highly divergent national legislation, it also impacts judicial reviews.

Article 42 EPPO Regulation attributes the authority to review “procedural acts of the EPPO that are intended to produce legal effects vis-à-vis third parties” to the Member States’ courts. The interpretation of this clause raises a number of questions. The clause excludes annulment proceedings before the CJEU (Article 263 TFEU), as far as the EPPO is acting on the grounds of national law. As a result, in these cases, the CJEU will not be able to exercise its harmonising function for the interpretation of EU law. The CJEU, according to Article 42 (2) EPPO Regulation, will only have jurisdiction over preliminary references stemming from the Member States’ courts, as far as the EPPO will act directly on the basis of Union law – thus the EPPO Regulation or other relevant EU law.

This complex construction is likely to impact the monitoring of potential violations of fundamental rights. As far as the EPPO will act on the grounds of national law, the legal remedies will depend upon domestic procedural law. In Member States where individuals can bring fundamental rights cases directly before the constitutional court in a constitutional complaint, for example in Germany, the individuals concerned will have stronger legal remedies compared to Member States without this option.

To better articulate the legal framework applicable to national authorities when interacting with the EPPO, Article 5 (3) EPPO Regulation offers the starting point. This provision must be interpreted in the sense that the national legal framework governing the case handled by an EDP will apply in every single matter not covered by the EPPO Regulation (and future implementing measures). However, whenever the national law is the reflection of the harmonising effect provided by EU law (referring here to the Directives on substantial Criminal Law and on procedural safeguards), the key concepts are to be interpreted in an autonomous (European) way, in the light of CJEU case-law, not in the light of the general principles of national law.

To secure uniform application across Participating Member States, national courts in EPPO-led proceedings should refer to the CJEU any doubts (arising from the national law implementing the PIF directive and directives on procedural safeguards) for a preliminary ruling under Article 267 TFEU. The ‘uniformising effect’ of the preliminary ruling hinges, however, on the extent to which national courts make actual use of it. If the national courts of a certain Member State systematically dodge the preliminary ruling by invoking the ‘doctrine of the *clair act*’, i.e., they reject the existence of doubts on

the interpretation and enforcement of EU criminal law or PIF law, the CJEU will never have the chance of contributing to uniformity across Member States. National discretion must not come at the expense of the EPPO's performance, given that criminal proceedings on PIF crimes fall 'within the scope of application of EU law' and, in that sense, the general principles of EU law will apply, even when the applicable legal framework is the national one. The CJEU might enforce this consistent case-law through references for a preliminary ruling under Article 267 TFEU or through an action for infringement under Articles 258 and 260 TFEU.

With regard to the former avenue for referrals to the CJEU, preliminary rulings, attention is drawn as to the emergence of cases (particularly in Eastern Europe) in which the option (enjoyed by the national court under Article 267 TFEU) to refer for a preliminary ruling or not seems mediated by the interference of the Supreme national courts (High Court, Supreme Court or Constitutional Court). On several occasions in recent years, the CJEU has asserted that lower courts may autonomously submit references to it, and criticised accordingly the attempts by higher courts to discipline lower courts as to whether, when, and how they may ask for the CJEU's clarification. The most recent one, dated 12 February 2019, concerns, precisely, a Bulgarian case¹⁷².

With regard to the infringement procedure, it is suggested here that mechanisms are articulated to allow the EDPs to refer to the Commission any instances of non-cooperative attitude by the national authorities, be it law enforcement bodies or members of the judiciary, either directly (probably not advised) or through the intermediary of the Permanent Chambers and the ECP. It should be recalled that the CFREU is applicable to all activities conducted by the EPPO, and to all activities conducted by national authorities upon legally binding orders by the EDPs, which fall within the scope of Article 51(1) CFREU, as confirmed by the now settled CJEU case-law¹⁷³.

In that sense, **a clear risk of loss of legitimacy for the Union would derive from the perception (real or assumed) that the investigating activities of EPPO are devoid of judicial review or even immune.** This issue must be assessed **in the broader light of the international responsibility of the European Union and its Member States for breaches of the fundamental rights enshrined in the European Convention for Human Rights**, adjudicated by the European Court of Human Rights in Strasbourg.

In this sense, several scenarios arise, and different mechanisms of judicial redress may apply in each of them.

- **Legal acts taken at the central level of the EPPO.**

That would be the typical case of general guidelines on matters pertaining to the prosecution, or instructions provided by the permanent chamber. The CFREU would be applicable, and the CJEU competent in the framework of 263. As general acts, their annulment might be brought forward by the EP in accordance with Article 263 (1) TFEU. It is suggested here that **the EP includes this issue in the matters subject to regular scrutiny as regards the EPPO.** In parallel, compensation for damages under Article 340 TFEU would, probably, be rare although the existence of such a possibility may have a deterrent effect.

- **Acts taken by the EDPs**

The first issue that must be resolved is whether **the EPPO is 'an EU agent'**. Without prejudice to future CJEU interpretation, which undoubtedly will happen, our interpretation of the legal status of all

¹⁷²CJEU Order of 12 February 2019, Case RH, C-8/19 PPU, ECLI:EU:C:2019:110

¹⁷³See CJEU Judgements in cases Åkerberg Fransson, C-617/10, EU:C:2013:105, para 19, and Torralbo Marcos, C-265/13, EU:C:2014:187, para 29

members of the EPPO (including the EDPs) is that such is the case. Assuming that it is the case, and focusing on the EDPs, even if they are part of the national prosecuting structure, legal acts or measures specifically adopted by EDPs will not be subject to the jurisdiction of the ECHR until the EU accession to the ECHR has been resolved. By contrast, they will fall within the remit of the CJEU, through the action for annulment and the action for compensation for damages. The extent of the coverage of EDP's immunity is of relevance too, but it is not examined in the framework of this study. This issue is relevant to the extent that the EDP may apply national law (as a complementary legal framework) and breach the CFREU. It would certainly be liable before the CJEU but the question arises as to whether it would be immune before national courts. We assume that, as a member of a Union body, the EDP is immune; however, drawing on the fundamental right to a fair trial, it should be possible to seek national redress against the prosecutor. This is another problematic issue stemming from the EPPO's hybrid nature.

By contrast, if the EDP acts applying national law and breaches the ECHR, the CJEU would be competent under Article 6 (3) TEU. Even if the EDP did not enjoy immunity, we have strong doubts that it can be brought to justice in Strasbourg because it would not be a national civil servant.

- **Acts taken by the national polices or law enforcement bodies, following an order issued by an EDP**

If the breach of a fundamental right under the CFREU (and in most cases, this will also entail a breach of the national constitutions or the ECHR) is committed by the national law enforcement bodies, they will be brought to justice before the national courts, who will potentially call on the CJEU for a preliminary ruling. Eventually, the case might end up before the Strasbourg Court, who will assess the 'ownership' of the breach of the fundamental right (i.e. who ordered the violation of the fundamental right?).

If law enforcement was acting on its own, national courts and Strasbourg will be competent.

If law enforcement was following EDP's orders (either through instructions from the permanent chambers or its own) and the case reaches Strasbourg, the Bosphorus case establishes a 'presumption of equivalent protection' between the EU system of fundamental rights protection and the ECHR one. However, there is a serious risk that, at some point, the ECHR assesses a situation and reaches the contrary conclusion, especially following the CJEU Opinion 1/2013. Should that occur, the ECHR would put aside the presumption of 'equivalent protection' and condemn the State (national police, national judiciary) for violations of the Convention. **The Participating Member State would be in the difficult situation of having to choose between either breaching EU law, on the one hand, or the ECHR or its constitution, on the other.** Furthermore, such a situation would entail a veiled criticism of the ECHR on the EU system of fundamental rights protection, which would lead to a loss of legitimacy for the EU.

8 FUTURE CHALLENGES

KEY FINDINGS AND POSSIBLE SOLUTIONS

- Even if political leaders have publicly expressed their desire to extend the EPPO's mandate to the investigation of cross-border terrorism cases, it does not seem likely that this will occur in the near future since the extension to terrorism is seen as a 'political pitch' too far.
- By contrast, a mandate for investigating cases of Euro counterfeiting, cross-border money laundering and corruption would seem to fit with the EPPO's current mandate.
- However, the current Treaty framework requiring unanimity among all Member States in the European Council for any addition to the EPPO's mandate (Article 86(4) TFEU) – even related to counterfeiting of Euro banknotes – seems inadequate for the EPPO's further development. This should be taken into account in a next round of Treaty revisions.

Even before the EPPO is fully operational, a debate on extending its mandate has already begun. Article 86(4) TFEU enables the European Council "to extend the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension". In other words, there is already a certain political backing and legal room for manoeuvre, meaning that we may see 'functional spill over' of the EPPO's tasks into other areas. Decision-making in this case requires unanimity in the European Council, and the European Parliament's consent. Thus, the likelihood for extending the EPPO's mandate, as foreseen by the Treaty of Lisbon, is high.

Article 83 (1) TFEU lists the following areas as "particularly serious crime with a cross-border dimension":

- terrorism,
- trafficking in human beings and sexual exploitation of women and children,
- illicit drug trafficking,
- illicit arms trafficking,
- money laundering,
- corruption,
- counterfeiting of means of payment,
- computer crime and organised crime.

Once established, the complex structure that is currently being set up for the EPPO could be technically developed to cover at least some of these areas.

8.1 THE EPPO'S POTENTIAL AUTHORITY BEYOND THE PROTECTION OF THE UNION'S FINANCIAL INTERESTS

In the political debate, an extension of the EPPO's authority to additional fields of crime, particularly to cases of cross-border terrorism, has been raised. In his September 2018 address on the State of the Union, Commission President Juncker put forward a written contribution to the European Council meeting in Salzburg¹⁷⁴: "The European Union must also be stronger in fighting terrorism. In the past three years, we have made real progress. But we still lack the means to act quickly in case[s] of cross-border terrorist threats. (...) I also see a strong case for tasking the new European Public Prosecutor with prosecuting cross-border terrorist crimes." The Heads of State and Government considered that

¹⁷⁴ European Commission 2018a and 2018b.

this “should be examined”.¹⁷⁵ French President Emmanuel Macron had already mentioned terrorism and organised crime as potential additional areas to be attributed to the EPPO’s authority, in his Sorbonne speech in September 2017.¹⁷⁶

However, criminal justice practitioners and government representatives involved in the EPPO negotiations do not believe in an extension to terrorism in the near future. Transferring the prosecution of cross-border terrorist cases to the EPPO would raise complex issues, starting with divergences over the concept of terrorism, despite the harmonised concept provided by Article 3 Directive (EU) 2017/541 of 15 March 2017, which should have been transposed before 8 September 2018.¹⁷⁷ Some law enforcement agencies tend to see the extension of the EPPO’s mandate to terrorism as a *window of opportunity*. However, terrorism represents a field in which there is great divergence in the various approaches taken by Member States. As the negotiations leading to the 2017 terrorism directive showed, those Member States with a long record of fighting internal or external terrorism have accumulated sound experience, which they are often reluctant to share with the so-called new-comers.

While police officers have built a well-grounded cooperation infrastructure within the framework of Europol and other bi- and multilateral avenues,¹⁷⁸ cooperation is still less developed at the criminal justice level. The general perception among our interviewees is that requests for cross-border police assistance are mostly carried out swiftly and that data is often exchanged to the largest possible extent. Compared to cross-border policing, judicial cooperation has always been lagging behind.¹⁷⁹ The level of convergence (both formal – legal – and informal – trust –) among judicial bodies is still far from optimal, despite the overall excellent assessment of Eurojust by legal experts. Some countries are simply more collaborative than others, with the number of requests for judicial cooperation uneven.

As a result, securing the required unanimity to broaden the EPPO’s mandate as regards terrorism will be difficult in the near future and under the current Treaty framework. Negotiations on the extension of the mandate have not yet started, but reception to the Commission’s proposal was rather hesitant, for varying reasons.

By contrast, some other areas of serious cross-border crime mentioned in Article 83 (1) TFEU have greater potential to be harmonised, given the EPPO’s current mandate relating to the Union’s financial interests. In particular, this would be the case for counterfeiting Euro banknotes. However, for this decision, Article 86 (4) TFEU would require unanimity among all Member States, not only among the Eurozone countries. Serious cross-border cases of money-laundering and corruption could also be harmonised more easily, given the EPPO’s current mandate – compared to terrorism.

8.2 TOWARDS SUBSTANTIVE EU CRIMINAL LAW AND A EUROPEAN CRIMINAL COURT?

The establishment of a European Criminal Court is not even perceived by most policy-makers and practitioners to be a medium-term perspective. Even if Article 257 (1) TFEU already allows for the establishment of special courts for “certain classes of action or proceeding”, a European Criminal Court is not covered by this provision.

In the perspective of the protection of the Union’s financial interests, the harmonising effect for sanctions that can be reached by the EPPO remains limited, as long as the EPPO has to bring the cases before national courts in highly divergent criminal justice system.

¹⁷⁵ European Council conclusions, 18 October 2018, p.9 <https://www.consilium.europa.eu/media/36775/18-euco-final-conclusions-en.pdf>

¹⁷⁶ Macron 2017.

¹⁷⁷ Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA

¹⁷⁸ Cf. Aden 2018a and 2018b.

¹⁷⁹ Cf. Fijnaut and Groenhuijsen 2002; Aden 2018a.

Therefore, in a longer-term perspective, further harmonisation would require a (limited) number of criminal offences to be actually defined (not merely harmonised to a minimum level) under EU law. These cases could then be brought before a European Criminal Court, if one day established after future Treaty reform.

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ANNEX I: LIST OF PERSONS INTERVIEWED

The report draws on 29 interviews. The names of 20 interviewees are listed here. Random codes were assigned to seven interviewees who preferred to remain anonymous. Two further interviewees are not listed in respect of their wishes.

A00003	Ministry of Justice (BG)
A00032	Ministry of Justice (PL)
A00044	Sofia University (BG)
A00105	National Revenue Agency (BG)
A00121	General Prosecutor's Office (PL)
A00127	Commission for Establishing of Property Acquired from Criminal Activity (CEPACA) (BG)
A00326	Centre for the Study of Democracy, (BG)
ADÁN, Carmen	Supreme Court of the Basque Country, Chief Regional Prosecutor (ES)
ALARCÓN, Jose Maria	National Tax Management Administration, Antifraud Office, Head (ES)
ARCE, José Manuel	National Police, Economic & Tax Crime Unit, Head (ES)
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This study analyses challenges related to the establishment of the European Public Prosecutor's Office (EPPO) as enhanced cooperation among the current 22 Member States and discusses possible solutions for coping with them. Complexity is identified as a main challenge owing to the EPPO's specific multilevel structure, the relationship between the EPPO and non-participating Member States, and the fact that the EPPO Regulation leaves many procedural rules to the law of the Member State in which an investigation takes place. Depending on the nature of the challenge, the suggested strategies to cope with complexity encompass legislative, administrative, and monitoring measures.

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