European prosecution between cooperation and integration: The European Public Prosecutor’s Office and the rule of law

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Abstract
The article will examine the challenges that the establishment of the European Public Prosecutor’s Office poses for the rule of law – a question which has been underexplored in the policy and academic debate on the establishment of the EPPO, which focused largely on questions of structure and powers of the EPPO and the battle between intergovernmental and supranational visions of European prosecution. The implications of the finally adopted legal framework on the EPPO on the rule of law will be analysed primarily from the perspective of the rule of law as related to EPPO investigations and prosecutions and their consequences for affected individuals – in terms of legal certainty and foreseeability, protection from executive arbitrariness, effective judicial protection and defence rights. The article will undertake a rule of law audit of the EPPO by focusing on three key elements of its legal architecture – the competence of the EPPO, applicable law and judicial review – and the interaction between EU and national levels of investigation and prosecution that the EPPO Regulation envisages. The analysis will aim to cast light on the current rule of law deficit in a hybrid system of European prosecution located somewhere between co-operation and integration.

Keywords
European public prosecutor’s office (EPPO), rule of law, defence rights, judicial protection, judicial review, protection of Eu financial interests

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Introduction

The establishment of a European Public Prosecutor’s Office has been the outcome of a long gestation process fraught with political and constitutional tensions. A key tension in this context has been the clash between a supranational, centralized vision of European prosecution put forward by the European Commission and a more intergovernmental model of prosecution based on co-operation between national systems appealing in a number of EU Member States concerned about the impact of a centralized prosecution model on state sovereignty and national diversity in criminal matters. The supranational and centralized vision of European prosecution has been inextricably linked with the view of the EU budget as a sui generis, ‘European’ interest distinct from national interests. This vision emerged clearly in the academic study on the Corpus Juris funded by the European Commission in the 1990s: the drafters of the Corpus Juris put forward a highly centralized model of European criminal law related to the fight against fraud, a model which emanated from the belief that the budget is a unique, European interest. According to its Explanatory Memorandum, ‘the Budget, defined as “the visible sign of a true patrimony common to citizens of the Union” . . ., is the supreme instrument of European policy. To say this emphasizes the extreme seriousness of any crime which undermines this patrimony.’

At a time of limited EU competence in the field of criminal law, the Corpus Juris – which put forward the establishment of a European Public Prosecutor and a high level of harmonization in the fields of substantive criminal law and criminal procedure – and institutions such as the European Commission were arguing for further Europeanization in order to effectively protect the budget as a European interest. Underlying calls for EU intervention in this context has been a perception of mistrust: national authorities are perceived to be unwilling or unable to fight impunity effectively and to protect European interests in the same way or as effectively as they would protect national interests by the use of criminal law. The Corpus Juris as such was not adopted in the form of EU law at the time. Member States’ concerns with regard to the perceived adverse effects of the model proposed therein on state sovereignty and national diversity in criminal law have led to the advancement of European integration in criminal matters in forms which were distinctly more intergovernmental and co-operative: mutual recognition (rather than harmonization) as the centrepiece of European integration in criminal matters from the Tampere programme onwards, and the establishment – instead of a centralized European Public Prosecutor – of a highly intergovernmental, ‘collegiate’ body responsible for enhancing co-operation between national authorities but devoid of coercive powers, Eurojust.

1. The article builds on a presentation at the conference Transnational Criminal Enforcement by EU Criminal Justice Agencies: From Cooperation to Integration?, organized by Jacob Öberg and the Swedish Network for European Legal Studies on 17–18 October 2019 at Lund University. I would like to thank participants for their feedback and Fabio Giuffrida and Jacob Öberg for their comments on an earlier draft. The usual disclaimer applies.
2. V. Mitsilegas, ‘The Normative Foundations of European Criminal Law’, in R. Schütze (ed.), Globalisation and Governance: International Problems, European Solutions (Cambridge University Press, 2018), p. 418.
3. M. Delmas-Marty (ed.), Corpus Juris (Economica, 1997), p. 12.
4. For a background to the Corpus Juris, see M. Delmas-Marty, ‘Guest Editorial: Combatting Fraud – Necessity, Legitimacy and Feasibility of the Corpus Juris’, 37 Common Market Law Review (2000), p. 247.
5. V. Mitsilegas, ‘Conceptualising Impunity in the Law of the European Union’, in S. Montaldo and L. Marin (eds.), The Fight Against Impunity in EU Law (Hart Publishing, 2020 p. 13.
6. For an overview on the establishment and development of Eurojust see V. Mitsilegas, EU Criminal Law (Hart Publishing, 2009) and V. Mitsilegas, EU Criminal Law After Lisbon: Rights, Trust and the Transformation of Justice in Europe (Hart Publishing, 2016).
In spite of the pushback by Member States, calls for the establishment of a European Public Prosecutor did not go away, with the Lisbon Treaty introducing in Article 86 TFEU a provision granting for the first time the European Union competence to establish a European Public Prosecutor’s Office (hereinafter EPPO). The inclusion of a legal basis for the establishment of the EPPO in the Lisbon Treaty raised high hopes for those viewing this development as an accelerator for European integration in criminal matters. A pro-integration reading of the potential of Article 86 TFEU was put forward by Jörg Monar, who argued that this represents a shift from cooperation to integration, defined as meaning a process leading to the creation of new single system through the merging of several previously separately existing systems as opposed to ‘cooperation’ as a process where these systems interact but remain essentially separate. Monar argued that the shift towards integration will have a profound effect on the development of European criminal law and its impact on national criminal justice systems. According to Monar, the system-changing effects of the establishment of the EPPO would not stop with the reach of its powers into the national criminal justice systems but would result in a fully harmonized definition of the constitutive elements of all criminal acts within the EPPO’s competence (moving towards a system of ‘federal crimes’ as it exists in the US) and in the adoption of a significant body of common criminal procedural rules to ensure identical judicial rights and avoid EPPO prosecution cases failing before national courts because of different procedural rules.

After a lengthy period of negotiations, the EPPO Regulation has now been adopted. The outcome of many compromises between the Commission’s view of a more supranational, vertical model of European prosecution and Member States’ more intergovernmental, sovereignty-friendly views of the EPPO, the finally adopted text of the EPPO Regulation introduces a system of prosecution consisting of a (highly complex) centralized, and a decentralized level of European prosecution. Writing seven years after the publication of Monar’s article, and at a time when the EPPO is on the verge of becoming operational, this article aims to test his hypothesis that the establishment of the EPPO would represent a shift from co-operation to integration. The article will do so by focusing on the impact of the finally adopted Regulation on the operation of the EPPO, a focus which is inextricably linked with the second key question the article seeks to explore, namely the impact of the establishment of the EPPO on the rule of law. The article will develop thinking, prompted by the negotiations and earlier drafts of the EPPO Regulation, on the impact of the establishment of the EPPO on judicial protection, fundamental rights and...
justice in European criminal law. The implications of the finally adopted legal framework on the EPPO on the rule of law will be examined primarily from the perspective of the rule of law as related to EPPO investigations and prosecutions and their consequences for affected individuals – in terms of legal certainty and foreseeability, protection from executive arbitrariness, effective judicial protection and defence rights. The examination of the impact of the EPPO on the rule of law is prompted by the realization that, while the EPPO is the first EU agency granted coercive powers in the field of criminal law, the impact of these powers on individuals and on the rule of law more broadly has been dealt with as an afterthought in the lengthy battles in negotiations between competing intergovernmental and supranational visions of the EPPO. While the text of the Regulation pays lip service to the respect of the rule of law, the article will evaluate critically whether the provisions of the EPPO Regulation do justice to this claim. By focusing on three key elements of the legal architecture of the EPPO – the competence of the EPPO, applicable law and judicial review – and the interaction between EU and national levels of investigation and prosecution that the EPPO Regulation envisages, the article will aim to cast light on the current rule of law deficit in a hybrid system of European prosecution located somewhere between co-operation and integration.

**Competence**

A question which has revealed clearly the tensions between supranational and intergovernmental visions of European prosecution has been the demarcation of the competence of the EPPO to act vis-à-vis Member States in terms of both the existence and the exercise of such competence. From the outset, the Commission has introduced a strong supranational element in its vision of the EPPO: exclusive competence. By granting the EPPO exclusive competence, the Commission sent a strong signal to Member States that it is only the EPPO which is responsible and competent for the investigation and prosecution of the ‘European Union’ offences associated with fraud against the Union budget. This choice by the Commission may be explained by its mistrust towards the willingness or ability of Member States to provide effective protection of the EU budget but it can also be seen as having a symbolic value, in conferring a supranational body (the first of its kind in Europe’s area of criminal justice) with exclusive competence.

13. V. Mitsilegas, _EU Criminal Law After Lisbon: Rights, Trust and the Transformation of Justice in Europe_, chapter 4.
14. These aspects of the rule of law are all elements of what I have characterized elsewhere as the _rule of law ex post_, which includes principles which are applicable after the enactment of legislation (including legal certainty, prohibition of arbitrariness, effective judicial protection and the protection of human rights) – V. Mitsilegas, ‘Rule of Law: Theorising EU Internal Security Cooperation from a Legal Perspective’, in R. Bossong and M. Rhinard (eds), _Theorising Internal Security Cooperation in the European Union_ (OUP, 2016), p. 109. They encompass both formal/procedural and substantive dimensions of the rule of law (for these distinctions see P. Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’, _Public Law_ (1997), p. 467; and T. Bingham, _The Rule of Law_ (Allen Lane, 2010). All the dimensions examined in this article are included within the European Commission’s definition of the rule of law: European Commission, Communication from the Commission to the European Parliament and the Council, _A New EU Framework to Strengthen the Rule of Law_, COM(2014) 158 final.
15. Article 5(2) of the Regulation states that the EPPO will be bound by the principles of rule of law and proportionality in all its activities.
16. European Commission, Proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office, COM(2013) 534 final, Article 11(4).
17. P. Asp, ‘Jeopardy on European Level: What is the Question to which the answer is the EPPO?’, in P. Asp (ed.), _The European Public Prosecutor’s Office – Legal and Criminal Policy Perspectives_ (Jure, 2015), p. 65.
Perhaps unsurprisingly given the strength of Member States’ concerns over the impact of the EPPO on domestic criminal justice systems and state sovereignty in the administration of criminal justice, exclusivity did not survive negotiations. The Regulation has replaced the exclusive competence of the EPPO with a system of shared\(^1\) (or to some extent ‘priority’\(^2\)) competence of the EPPO, backed up by a right to evocation.\(^3\) The EPPO will exercise its competence either by initiating an investigation or by deciding to use its right of evocation.\(^4\) Under the latter, if the EPPO becomes aware of the fact that an investigation in respect of an offence falling within its mandate is already undertaken by national authorities, it will consult with the latter authorities and will thereafter decide whether to open its own investigation and request the competent authorities to transfer the proceedings to it.\(^5\) Where the EPPO exercises its right of evocation, the competent authorities of the Member States must transfer the file to the EPPO and refrain from carrying out further acts of investigation in respect of the same offence\(^6\) – in this manner priority competence essentially becomes exclusive.\(^7\) However, in cases of disagreement between the EPPO and the national prosecution authorities over the question of whether the criminal conduct falls within the material scope of the EPPO competence, it is not the EPPO, but the national authorities competent to decide on the attribution of competences concerning prosecution at national level which will decide who is to be competent for the investigation of the case.\(^8\)

The combination of these provisions aims to strike a balance between the centralized model of exclusivity put forward by the Commission and Member States’ preference for a less integrated, more interactive and co-operative model – yet the compromise reached in the final text of the Regulation raises serious questions of legal certainty and foreseeability for the individual under investigation on whether the exercise of competence lies with the EPPO or with Member States. Moreover, as Herrnfeld has pertinently noted, the fact that the EPPO is supposed to have a priority competence and may exercise a right of evocation but on the other hand in case of disagreement it is a national judicial authority that decides on the attribution of competence, may give rise to disturbances in the course of conducting an efficient investigation.\(^9\) Legal certainty and foreseeability concerns also arise from the fact that the Regulation is silent as to which Member State will have competence or will decide on competence in cases where more than one Member States are affected by an offence – as the EPPO should not be considered the right body to decide which of the affected Member State should exercise its competence to investigate and prosecute the case in situations where the EPPO has to refrain from exercising its own.\(^10\) As has been noted, under Article 25(6) of the Regulation the decision on the attribution of competence is taken by the national authorities on the basis of national law and varies from one Member State to another – and while the Court of Justice has as will be seen below jurisdiction on Article 25 of the

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18. Recital 13, Council Regulation (EU) 2017/1939,
19. Ibid., Recital 58.
20. Ibid., Article 27.
21. Ibid., Article 25(1).
22. Ibid., Articles 27(1), (3), (4) and (5).
23. Ibid., Article 27(2).
24. H.-H. Herrnfeld, ‘Article 27: Right of Evocation’ in H.-H. Herrnfeld et al. (eds.), European Public Prosecutor’s Office (Beck-Hart-Nomos, 2021), p. 243, para.21.
25. Article 25(6) of Council Regulation (EU) 2017/1939.
26. H.-H. Herrnfeld in H.-H. et al. (eds.), European Public Prosecutor’s Office. Article-by-Article Commentary, p. 211, para. 27 and 29.
27. Ibid., p. 211, para. 30.
Regulation, this jurisdiction is focused on the interpretation of the provision through the preliminary rulings procedure.\textsuperscript{28}

In terms of the existence of EPPO competence, the EPPO Regulation has not followed the approach of the \textit{Corpus Juris} in defining and harmonizing the offences for which the Prosecutor would be competent in the text of the Regulation. Rather, the material competence of the EPPO is defined primarily by reference to another piece of EU secondary law, the PIF Directive,\textsuperscript{29} which aims to harmonize substantive criminal law regarding offences affecting the EU budget.\textsuperscript{30} In addition, the material competence of the EPPO has been defined to include offences regarding participation in a criminal organization as defined in Framework Decision 2008/841/JHA,\textsuperscript{31} if the focus of the criminal activity of such a criminal organization is to commit any of the offences covered in the PIF Directive;\textsuperscript{32} and any other criminal offence that is inextricably linked to criminal conduct that falls within the scope of the PIF Directive.\textsuperscript{33}

From a rule of law perspective, the question here is whether the delimitation of the material competence of the EPPO in this manner provides with an adequate level of legal certainty and foreseeability. If one starts with the core material competence of the EPPO, namely offences affecting the financial interests of the EU, the discussion has centred on whether the choice to define competence (a) not in the Regulation itself, but by reference to another instrument, which (b) is a Directive and not a Regulation, provides a sufficiently clear level playing field for EPPO operations. This discussion is of relevance for the parallel debate on whether harmonization of substantive criminal law on fraud offences (seen as attacking a ‘European’ interest par excellence) should take place in the form of a Regulation (seen to provide a higher level of uniformity) or a Directive (allowing Member States leeway in implementation).\textsuperscript{34} In the negotiations on the PIF Directive, the Commission’s choice of Article 325 TFEU as a legal basis (seen as allowing the adoption of a Regulation) was rejected by Member States and ultimately it was a Directive which was adopted (and not a Regulation) under Article 83(2) TFEU. This choice seems to conform with the constitutional choice made by the Lisbon Treaty to reserve the adoption of EU substantive criminal law measures in the form of Directives under Article 83(1) and (2) TFEU, within a broader framework of recognition of the need to respect national diversity in the field of criminal justice.\textsuperscript{35}

\textsuperscript{28}C. di Francesco Maesa, ‘The Fight Against Impunity Between EU and National Legal Orders: What Role for the EPPO?’, in L. Marin and S. Montaldo (eds.), \textit{The Fight Against Impunity in EU Law} (Hart Publishing, 2020), p. 150. For further analysis of the CJEU on the EPPO see ‘Judicial review’ below.

\textsuperscript{29}Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union’s financial interests by means of criminal law, [2017] OJ L 198/29.

\textsuperscript{30}Article 22(1) and Article 4 of Council Regulation (EU) 2017/1939.

\textsuperscript{31}Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime [2008] OJ L 300/42.

\textsuperscript{32}Article 22(2) of Council Regulation (EU) 2017/1939.

\textsuperscript{33}Ibid., Article 22(3).

\textsuperscript{34}It has been noted that despite the fact that the financial interests of the EU are the same irrespective of the country where the offences are committed, investigated, prosecuted and tried, the substantive legal framework regarding prosecution will differ from one Member State to another – P. Caeiro and J. Amaral Rodrigues, ‘A European Contraption: The Relationship Between the Competence of the EPPO and the Scope of Member States’ Jurisdiction Over Criminal Matters’, in K. Ligeti et al. (eds.), \textit{The European Public Prosecutor’s Office at Launch} (Wolters Kluwer-CEDAM, 2020), p. 61.

\textsuperscript{35}For a discussion of the relationship between Articles 83 and 325 TFEU as a legal basis for harmonization of substantive criminal law by the EU see V. Mitsilegas, \textit{EU Criminal Law After Lisbon: Rights, Trust and the Transformation of
The impact of the determination of the material competence of the EPPO via a reference to the PIF Directive on legality, legal certainty and foreseeability must be seen from the broader perspective of legal certainty in the context of the harmonization of substantive criminal law at EU level. EU legislative intervention pre (via Framework Decisions) and post (via Directives) Lisbon in the field is designed to allow Member States a degree of leeway in implementation, in order to adjust EU law objectives within the specificity of their domestic criminal justice systems. In addition to sovereignty concerns, this choice reflects the considerable diversity in national criminal justice systems and their internal coherence. Legality, legal certainty and foreseeability must thus be assessed primarily from the perspective of the implementation of EU law in domestic legal orders – a point which is made clearly throughout Article 22 of the EPPO Regulation which enumerates the offences forming its material competence ‘as implemented by national law’. Sceptics of this approach point out that it may lead to divergences in the mandate of the EPPO depending on the different implementation routes of the PIF Directive in different Member States – hence hindering legal certainty and foreseeability in terms of EPPO action across the board especially in cases of defective transposition of the Directive by Member States.

Two arguments can be put forward to address this concern. Firstly, even if EU criminal law on PIF offences had taken the form of a Regulation, it is highly likely that Member States, as in the case of the EPPO Regulation itself, would still have to adopt implementing legislation to adjust the requirements of EU law within their domestic legal orders. It is hard to see how an EU text in criminal law would provide in all cases a one-size-fits-all solution applicable in all Member States bound by the instrument without the need for further national adjustment. Secondly, one should not underestimate the potentially high harmonizing effect of Directives. While there may be differences in implementation in Member States, the post-Lisbon constitutional armoury in EU criminal law grants extensive powers of scrutiny of national implementation to the Commission, and jurisdiction to the CJEU to clarify any grey areas which may arise. The argument that ‘European’ offences such as fraud which affects a ‘European’ interest distinct from national interests require a uniform European substantive criminal law does not add much to the above discussion – and in fact would pose additional challenges to legal certainty. In view of the extension of the EPPO mandate to related offences and of proposals to extend in the future EPPO’s material competence to cover offences such as terrorism, it is not clear how one can meaningfully distinguish between offences affecting the EU financial interests on the one hand (as ‘true’ European offences requiring uniform criminal law) and other areas of crime triggering

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Justice in Europe, chapter 2; J. Öberg, “The Legal Basis for EU Criminal Law Harmonisation. A Question of Federalism?”, 43 European Law Review (2018), p. 366. For a discussion of the constitutional choices of the Lisbon Treaty to reflect national diversity in criminal matters see V. Mitsilegas, ‘European Criminal Law and Resistance to Communitarisation Post-Lisbon’, in 1 New Journal of European Criminal Law (2010), p. 458.

36. For a critique on the potential lack of harmonization leading to diversity in terms of applicable law see R. Sicurella, ‘A Blunt Weapon for the EPPO? Taking the Edge Off the Proposed PIF Directive’, in W. Geelhoed et al. (eds.), Shifting Perspectives on the European Public Prosecutor’s Office (Asser Press and Springer, 2018), p. 102.

37. See P. Caeiro and J. Amaral Rodrigues in K. Ligeti et al. (eds.), The European Public Prosecutor’s Office at Launch, p. 64.

38. For a discussion of the potential extension of the material competence of the EPPO see A. Juszszak and E. Sason, ‘Fighting Terrorism Through the European Public Prosecutor’s Office (EPPO)?’, Eucrim (2019), p. 66.
EU competence under the legal bases on securitized and functional criminalization set out in Article 83(1) and (2) TFEU.\(^{39}\)

Greater concerns with regard to legal certainty and foreseeability in terms of the material competence of the EPPO arises by the extension of this competence in paragraphs 2 and 3 of Article 22 of the EPPO Regulation. Article 22(2) extends competence to offences regarding participation in a criminal organization as defined in Framework Decision 2008/841/JHA, if the focus of the criminal activity of such a criminal organization is to commit any of the offences provided in the PIF Directive. There are two areas of concern regarding legal certainty here. The first relates to the very low level of harmonization provided by Framework Decision 2008/841/JHA – however, this concern has not led thus far to the ‘Lisbonization’ of the instrument and the Union continues to operate under an outdated and vague legal framework, providing little in terms of meaningful harmonization or a common legal understanding of the organized crime phenomenon across the EU.\(^{40}\)

The second area of concern involves the lack of clarity as to the second condition of competence, namely that the ‘focus’ of criminal activity is to commit PIF offences.\(^{41}\) There may be markedly different approaches on defining such focus between different Member States and the EPPO, and this issue may be left to be resolved – with some delay in practice – by the CJEU via preliminary references – with the meaning of ‘focus’ being a prime candidate for assuming an autonomous EU law interpretation. Similar concerns regarding legal certainty and foreseeability arise regarding Article 22(3). The scope of competence is broad: any other criminal offence inextricably linked to PIF offences. Any offence – whether it is harmonized under EU law or not – may come under the scope of the EPPO material competence,\(^{42}\) rendering this competence at the same time broad and vague.\(^{43}\) The second condition, aiming a tempering this broad scope, is also vague: offences must be ‘inextricably linked’ to PIF offences, but again the understanding of such link may vary from authority to authority, from state to state and between Member States and the EPPO. Questions of interpretation of what constitutes an ‘inextricably linked’ offence are crucial to uphold legality and foreseeability in this context and are bound to arise before the CJEU.\(^{44}\) Their significance for legal certainty is not limited to the determination of the material competence of the EPPO, but extends crucially to determining the protection of the affected individuals under the *ne bis in idem* principle.\(^{45}\)

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39. On a taxonomy of EU competence in the field of substantive criminal law in Article 83 TFEU under these terms see V. Mitsilegas, ‘EU Criminal Law Competence After Lisbon: From Securitised to Functional Criminalisation’, in D. Acosta and C. Murphy (eds.), *EU Security and Justice Law* (Hart Publishing, 2014), p. 110.
40. For recent calls to revise substantive EU criminal law on organized crime see L. Foffani et al., ‘Strengthening the Fight Against Organised and Financial Crime within the EU’, in *Eucrim* (forthcoming).
41. For a critique on the lack of detail as to what constitutes the focus of criminal activity see G. Grasso et al., ‘EPPO Material Competence: Analysis of the PIF Directive and Regulation’, in K. Ligeti et al. (eds.), *The European Public Prosecutor’s Office at Launch* (Wolters Kluwer-CEDAM, 2020), p. 34.
42. According to Caeiro and Amaral Rodrigues, ancillary competence may encompass non-harmonized offences and even offences which do not fall within 83(1) and (2) TFEU – P. Caeiro and J. Amaral Rodrigues in K. Ligeti et al. (eds.), *The European Public Prosecutor’s Office at Launch*, p. 65.
43. Bitzilekis notes in this context the lack of reference to the normative connection between the two relevant offences – N. Bitzilekis, ‘The Definition of Ancillary Competence according to the Proposal for an EPPO-Regulation’, in P. Asp (ed.), *The European Public Prosecutor’s Office – Legal and Criminal Policy Perspectives* (Jure, 2015), p. 115.
44. Guidance on the concept of ‘inextricably linked offences’ is provided in the Preamble to the EPPO Regulation (recital 54).
45. See G. Grasso et al., in K. Ligeti et al. (eds.), *The European Public Prosecutor’s Office at Launch*, p. 35.
Applicable law

Once the determination of the existence and exercise of the EPPO competence vis-à-vis its relations with Member States (and whether an investigation and a prosecution will be led by the EPPO or by Member States) has taken place, the next question which arises in terms of respect for the rule of law, legal certainty and foreseeability involves the determination of applicable law once it has been established that the EPPO has competence to act. These questions arise here at two levels: at the level of EPPO investigations and prosecutions in a single EPPO Member State; and at the level of multi-jurisdictional investigations, involving more than one state. A key issue to clarify here is the one of applicable law (whether national or EU law will apply), which is linked with the issue of legal certainty in terms of the protection and rights of suspects, including the existence of adequate legal remedies.

Relationship between EU and national law

The relationship between EU and national law applicable in EPPO operations has evolved in the negotiations of the instrument, reflecting again the different visions between the Commission and Member States as regards the nature of the EPPO. In the Commission’s proposal, the hierarchical model of European prosecution granting EPPO exclusive competence was also backed up by the application of the principle of European territoriality. According to Article 25 of the Commission’s draft, for the purpose of investigations and prosecutions conducted by the European Public Prosecutor’s Office, the territory of the Union’s Member States will be considered a single legal area in which the European Public Prosecutor’s Office may exercise its competence. The Commission’s draft thus mirrors the approach taken by the drafters of the Corpus Juris. The Guiding Principles of Corpus Juris introduced the principle of European territoriality by stating that for the purposes of investigation, prosecution, trial and execution of sentences concerning the Corpus Juris offences, the territory of the Member States of the European Union constitutes a single area, called the European judicial area and that the competence ratione loci of the European Public Prosecutor and of national prosecutors to issue warrants and judgments pursuant to the Corpus Juris extends to the entire European judicial area. However, this single legal area did not signify the application of a single legislative framework to the operation of the EPPO but rather had to rely in many instances on the applicability of national law, in particular in EPPO investigations. The references of the Commission’s draft to the applicability of national law led commentators to argue that the proposal led to a situation where the investigative powers of the EPPO are defined by the national criminal procedural law of each Member State.

The final text of the Regulation has abandoned the concept of European territoriality. The Regulation now states that when conducting investigations and prosecutions in the territory of the

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46. Article 25(1) of COM (2013) 534 final. Emphasis added.
47. Article 18 (1) of the Corpus Juris.
48. Guiding Principles of Corpus Juris 2000, http://ec.europa.eu/anti_fraud/documents/fwk-green-paper-corpus/corpus_juris_en.pdf.
49. See in particular Article 11(3) and Article 26(2) of COM (2013) 534 final.
50. K. Ligeti, ‘The European Public Prosecutor’s Office’, in V. Mitsilegas et al. (eds.), Research Handbook on EU Criminal Law (Edward Elgar, 2015), p. 480.
51. For an analysis of the concept of European territoriality in the evolution of proposals for a European Public Prosecutor see J. Vervaele, ‘European Territoriality and Jurisdiction: The Protection of the EU’s Financial Interests in Its
Union’s Member States, the European Public Prosecutor’s Office will operate as one single office. This has been seen as a compromise wording to indicate that the EPPO would be able to function on a cross-border basis without having recourse to traditional forms and mutual legal assistance or mutual recognition. The Regulation thus rejects the view of the European Union as one single legal area and confirms the view of the Union consisting of a number of different national legal orders, upholding the territorial application of criminal law. The abandonment of the concept of European territoriality – a concept which can be seen as having a strong symbolic value in projecting the supranational character of the EPPO – has been combined with retaining a number of references to national law as applicable law throughout the text of the EPPO Regulation. Respect for the internal organization of national systems is already stated from the outset in the Preamble to the Regulation.

The Regulation itself provides for a complex interaction between EU law and national law in the operations of the EPPO. Article 5(3) states that national law will apply to the extent that a matter is not regulated by the Regulation, while a number of provisions in the Regulation refer expressly to the application of national law, in particular regarding EPPO investigations including provisions on the conduct of investigations, rules on investigative measures, rules on cross-border investigations, enforcement and pre-trial arrest. It is submitted that, notwithstanding these references to national law, all EPPO operations and the application of national law therein must be in full conformity with the Charter of Fundamental Rights, as indicated expressly also in the text of the EPPO Regulation. The Charter may be applicable, in a spill-over effect, throughout the EPPO investigation and prosecution at national level, as EPPO-EDP operations and their position within the national criminal justice system constitute clearly an implementation of EU law under the Fransson criteria.

It has been argued that references to national law should serve to facilitate a smooth integration of the EPPO into the criminal justice systems of Member States, especially considering that the EPPO will not have its own investigators but will rely instead on the national police and customs authorities to carry out investigation measures and on national courts to issue the ex ante judicial authorization of investigation measures. Yet reliance on national law for EPPO operations creates a considerable degree of legal uncertainty in Europe’s area of criminal justice in view of the divergences among national criminal procedural standards and rules – with the EPPO being in essence an EU agency operating on the basis of national law. The potential for legal uncertainty on

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52. Article 8(1) of Council Regulation (EU) 2017/1939.
53. H.-H. Herrnfeld in H.-H. Herrnfeld et al. (eds.), European Public Prosecutor’s Office. Article-by-Article Commentary, p. 286, para.4.
54. Recital 15 states that the Regulation is without prejudice to Member States’ national systems concerning the way in which criminal investigations are organized.
55. Article 28(1) of Council Regulation (EU) 2017/1939.
56. Ibid., Article 30(2) and (3).
57. Ibid., Article 31.
58. Ibid., Article 32.
59. Ibid., Article 33.
60. Ibid., Article 5.
61. H.-H. Herrnfeld, ‘Implementation of the EPPO Regulation: A Perspective from Germany’, in K. Ligeti et al. (eds.), The European Public Prosecutor’s Office at Launch, p. 154.
the basis of the applicability of national law extends also at the earlier stage of the adoption of the decision to initiate and investigation, which will be triggered by a European Delegated Prosecutor where, in accordance with the applicable national law, there are reasonable grounds to believe that an offence within the competence of the EPPO is being or has been committed.62

The decision to initiate an investigation is significant as it may have a significant impact on the position and the rights of the defence, which may vary between different Member States where the EPPO can operate – but the Regulation does not offer a remedy against this decision before the CJEU and is not clear on whether there will be a remedy before national courts,63 although it is submitted that the decision is a procedural act producing legal effects on the defence.64 This adverse position for the defence is exacerbated by the fact that the decision on the initiation of an investigation is to be taken in accordance to national law, rather than in accordance with clear criteria established by EU law, leading to considerable legal uncertainty: as Herrnfeld has noted, what remains to be seen is how the inter-relationship between 26(1) and the relevant national law referred to therein will function in practice, considering different approaches and standards in the Member states on the concept of ‘reasonable grounds to believe’ that an offence has been committed.65

Cross-border cases and choice of forum

Legal uncertainty regarding applicable law becomes even more pronounced in cases where the EPPO can act in multiple jurisdictions. The EPPO Regulation contains some rules on the determination of forum on investigations and prosecutions. Article 26(4) of the EPPO Regulation provides that, in terms of investigations, a case must as a rule be initiated and handled by a European Delegated Prosecutor from the Member State where the focus of the criminal activity is or, if several connected offences within the competences of the EPPO have been committed, the Member State where the bulk of the offences has been committed66 – with deviation from this rule allowed only on the basis of specifically enumerated criteria.67 Until a decision to prosecute is taken, the competent Permanent Chamber of the EPPO may decide to reallocate the case to an EDP in another Member State or to merge or split cases and, for each case, choose the European Delegated Prosecutor handling it, if such decisions are in the general interest of justice and in accordance with the criteria set out in Article 26(4).68 In terms of choice of forum regarding prosecution, the EPPO Regulation states that in principle the Permanent Chamber must decide to bring the case to prosecution in the Member State of the handling European Delegated Prosecutor.69 However, the Permanent Chamber may decide to bring the case to prosecution in a

62. Article 26(1) Council Regulation (EU) 2017/1939. Emphasis added.
63. H.-H. Herrnfeld in H.-H. Herrnfeld et al. (eds.), European Public Prosecutor’s Office. Article-by-Article Commentary, p. 219, para. 11 and p. 231, para. 37.
64. On judicial review see ‘Judicial review’ below.
65. H.-H. Herrnfeld in H.-H. Herrnfeld et al. (eds.), European Public Prosecutor’s Office. Article-by-Article Commentary, p. 233, para. 40.
66. Emphasis added.
67. According to Article 26(4) of Council Regulation (EU) 2017/1939 these criteria are, in order of priority: the place of the suspect’s or accused person’s habitual residence; the nationality of the suspect or accused person; and the place where the main financial damage has occurred.
68. Article 26(5) of Council Regulation (EU) 2017/1939. Emphasis added.
69. Ibid., Article 36(1) first indent.
different Member State, if there are sufficiently justified grounds to do so, taking into account the criteria set out in Article 26(4) and (5) on allocation of the forum of investigation. The EPPO is therefore allowed to “switch” between different legal orders both during the investigation and at the stage of prosecution – in decisions which ultimately change the applicable law in the investigation and prosecution. The Permanent Chamber may further decide to join several cases, where investigations have been conducted by different European Delegated Prosecutors against the same person(s) with a view to prosecuting these cases in the courts of a single Member State which, in accordance with its law, has jurisdiction for each of those cases.

The choice of forum provisions in the EPPO Regulation (and the lack of detail underpinning them) has substantial rule of law implications in terms of legal certainty, foreseeability and the protection of fundamental rights following decisions determining applicable law which may differ substantially from Member State to Member State. Choice of forum decisions is left largely to the discretion of the executive (EPPO) with limited avenues of challenge and judicial review. As has been noted, individuals are required to deal with the potential application of a multitude of laws, even laws they cannot know at the time of the act. Moreover, decisions are to be taken on the basis of criteria which are broad and vague. Commentators have raised the issue of the potential lack of clarity of concepts such as ‘the focus of criminal activity’ or ‘the bulk’ of the offences being committed, and what constitutes a decision ‘in the general interest of justice’. Concerns have been raised that the concept of ‘general interest of justice’ will be interpreted as synonymous with prosecutorial efficiency, leaving little space for the interests of the defence, with the Regulation not really providing for meaningful defence participation in the process leading to choice of forum decisions.

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70. Ibid., Article 36(1), second indent.
71. F. Zimmerman, ‘Choice of Forum and Choice of Law under the Future Regulation on the Establishment of a European Public Prosecutor’s Office’, in P. Asp (ed.), The European Public Prosecutor’s Office – Legal and Criminal Policy Perspectives (Jure, 2015), p 167.
72. See P. Caeiro and J. Amaral Rodrigues in K. Ligeti et al. (eds.), The European Public Prosecutor’s Office at Launch, p. 80; H.-H. Herrnfeld in H.-H. Herrnfeld et al. (eds.), European Public Prosecutor’s Office. Article-by-Article Commentary, p. 227, para. 25.
73. Article 36(4) of Council Regulation (EU) 2017/1939
74. M. Luchtman, ‘Transnational Law Enforcement Cooperation – Fundamental Rights in European Cooperation in Criminal Matters’, 28 European Journal of Crime, Criminal Law and Criminal Justice (2020), p. 14.
75. See ‘Judicial review’ below.
76. M. Luchtman, 28 European Journal of Crime, Criminal Law and Criminal Justice (2020), p. 14.
77. P. Caeiro and J. Amaral Rodrigues in K. Ligeti et al. (eds.), The European Public Prosecutor’s Office at Launch, p. 76
78. M. Panzavolta, ‘Choosing the National Forum for Proceedings Conducted by the EPPO: Who is to Decide?’, in L. Bachmeier Winter (ed.), The European Public Prosecutor’s Office. The Challenges Ahead (Springer, 2018), p. 76.
79. S. Ruggeri, ‘Criminal Investigations, Interference with Fundamental Rights and Fair Trial Safeguards in the Proceedings of the European Public Prosecutor’s Office. A Human Rights Law Perspective’, in L. Bachmeier Winter (ed.), The European Public Prosecutor’s Office. The Challenges Ahead (Springer, 2018), p. 213.
80. Caeiro and Amaral Rodrigues draw attention to the risk of conflation between ‘general interest of justice’ with stronger prospects of conviction – P. Caeiro and J. Amaral Rodrigues in K. Ligeti (eds.), The European Public Prosecutor’s Office at Launch, p. 78
81. See M. Panzavolta in L. Bachmeier Winter (ed.), The European Public Prosecutor’s Office. The Challenges Ahead, p. 82 and S. Ruggeri in L. Bachmeier Winter (ed.), The European Public Prosecutor’s Office. The Challenges Ahead, p. 213.
The option for the EPPO to change the forum has been criticized as hampering effective defence and as being contrary to the principle of foreseeability in terms of access to a lawful judge as enshrined in Article 47(2) of the Charter – as the EPPO has the power to decide to change the forum during its operations. The lack of legal certainty regarding the choice of forum criteria in the EPPO Regulation can be seen as being at odds with the European Court of Human Rights approach on foreseeability in criminal proceedings and may be addressed to some extent by the CJEU by developing these criteria into autonomous concepts of EU law having a uniform EU law meaning. However, this process will inevitably be piecemeal and incremental and does not address fully the major issues of legal certainty for the defendant that the elliptical rules on choice of forum content and review the EPPO Regulation contains and the ensuing imbalance between prosecution and defence raise. The design of the EPPO as operating in a double-hatted manner not in a single legal area but in a transnational field comprising of different legal systems poses significant challenges to the rule of law in the absence of clear and detailed EU rules on applicable law and choice of forum. This leaves EPPO operating not in a single legal area but in a double-hatted manner in a transnational field consisting of different legal systems. In the absence of a body of detailed EU rules, the current Regulation leaves EPPO with discretion – executive power to pick and choose. In this transnational space, the defendant is left in the dark regarding legal certainty, foreseeability and exercise of defence rights: as has been eloquently noted, they depend on discretionary choices in a regulatory patchwork, which can end up in forum shopping and a run to the bottom of the lowest protective denominator of safeguards.

The impact of EU standards

In terms of the application of EU standards on the operations of the EPPO, the choice has been not to develop detailed rules in the body of the Regulation but to cross-refer (as in the case of the delimitation of the material competence of the EPPO) to the EU acquis in the field of...

82. Caeiro and Amaral Rodrigues raise the issue of legal certainty and legitimacy of decisions on the change of forum such as reallocation at a late stage of the procedure – P. Caeiro and J. Amaral Rodrigues in K. Ligeti et al. (eds.), The European Public Prosecutor’s Office at Launch, p. 81
83. M. Panzavolta in L. Bachmeier Winter (ed.), The European Public Prosecutor’s Office. The Challenges Ahead, p. 67; P. Caeiro and J. Amaral Rodrigues in K. Ligeti et al. (eds.), The European Public Prosecutor’s Office at Launch, p. 80.
84. See the ruling in Camilleri v Malta, Application no. 42931/10, judgment of 22.1.2013, in particular para. 42 and para. 43. For further analysis see V. Mitsilegas, EU Criminal Law After Lisbon: Rights, Trust and the Transformation of Justice in Europe, chapter 4.
85. On the development of autonomous concepts in Europe’s area of criminal justice see V. Mitsilegas, ‘Managing Legal Diversity in Europe’s Area of Criminal Justice: The Role of Autonomous Concepts’, in R. Colson and S. Field (eds.), EU Criminal Justice and the Challenges of Legal Diversity: Towards A Socio-Legal Approach to EU Criminal Policy (Cambridge University Press, 2016), p. 125; and V. Mitsilegas, ‘Autonomous Concepts, Diversity Management and Mutual Trust in Europe’s Area of Criminal Justice’, 57 Common Market Law Review (2020), p. 45.
86. Zimmerman calls in this context for a reconceptualization of the principle of legality in a transnational field consisting of different legal systems – F. Zimmerman in P. Asp (ed.), The European Public Prosecutor’s Office – Legal and Criminal Policy Perspectives, p. 156. The foreseeability deficit in the decentralized design of the EPPO was pointed out by Vervaele and Luchtman – they noted that a mixture of EU and divergent national rules on investigative powers will lead to a situation in which citizens have great difficulty in assessing the scope of investigatory powers and their legality – and to situations in which executive powers enjoy great discretion in determining the applicable legal regime. J. Vervaele and M. Luchtman, ‘European Agencies for Criminal Justice and Shared Enforcement (Eurojust and the European Public Prosecutor’s Office)’, in 10 Utrecht Law Review (2014), p. 142.
87. M. Vervaele and J. Luchtman, 10 Utrecht Law Review (2014).
harmonization of procedural rights in criminal proceedings. The scope of these rights is circumscribed in Article 41 of the EPPO Regulation. Article 41 sets out a minimalist legal framework, with further action required by all actors at national level to ensure effective protection of fundamental rights in compliance with EU law and national law. The activities of the EPPO must be carried out in full compliance with the rights if suspects and accused persons as enshrined in the Charter, including the right to a fair trial and the rights of defence. Without prejudice to rights under EU law, suspects and accused persons as well as other persons involved in the proceedings of the EPPO must have all the procedural rights available to them under the applicable national law, including the possibility to present evidence, to request the appointment of experts or expert examination and hearing of witnesses, and to request the EPPO to obtain such measures on behalf of the defence. As a minimum, any suspect or accused in the criminal proceedings of the EPPO will have the procedural rights provided by EU law, including rights enshrined in the following EU defence rights Directives as implemented in national law such as: the right to interpretation and translation, the right to information, the right of access to a lawyer, the right to legal aid and the presumption of innocence and the right to remain silent.

The cross-reference of the EPPO Regulation to the EU procedural rights directives as the main EU law benchmark for the operations of the EPPO has been criticized on the grounds of protection being reliant on national law and the ensuing fragmentation of protection in the operations of the EPPO. Strong and focused enforcement by the European Commission in its role as guardian of the Treaties via the monitoring of Member States implementation would serve to address fragmentation concerns to some extent. Moreover, the CJEU has placed emphasis on enforcement of these standards in Member States by stressing the application of the principles of effectiveness and direct effect vis-à-vis key provisions on procedural rights.

88. Article 41(1) of Council Regulation (EU) 2017/1939.
89. Ibid., Article 41(3).
90. Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, [2010] OJ L 280/1.
91. Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, [2012] OJ L 142/1.
92. Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, [2013] OJ L 294/1.
93. Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, [2016] OJ L 297/1.
94. Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, [2016] OJ L 65/1.
95. T. Wahl, ‘The European Public Prosecutor’s Office and the Fragmentation of Defence Rights’, in K. Ligeti et al. (eds.), The European Public Prosecutor’s Office at Launch, p. 95.
96. Case C-216/14 Covaci, EU:C:2015:686; Joined Cases C-124/16 Ianos Tranca, C-188/16 Tanja Reiter and C-213/16 Ionel Opria, EU:C:2017:228.
97. Case C-416/20 PPU, TR (Generalsstaatsanwaltschaft Hamburg), judgment of 17 December 2020, para. 55.
98. For further analysis, including the enforcement potential of the Directives via the principles of effectiveness and direct effect, see V. Mitsilegas, EU Criminal Law After Lisbon: Rights, Trust and the Transformation of Justice in Europe, chapter 6.
together with the limits to judicial review the Regulation appears to introduce\textsuperscript{99} – is that EU secondary law on procedural rights does not cover all areas of EPPO activity.\textsuperscript{100} A wide range of EPPO acts are covered primarily by national law, with the EU acquis in the field being extremely limited. This is particularly the case with regard to the exercise of coercive measures and the gathering and admissibility of evidence. The EPPO Regulation contains very limited provisions on evidence\textsuperscript{101} and the EU legislators have not made use of the possibility offered to them by Article 82(2) TFEU to adopt legislation on minimum standards on the admissibility of evidence.\textsuperscript{102} Coercive acts by an EU agency are thus primarily governed by national law and by a limited body of EU rules, raising important issues of legal certainty and fundamental rights protection including in cross-border cases. It remains to be seen whether the launch and evolution of EPPO operations will have a spill-over effect into the adoption of further EU legislation in the field of criminal procedure.

\textbf{Judicial review}

The EPPO Regulation presents a significant rule of law deficit in terms of judicial protection by establishing very limited jurisdiction of the CJEU in reviewing EPPO acts. A minimalistic approach to the jurisdiction of the Court of Justice was adopted by the Commission in its initial proposal for the EPPO Regulation.\textsuperscript{103} The Commission proposal largely excluded the judicial review of the EPPO at EU level. Article 36 of the Commission’s draft stated clearly that when adopting procedural measures in the performance of its functions, the European Public Prosecutor’s Office would be considered as a national authority for the purpose of judicial review.\textsuperscript{104} It was further added that where provisions of national law were rendered applicable by this Regulation, such provisions would not be considered as provisions of Union law for the purpose of Article 267 TFEU.\textsuperscript{105} Shielding the EPPO from EU judicial scrutiny was also confirmed elsewhere in the Commission’s draft where judicial review of certain EPPO decisions were excluded in general.\textsuperscript{106} The Commission justified the exclusion of EU judicial review on three main grounds: on the perceived specificity and difference of the EPPO from all other Union bodies and agencies which requires special rules on judicial review;\textsuperscript{107} on the strong link between the operations of the EPPO and the legal orders of the Member States;\textsuperscript{108} and on the need to respect the principle of subsidiarity.\textsuperscript{109} The Commission’s approach towards the limited judicial review of the EPPO at EU level reflected its conception of the EPPO as a national and not a European authority for the

\begin{itemize}
  \item \textsuperscript{99} The Regulation does not allow national courts to send preliminary references to the CJEU on questions on the validity of the procedural acts of the EPPO with regard to national measures transposing Directives, even if this Regulation refers to them – (Recital 88(3)).
  \item \textsuperscript{100} T. Wahl in K. Ligeti (eds.), \textit{The European Public Prosecutor’s Office at Launch}, p. 96
  \item \textsuperscript{101} See Article 37 of Council Regulation (EU) 2017/1939.
  \item \textsuperscript{102} P. Caeiro and J. Amaral Rodrigues in K. Ligeti et al. (eds.), \textit{The European Public Prosecutor’s Office at Launch}, p. 59.
  \item \textsuperscript{103} Ibid., p. 59.
  \item \textsuperscript{104} Article 36(1) of Council Regulation (EU) 2017/1939.
  \item \textsuperscript{105} Ibid., Article 36(2).
  \item \textsuperscript{106} This applies to the decision to dismiss a case following a transaction – Article 29(4) of Council Regulation (EU) 2017/1939.
  \item \textsuperscript{107} Para 3.3.5, COM(2013) 534 final
  \item \textsuperscript{108} Ibid.
  \item \textsuperscript{109} Ibid., p. 5.
\end{itemize}
purpose of the judicial review of its acts.\textsuperscript{110} The Commission’s approach is highly problematic from a rule of law perspective. The possibilities allowed by the Treaty of Lisbon for specific rules concerning judicial review of EU agencies in general\textsuperscript{111} and the EPPO in particular (Article 86(4) TFEU) do not mean that rules of secondary EU law can limit substantially judicial review for EU agencies, including the EPPO. The exclusion of such review would be a direct attack to the rule of law in the European Union and would challenge the obligation of the EU to uphold fundamental rights as enshrined in the ECHR and the Charter, and in particular Articles 47 and 49 of the Charter. Exclusion of EU judicial review of the EPPO would in particular be hard to reconcile with the right to effective judicial protection, which has assumed a central role in EU constitutional law in recent years.\textsuperscript{112}

Notwithstanding these rule of law concerns arising from limiting the jurisdiction of the CJEU as regards the acts of the EPPO, the finally adopted EPPO Regulation has introduced limited changes to the Commission proposal introducing a very limited review of EPPO acts by the CJEU.\textsuperscript{113} This limited review is justified on the basis of the ‘exceptional’ nature of the EPPO in relation to other EU agencies,\textsuperscript{114} which is linked to the reliance of the EPPO on the legal orders of Member States in terms of the applicability of national law and criminal justice mechanisms.\textsuperscript{115} The Regulation relies on national courts and not the CJEU for the review of procedural acts of the EPPO that are intended to produce legal effects vis-à-vis third parties in accordance with the requirements and procedures laid down by national law.\textsuperscript{116} When national courts review the legality of such acts, they may do so on the basis of Union law, including the EPPO Regulation, and also on the basis of national law, which applies to the extent that a matter is not dealt with by the Regulation.\textsuperscript{117} The Regulation does allow national courts to send preliminary references to the CJEU but excludes questions on the validity of the procedural acts of the EPPO with regard to national procedural law or to national measures transposing Directives, even if this Regulation refers to them.\textsuperscript{118} Article 42 of the EPPO Regulation stresses from the outset that procedural acts of the EPPO that are intended to produce legal effects vis-à-vis third parties will be subject to review by the competent national courts in accordance with the requirements and procedures laid down by national law; the same applies to failures of the EPPO to adopt procedural acts which are intended to produce legal effects vis-à-vis third parties and which it was legally required to adopt under the Regulation.\textsuperscript{119}

\textsuperscript{110} Recital 37 of Council Regulation (EU) 2017/1939.
\textsuperscript{111} Article 263(5) TFEU.
\textsuperscript{112} See inter alia the rulings in the \textit{Kadi} litigation, and in particular the Court’s findings in \textit{Kadi II} – Joined Cases C 584/10 P, C 593/10 P and C 595/10 P, \textit{Commission v Kadi}, EU:C:2013:518.
\textsuperscript{113} See V. Mitsilegas and F. Giuffrida, ‘Judicial Review of EPPO Acts and Decisions’, in K. Ligeti et al. (eds.), \textit{The European Public Prosecutor’s Office at Launch} (Wolters Kluwer CEDAM, 2020), p. 115.
\textsuperscript{114} Recital 86 of Council Regulation (EU) 2017/1939.
\textsuperscript{115} Ibid., Recital 87.
\textsuperscript{116} Ibid., Recital 87. Emphasis added.
\textsuperscript{117} Ibid., Recital 88(2).
\textsuperscript{118} Ibid., Recital 88(3). This is, however, without prejudice to preliminary references concerning the interpretation of any provision of primary law, including the Treaties and the Charter, or the interpretation and validity of any provision of Union secondary law, including this Regulation and applicable Directives. In addition, this Regulation does not exclude the possibility for national courts to review the validity of the procedural acts of the EPPO which are intended to produce legal effects vis-à-vis third parties with regard to the principle of proportionality as enshrined in national law.
\textsuperscript{119} Ibid., Article 42(1).
The role of the CJEU in holding the EPPO judicially accountable remains limited in the EPPO Regulation. The EPPO Regulation grants the CJEU jurisdiction to give preliminary rulings in three cases: on the validity of procedural acts of the EPPO, in so far as such a question of validity is raised before any court or tribunal of a Member State directly on the basis of Union law; on the interpretation or the validity of provisions of Union law, including the EPPO Regulation; and on the interpretation of Articles 22 and 25 of the EPPO Regulation in relation to any conflict of competence between the EPPO and the national authorities. The Court’s 267 TFEU jurisdiction in the Regulation is somewhat more extensive compared with the Commission proposal. The latter prevented the Court from giving preliminary rulings concerning the validity of EPPO procedural acts altogether on the basis that those acts should not be considered acts of a body of the Union for the purpose of judicial review. The Commission’s approach over-emphasized the links of the EPPO with national legal orders, yet disregarded the fact that EPPO decisions are acts adopted by an EU agency – with the Commission’s approach treating EPPO acts as act by national authorities and effectively creating a European agency lying outside European judicial control. While the finally adopted text of the Regulation constitutes some improvement, the Court’s jurisdiction under Article 267 TFEU continues to be subject to additional conditions in the Regulation, maintaining a somewhat artificial distinction between national law and Union law in the operations of the EPPO. It is constitutionally questionable whether limits to Treaty-based jurisdiction of the CJEU can be imposed by secondary law.

A further rule of law deficit arises from the significant limits that the EPPO Regulation imposes on the CJEU jurisdiction under Article 263 TFEU. As mentioned above, the EPPO Regulation does not confer to the CJEU jurisdiction for procedural acts of the EPPO at the decentralized level, even if these acts affect the legal position of the individual concerned. Moreover, the EPPO Regulation limits considerably judicial review by the CJEU of the vast majority of EPPO acts adopted at the centralized level in Luxembourg. The CJEU has very limited role in actions for annulment of EPPO acts under Article 263 TFEU, covering only decisions of the EPPO to dismiss a case ‘in so far as they are contested directly on the basis of Union law’. However, the CJEU does not have jurisdiction under Article 263 TFEU on key EPPO decisions including the initiation of an investigation and a prosecution, the merging or reallocation of cases, and decisions on choice of

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120. The Court of Justice is also competent in any dispute concerning: (i) compensation for damage caused by the EPPO; (ii) arbitration clauses contained in contracts concluded by the EPPO; and (iii) staff-related matters (respectively, Articles 42(4), (5) and (6) of Council Regulation (EU) 2017/1939). The CJEU has jurisdiction on the dismissal of the European Chief Prosecutor or European Prosecutors (Article 42(7) of Council Regulation (EU) 2017/1939). Finally, pursuant to the fourth paragraph of Article 263 TFEU, the Court is competent to review EPPO administrative decisions (Article 42(8) of Council Regulation (EU) 2017/1939), e.g. decisions on data protection or the decisions of the College to dismiss the European Delegated Prosecutors.

121. Ibid., Article 42(2).

122. Recital 18 of COM(2013) 534 final.

123. Article 42(3) of Council Regulation (EU) 2017/1939. For a discussion of judicial review options for EPPO dismissal decisions, see J. Göhler, ‘To Continue or Not: Who Shall Be in Control of the European Public Prosecutor’s Dismissal Decisions?’, 6 New Journal of European Criminal Law (2015), p. 102.

124. Erbeznik notes that the text of the Regulation is silent on the question of a remedy against investigation as such and argues that such a remedy might be a requirement under Article 19(1) TEU – A. Erbeznik, ‘EU Criminal Law and the Way Forward in the Case of the Functions of the EPPO’, 27 Croatian Annual of Criminal Sciences and Practice (2020), p. 72. For a different view see Herrnfeld, who argues that the EPPOs decision to initiate an investigation is not, taken by itself, already ‘a procedural act intended to produce legal effects vis-a-vis third parties’ but rather a preparatory act: H.-H. Herrnfeld in H.-H. Herrnfeld et al. (eds.), pp. 231, para.37.
forum and conflicts of jurisdiction. All these decisions have a significant impact on the legal position of the defendant, meeting the standing criteria of Article 263 TFEU as their binding legal effects are capable – unlike the current approach regarding acts of OLAF – of affecting the interests of the applicant by bringing about a distinct change in its legal position. The lack of a remedy before the CJEU undermines effective judicial protection and the role of the defence, by leaving key EPPO decisions without a sufficient level of judicial scrutiny and accountability. While the approach of the Regulation has been justified on the basis that national courts provide together with the CJEU a system of complete legal remedies in EU law, it is questionable whether national courts, to the extent that they are granted jurisdiction by the EPPO Regulation, have the capacity and the powers at national level to provide effective judicial protection vis-à-vis decisions taken by the EPPO at the centralized level, including assessing meaningful scrutiny of choice of forum decisions. It is also questionable whether defence rights can be meaningfully upheld solely on the basis of the CJEU Article 267 jurisdiction. The limited provisions for judicial review generate a rule of law deficit which is exacerbated in decisions on choice of forum, where the position of the defendant becomes even more compromised. The final text of the Regulation essentially establishes an EU agency essentially without EU judicial control, a system of European investigation and prosecution without a European remedy.

Conclusion: Caught between co-operation and integration: hybridization of prosecution as a rule of law challenge

Monar’s hope that the establishment of the EPPO would signify a move from co-operation to integration has not been (yet?) fully fulfilled. While the adoption of the EPPO Regulation undoubtedly constitutes a landmark shift towards further integration in Europe’s area of criminal justice – by establishing for the first time an EU agency with coercive powers in criminal law – the establishment of this agency has not been backed up by a strong framework of EU rules to regulate its operations. What we have is a European agency established to protect a European interest, but operating not in a single European legal area on the basis of common European standards, but in the distinct national jurisdictions of participating Member States largely on the basis of national law. The establishment of the EPPO in those terms is an example of a process which Mireille

125. See, e.g., Case T-193/04, Tillack v Commission, EU:T:2006:292. For a critical overview of the limits of EU judicial review of OLAF’s acts, see V. Mitsilegas, EU Criminal Law After Lisbon: Rights, Trust and the Transformation of Justice in Europe, chapter 4.
126. See H.-H. Herrnfeld in H.-H. Herrnfeld et al. (eds.), European Public Prosecutor’s Office. Article-by-Article Commentary p. 439, para. 71.
127. Herrnfeld notes that the future role of the CJEU in ensuring judicial protection against procedural acts of the EPPO will thus largely depend on the circumstances under which the national courts will consider a question of validity of a procedural act of the EPPO being ‘raised…directly on the basis of Union law’ – ibid., p. 440, para. 72.
128. For similar concerns see M. Panzavolta in L. Bachmeier Winter (ed.), The European Public Prosecutor’s Office. The Challenges Ahead, p. 80 and S. Ruggeri in L. Bachmeier Winter (ed.), The European Public Prosecutor’s Office. The Challenges Ahead, p. 214.
129. See also H.-H. Herrnfeld in H.-H. Herrnfeld et al. (eds.), European Public Prosecutor’s Office. Article-by-Article Commentary, p. 439, para. 72.
130. On the basis of this structure, Giuffrida has called the EPPO a ‘king without a kingdom’: it can adopt relevant decisions without a common legal area where it can exercise its powers and without even relying on a homogenous, European corpus of rules: F. Giuffrida, The European Public Prosecutor’s Office: King Without Kingdom?, CEPS Research report No 2017/03, February 2017.
Delmas-Marty has called the hybridization of prosecution, with the European Prosecutor will function under the jurisdiction of national courts. Delmas-Marty is also of the view that harmonization of national rules (albeit minimal) is inevitable in this context in a process which will lead to further readjustments in national systems. In this model of hybrid prosecution, the legal framework underpinning EPPO operations is problematic in terms of detail and legal certainty. The provisions regulating the exercise of the competence and powers of the EPPO are at times elliptical, vague and subject to multiple interpretations. At the same time, key EPPO operations are governed not by EU, but by national law. Then unprecedented coercive powers conferred to an EU agency are not accompanied by an adequate level of judicial protection at EU level, and arguably at the national level as well. Viewed in those terms, the implementation of the EPPO Regulation may lead a serious rule of law deficit. In negotiations focusing largely on the balance between supranational and intergovernmental elements in the establishment of the EPPO on the one hand, and concerns to achieve a system which will be credible towards effective prosecution on the other, respect for the rule of law and fundamental rights, including the rights of the defence, appear as an afterthought in the text of the Regulation. The half-way house between co-operation and integration has also led to a half-way house regarding safeguarding the rule of law.

With EPPO becoming operational, a key question is whether a move towards further integration is feasible and whether such a move would lead to stronger protection of the rule of law. The initiation of EPPO investigations and prosecutions will generate a number of questions on the interpretation of the provisions of the Regulation and on the protection of the rights of individuals under investigation and prosecution which will have to be tackled by national courts and by the CJEU. These questions will multiply if the material competence of the EPPO is extended to cover also terrorism and other forms of serious crime. In the first instance, the role of national courts and the CJEU in developing the EPPO legal framework in a rule of law compliant manner will be crucial. In key cases, the CJEU may have to overcome the limits to its jurisdiction established by secondary law in the EPPO Regulation via extending its jurisdiction in order to fully comply with Article 47 of the Charter and with the rule of law. The CJEU will have opportunities to develop standards and benchmarks underpinning the EPPO operations, including by providing to the extent possible a uniform interpretation of key provisions of the Regulation through their development of autonomous concepts of EU law. Provisions related to the determination of the exercise of the competence of the EPPO and on choice of forum criteria are prime candidates for assuming an autonomous meaning under EU law.

In this process, the spotlight will be on ensuring effective defence rights and representation, both at the domestic and at the cross-border level. Testing the EPPO Regulation in courts and casting light on the fundamental rights and rule of law issues the EPPO operations may entail may raise the prospect, in the medium term, for the need to underpin these operations by a more detailed body of EU rules, especially in the field of criminal procedure, which will incorporate the CJEU case-law and provide a firmer legal ground for the EPPO to operate. It may also put back on the table the discussion on the extent of the role of the CJEU in scrutinizing EPPO operations, and whether the establishment of a specialized EU criminal court and/or a first instance chamber would become a necessity. As it has been demonstrated in other areas of European criminal law (notably

131. M. Delmas-Marti, Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World (Hart Publishing, 2009), p. 69.
132. Ibid., p. 68.
in the operation of the European Arrest Warrant) that the adoption of enforcement-focused EU law may lead, in an incremental manner and with a spill-over effect, to the extension of EU competence and the adoption of EU legislation in aspects of criminal law which had been viewed traditionally as no-go areas for the EU in terms of state sovereignty. In this manner, the launch of the EPPO and the legal issues its operations will raise will help fulfil Monar’s ambition of a move from cooperation to integration in European prosecution. Further EU action on the existence and exercise of defence rights, effective remedies and provisions underpinning the exercise of EPPO powers (including evidence and coercive powers) will be key to enhance the rule of law framework of EPPO operations.

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