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THE STRUCTURE OF THE EPPO: FEATURES AND CHALLENGES

*Prior to the adoption of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office, the structure of the European Public Prosecutor's Office was highly debatable because of its status, powers and relations with other EU bodies and national authorities. This article analyses the EPPO structure originally conceived in the Commission's Proposal for an EPPO Regulation, then moves on to the Office's structure as is currently envisaged in the EPPO Regulation, explaining the differences. This structure poses two challenges: the (claimed) independence of the EPPO in those Member States where public prosecutors are not entirely independent of the executive, and the (potentially) complex implementation of the EPPO Regulation in those systems where the investigating judge (*juge d'instruction*) still plays a prominent role in criminal investigations and prosecutions. It can be concluded that the EPPO Regulation may bring changes in national legal orders that go well beyond the limited field of the protection of the Union's financial interests.*

Keywords: The European Public Prosecutor's Office, EPPO, EPPO structure, independence of prosecutors, EPPO regulation

1. INTRODUCTION

The structure of the European Public Prosecutor's Office (EPPO or the "Office") was one of the most debated issues during the negotiations that led to the adoption of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (hereinafter: "the EPPO Regulation").[1] As it deter-

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[1] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ("the EPPO") [2017] OJ L283/1.

mines the status and powers of the Office, as well as its relations with other EU bodies and national authorities, it is unsurprising that the structure of the EPPO was among the bones of contention. In order to be successful and achieve its mission, the Office should have an agile structure that allows it to act swiftly and effectively. How these requirements should be put into practice, however, was and still is contentious and open to debate. Furthermore, discussions on the Office's structure brought to the fore broader issues of legitimacy of the EPPO. Since the real need and added value of the EPPO was largely debated before and during the negotiations,[2] the creation of a body that seems to replicate the structure of another existing EU criminal law agency (that is, Eurojust) may make the establishment of the EPPO not easily justifiable in the eyes of EU citizens. Moreover, the EPPO structure is a litmus test of the Member States' desire to surrender their sovereignty in the field of criminal law: the more the structure of the Office interweaves with the structure of national prosecuting authorities, the more the Member States (have the impression that they) keep control of their criminal justice systems, and vice versa.

Against this backdrop, the aim of this contribution is, first, to briefly discuss the structure of the EPPO as was originally conceived in the Commission's Proposal for an EPPO Regulation,[3] which was tabled in July 2013 (section 2). The analysis will then move on to the Office's structure as is currently envisaged in the EPPO Regulation, explaining the differences, and the reasons thereof, with the Commission's Proposal (section 3). Section 4 will focus on two challenges that this structure poses, and namely the (claimed) independence of the EPPO in those Member States where public prosecutors are not entirely independent of the executive (section 4.1), and the (potentially) complex implementation of the EPPO Regulation in those systems where the investigating judge (*juge d'instruction*) still plays a prominent role in criminal investigations and prosecutions (section 4.2). Section 5 draws some conclusions.

[2] See K Ligeti and M Simonato, "The European Public Prosecutor's Office: Towards a Truly Prosecution Service?" (2013) 4 *New Journal of European Criminal Law* 7, 7–10; K Ligeti, "The European Public Prosecutor's Office" in V Mitsilegas, M Bergström and T Konstadinides (eds), *Research Handbook on EU Criminal Law* (Edward Elgar 2016) 480; F Giuffrida, "The European Public Prosecutor's Office: King without Kingdom?" CEPS Research Report No 2017/03 (2017) <www.ceps.eu/wp-content/uploads/2017/02/RR2017-03_EPPO.pdf> accessed 2 February 2020, 2ff.

[3] Commission, "Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office" COM(2013) 534 final (hereinafter: the "Commission's Proposal").

2. THE COMMISSION'S PROPOSAL: A LIGHT AND HIERARCHICAL STRUCTURE

One of the most ambitious parts of the Commission's Proposal related to the structure of the EPPO.[4] The configuration of this structure was duly studied by the Impact Assessment Study preceding the adoption of the Commission's Proposal.[5] From the various models advocated,[6] the Commission's Proposal (in accordance with the outcome of the Impact Assessment) opted for the so-called "decentralised/integrated" model. The denomination "integrated" has a double meaning: from a structural point of view the integrated EPPO would consist of a "head" at the central level and "arms" in the form of delegates in the Member States. From the viewpoint of available resources, the integrated model would benefit from the existing resources both at the national and EU level.

This model, which finds a blueprint in the *Corpus Juris*,[7] relies on a close-knit steering structure at the supranational level and a decentralised network of European Delegated Prosecutors (EDPs) in the Member States. Accordingly, the EPPO was conceived as a hierarchically organised EU body composed of a European Public Prosecutor and his or her four deputies at the central level, and the EDPs in the Member States.[8] No collegial body was foreseen at the

[4] Ligeti, "The European Public Prosecutor's Office" (n 2), whereupon the following remarks draw.

[5] Commission, "Staff Working Document. Impact Assessment Accompanying the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office" SWD(2013) 274 final, 33 (hereinafter: "EPPO Impact Assessment").

[6] The debate on the structure of the EPPO historically focused on four models: i) the so-called "Eurojust plus" model; ii) the college-type model; c) the decentralised/integrated model; and iv) the centralised model. For an in-depth analysis of the different models see Ligeti and Simonato (n 2) 10ff. See also A Met-Domestici, "The EPPO at the European Level: Institutional Layout and Consequences of the Links with the National Level" in C Nowak (ed), *The European Public Prosecutor's Office and National Authorities* (Wolters Kluwer & CEDAM 2016) 35ff.

[7] Corpus Juris *Introducing Penal Provisions for the Purpose of the Financial Interests of the European Union*, under the direction of M Delmas-Marty (Economica 1997). The first version of the *Corpus Juris* was then reworked by the study group that drafted it, and the second edition ("*Corpus Juris* 2000") can be found in M Delmas-Marty and JAE Vervaele (eds), *The Implementation of the* Corpus Juris *in the Member States* (Intersentia 2000), along with some studies on the compatibility of national legal systems with that text. The structure of the European Public Prosecutor as conceived in that project can be found in Art 18 of the *Corpus Juris* 2000.

[8] Art 6(1) and (2) of the Commission's Proposal. For further remarks on the EPPO structure as envisaged in the Commission's Proposal, see K Ligeti and A Weyembergh, "The European Public Prosecutor's Office: Certain Constitutional Issues" in LH Erkelens, AWH Meij and M Pawlik (eds), *The European Public Prosecutor's Office. An Extended Arm or a Two-Headed Dragon?* (TMC Asser Press & Springer 2015) 61–62.

central level. Pursuant to the Commission's Proposal, the EDPs would be in charge of the investigations and prosecutions under the "direction and supervision"[9] of the European Public Prosecutor. The European Public Prosecutor retained, under some circumstances, the power to conduct the investigation directly and reallocate the case to another EDP.[10]

This system had thus two features. First, there was a strong hierarchical relation between the central and the peripheral level.[11] There was a clear chain of command between the EPPO central office, the EDPs, and the competent national authorities. The European Public Prosecutor had the power to instruct the EDPs with regard to offences in the remit of the EPPO. The EDPs might then undertake the investigation measures themselves or instruct the competent national law enforcement authorities to do so.[12] The national law enforcement authorities were to follow the instructions of the EDP and execute the investigation measures that the EDPs instructed them to carry out.[13] The EPPO had therefore binding powers vis-à-vis national authorities. As the next section will demonstrate, the Regulation has watered down the "centralised, hierarchical and vertical model of European prosecution"[14] that the Commission had put forward and passionately defended. It will thus remain an unanswered question whether the model endorsed by the Commission would have turned out to be effective in practice, as one may wonder whether that small central office would be capable of steering investigations on PIF offences all over Europe.

Secondly, the EDPs were supposed to wear a "double-hat", as they were at the same time part of the EPPO and remained integrated into the judicial systems of their respective Member States. The "double-hat" approach had been advocated ever since the *Corpus Juris*.[15] Although the EDPs would work for the EPPO on cases of crimes affecting the Union's financial interests ("PIF crimes"),[16] they may, however, perform national investigations in relation to

[9] Art 6(4) of the Commission's Proposal. Cf also Art 18(1) of the Commission's Proposal, according to which the EDPs "shall lead the investigation on behalf of and under the instructions of the European Public Prosecutor".

[10] Art 18(5) of the Commission's Proposal.

[11] Apart from the powers to conduct investigations and reallocate cases, the European Public Prosecutor had an ordinary power to "instruct" the EDPs (Art 18(4) of the Commission's Proposal).

[12] Art 18(1) of the Commission's Proposal.

[13] ibid.

[14] V Mitsilegas, *EU Criminal Law after Lisbon* (Hart 2016) 105.

[15] See Art 18(3) of the *Corpus Juris* 2000.

[16] PIF stands for "*protection des intérêts financiers*". The crimes over which the EPPO is competent are defined in the so-called "PIF Directive" (Directive 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 L198/29).

other offences.[17] According to the Commission, the double-hat model is the best guarantee to ensure both coherent (through central and hierarchical decision-making) and effective prosecutorial action (through local law enforcement, the proximity of the EDPs to the field work of the investigation, and direct access to the national resources and law enforcement agencies).

This model should also ensure that the EPPO receives information about cases that are within its competence. Based on the experience of Eurojust and Europol it seems indeed that national authorities are reluctant to share "their" information with European bodies. Without sufficient information, however, European bodies – with the EPPO on the frontline – cannot exploit their full potential. As will be discussed in section 4, the double-hat model raises, however, some concerns as to the independence of the EPPO, since the EDPs are confronted with the dilemma of serving two masters simultaneously.[18]

The choice of the Commission on the structure of the EPPO, as well as other choices that cannot be examined in this contribution such as the introduction of the concept of "single legal area"[19] or the exclusive competence of the EPPO on PIF offences,[20] show that the Commission sought to balance the ambition of setting up a new European judicial actor and the reality of political negotiations. It made considerable efforts to consult national governments and national and European organisations of practitioners in order to pave the way.[21] Nevertheless, the Proposal found a mixed reception. After all, the centralised model that the Commission supported had a strong symbolic value and betrayed "a lack of trust towards the capacity or willingness of national authorities to combat effectively fraud against the budget of the Union".[22]

Unsurprisingly, therefore, the Commission's Proposal was met with some resistance by national parliaments and governments. As for the former, the Commission's Proposal raised the objection of 14 national parliaments, which,

[17] Art 6(6) of the Commission's Proposal.

[18] Ligeti and Simonato (n 2) 16.

[19] Art 25(1) of the Commission's Proposal. On the implications of the "single legal area" see, eg, S Allegrezza and A Mosna, "Cross-Border Criminal Evidence and the Future European Public Prosecutor. One Step Back on Mutual Recognition?" in L Bachmaier Winter (ed), *The European Public Prosecutor's Office. The Challenges Ahead* (Springer 2018) 143ff.

[20] Art 11(4) of the Commission's Proposal. For some extensive remarks on the issue of whether the EPPO should have exclusive or shared competence on PIF crimes see, eg, 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* (Stiftelsen Skrifter utgivna av Juridiska fakulteten vid Stockholms universitet 2015) 60–68. Mitsilegas refers to the EPPO's exclusive competence and the notion of "single legal area" as "two strong federal elements" in the Commission's vision of the EPPO (Mitsilegas (n 14) 109).

[21] An extensive overview of the preliminary consultations carried out in 2012 and 2013 is provided in the EPPO Impact Assessment (n 5) 9.

[22] ibid.

in accordance with the Early Warning System laid down in Article 7 of Protocol No 2 to the Lisbon Treaty on the application of the principles of subsidiarity and proportionality, posited that the Commission's Proposal did not comply with the subsidiarity principle and thus triggered the so-called "yellow card" procedure.[23] The Commission was then forced to review its Proposal and, on 27 November 2013, it issued a Communication announcing that it maintained its initial Proposal without any amendment.[24] One section of this Communication is devoted to the parliaments' objections concerning the structure of the EPPO. In particular, the French Senate and the Romanian and Maltese Chambers of Deputies emphasised that the decision by the Commission not to foresee a collegial structure for the EPPO was contentious.

The Commission, however, rebutted these claims by adducing three arguments. First, it contended that the EPPO's structure seems to concern the principle of proportionality rather than that of subsidiarity.[25] Second, the Commission argued that the choice between a collegial structure (invoked by the Member States) and a hierarchical structure (envisaged by the Commission) would not change the centralised nature of the EPPO, which would remain – in both cases – a body of the EU: "the comparison between the decentralised model of the proposal and the collegial structure preferred by a number of national Parliaments is *not* a comparison between action at the Union level and action at the Member State level, but a comparison between *two possible modes of action* at the *Union* level".[26] Therefore, in both cases, it cannot be said that the subsidiarity principle is violated. Finally, the Commission acknowledged that such principle can come into play also with regard to the Office's structure, since this structure should be conceived in a way that allows the EPPO to achieve its mission, so that it can be argued that the proposed action (stronger protection of the Union budget) can "be better achieved at Union level".[27] In that respect, the Commission "considers that creating the European Public Prosecutor's Office with a fully-fledged collegial structure could hamper its

[23] For some remarks on this "yellow card" procedure see, for instance, I Wieczorek, "The EPPO Draft Regulation Passes the First Subsidiarity Test: An Analysis and Interpretation of the European Commission's Hasty Approach to National Parliaments' Subsidiarity Arguments" (2015) 16 *German Law Journal* 1247; D Fromage, "The Second Yellow Card on the EPPO Proposal: An Encouraging Development for Member State Parliaments?" (2016) 35 *Yearbook of European Law* 1.

[24] Commission, "Communication on the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office with regard to the principle of subsidiarity, in accordance with Protocol No 2" COM(2013) 851 final.

[25] ibid 10.

[26] ibid (emphasis added).

[27] Art 5(3) TEU.

efficiency, rendering its decision-making less efficient".[28] Hence, the Commission did not consider it necessary to alter the Office's structure as envisaged in the initial Proposal.

As for the national governments, it was likewise clear from the beginning that the negotiations in the Council would not be easy and that Member States wanted several concessions before agreeing to the setting up of the EPPO. Precisely the Office's structure was a contested matter. It turned out that even those Member States that were ready to discuss the EPPO refused the degree of centralisation envisaged in the Commission's Proposal.[29] In particular, they wished to replace the hierarchical structure by a collegiate model in order to limit the genuine decisions of the EPPO to a few cases (mostly dismissal and forum choice), and, as argued immediately below, they managed to find an agreement on such a collegiate structure.

3. THE REGULATION

Unlike the Commission's Proposal, the final text of the Regulation lays down a complex design for the EPPO with a heavy structure, which, coupled with the extensive reliance of the EPPO on national law,[30] seems to entail a rather light intrusion in the procedural autonomy of the Member States.

The Regulation retains the idea of a single office – "indivisible Union body"[31] – with a central office and decentralised enforcement in the Member States.[32] As in the Commission's Proposal, the decentralised level is represented by the EDPs,[33] who shall have the same powers as national prosecutors[34] and still wear a "double hat". They can thus continue to conduct national investigations in relation to non-PIF offences,[35] yet some Member States have

[28] COM(2013) 851 final (n 24) 10. The Commission adds that, precisely because public prosecutor's offices need to take swift decisions, it is rare that, at the national or international level, they are organised in a collegial way (ibid 10–11).

[29] Council, "Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office – Report on the State of Play", Council doc 18120/13, 4.

[30] See more in Giuffrida (n 2). Also, the Commission's Proposal envisaged an EPPO that relied extensively on national law (see Ligeti and Weyembergh (n 8) 64ff).

[31] Art 8(1) of the EPPO Regulation. Unless otherwise specified, the provisions mentioned below are EPPO Regulation Articles or Recitals.

[32] Art 8(2).

[33] Art 8(4).

[34] Art 13(1).

[35] See more in Art 13(3).

already decided against this option.[36] In each Member State, there will be two or more EDPs,[37] according to the expected casework they will have.[38]

The central office, which will be based in Luxembourg, is composed of the European Chief Prosecutor and his or her deputies,[39] the European Prosecutors (one per each Member State that participates in the EPPO enhanced cooperation), the College, and some Permanent Chambers.[40] The new structure is not only reminiscent of that of Eurojust but also reveals an increased complexity in the structure of the EPPO, with additional layers of prosecutors being introduced in between the central EPPO collegiate structure (which will be led not by a "European Public Prosecutor" but by a "European Chief Prosecutor") and the work of EDPs at the national level.

As mentioned, the Commission opposed this intergovernmental collegial structure, as it could seriously hamper the independence of EPPO to take decisions on prosecutions and slow down the decision-making process of the Office. Furthermore, a collegial structure may allow pursuing national interests in the field of judicial cooperation, in this way contravening the need to create a new and independent EU public prosecutor's office. This collegial model echoes the intergovernmental approach of the pre-Lisbon cooperation in criminal matters which is neither compatible with the current legal framework nor in line with the objective to develop a genuine EU wide prosecution policy. To a certain extent, this model may recall the integrated model adopted for certain specialised investigation and prosecution services by some European civil law jurisdictions (e.g., the Italian *Direzione Nazionale Antimafia e Antiterrorismo*, which is organised as a central national office and twenty-six coordinated territorial offices, the *Direzioni Distrettuali Antimafia*). However,

[36] For instance, France and Belgium are likely not to rely on this option.

[37] Art 13(2).

[38] The procedure to decide the number of EDPs in each country is the following: "The European Chief Prosecutor shall, after consulting and reaching an agreement with the relevant authorities of the Member States, approve the number of European Delegated Prosecutors, as well as the functional and territorial division of competences between the European Delegated Prosecutors within each Member State" (Art 13(2)).

[39] In October 2019, after some tense political arm wrestling, the European Parliament and the Council finally agreed on the name of the first European Chief Prosecutor, who will be the former chief of the Romanian Anti-Corruption Directorate, Laura Codruța Kövesi (Council, "EU Public Prosecutor's Office - EPPO: Council confirms Laura Codruţa Kövesi as first European chief prosecutor" (press release) (14 October 2019) <www.consilium.europa.eu/en/press/press-releases/2019/10/14/eu-public-prosecutor-s-office-eppo-laura-codruta-kovesi-to-become-the-first-european-chief-prosecutor/> accessed 2 February 2020). The procedure to appoint the European Chief Prosecutor is governed by Art 14 of the EPPO Regulation.

[40] Art 8(3).

the EPPO represents a *sui generis* structure, due to the heavy reliance of the Regulation on the national law of the Member States.[41]

The Regulation gives a lot of weight to the Permanent Chambers, the number of which is to be decided by the internal rules of procedure of the EPPO.[42] These are small collegial organs, which are composed of two European Prosecutors and the European Chief Prosecutor (or his or her deputy) as chair and are entitled to monitor and direct the investigations and prosecutions conducted by the EDPs.[43] In contrast, the College has mostly management functions and shall *not* take operational decisions in individual cases, but may take decisions related to strategic matters or matters of general application arising out of individual cases.[44] The European Chief Prosecutor is the head of the EPPO and represents the Office vis-à-vis the other EU bodies and agencies, as well as the Member States.[45] The European Chief Prosecutor has limited involvement in investigations and prosecutions, mostly in his or her capacity as chair of the Permanent Chambers.[46]

It follows that the EDPs will be the kingpins of the Office's investigations, which will be mostly carried out pursuant to national law and under the direction of the Permanent Chamber.[47] EDPs will also be supervised by the European Prosecutor of their same Member State, who is part of the central Office. The European Prosecutors shall therefore "function as liaisons and information channels between the Permanent Chambers and the European Delegated Prosecutors in their respective Member States of origin. They shall monitor the implementation of the tasks of the EPPO in their respective Member States, in close consultation with the European Delegated Prosecutors".[48] The European Prosecutors have been included in the EPPO structure for reasons of efficiency, since the national criminal justice systems "still vary to a considerable degree, and it is clear that only a prosecutor with his or her background in

[41] K Ligeti, "The Place of the Prosecutor in Common Law and Civil Law Jurisdictions" in DK Brown, J Iontcheva Turner and B Weisser (eds), *The Oxford Handbook of Criminal Process* (OUP 2019) 159.

[42] Art 10(1). The internal rules of procedure shall be adopted by the College by a two-thirds majority, upon the proposal of the European Chief Prosecutor (see Art 21).

[43] Art 10(2).

[44] Art 9(2). This is therefore a remarkable difference between the EPPO and Eurojust, since the Eurojust College has operational powers (see more in Giuffrida (n 2) 14–15).

[45] Art 11.

[46] In addition, the European Chief Prosecutor is competent to make a reasoned written request for lifting privileges or immunities, when such privileges or immunities present an obstacle to a specific investigation being conducted (see Art 29).

[47] Cf recital 30 of the EPPO Regulation. In exceptional cases, the European Prosecutor may be authorised by the competent Permanent Chamber to conduct the investigation personally (see Art 28(4)).

[48] Art 12(5).

a given legal system will be able to know exactly what actions are most appropriate and efficient in that given state".[49] On top of that, the Regulation also clarifies that, when the national law of a given Member State provides for the internal review of certain acts within the structure of a national prosecutor's office, it is for the supervising European Prosecutor to carry out the review of such acts taken by the EDPs of their same Member State.[50]

During the investigations, the role of the Permanent Chambers is mainly limited to "crisis situations": if the EDP has not decided to do so, they instruct him or her to initiate the investigations or to evoke the case;[51] if the EDP does not follow the instructions of the central Office, they can reallocate the case to another EDP;[52] if EDPs do not agree on the measures to be adopted in cross-border cases, the Permanent Chambers decide on the issue.[53] At the end of the investigations, the division of competence is reversed and the key decisions on the proceedings – bringing the case to a court or dismissing it, relying on simplified prosecution procedures, or sending the case back to national authorities[54] – are taken by the Permanent Chambers upon proposal of the EDPs.[55]

As the Permanent Chambers are composed of three prosecutors who come from different countries from those of the EDPs who investigate and prosecute PIF offences, one may wonder whether the Chambers will truly be in a position to steer and decide the cases that will be assigned to them and whether they will have the necessary expertise and information to deviate from the EDPs' decisions.[56] In the literature, Đurđević highlights that the language issue will be of crucial importance in the framework of EPPO activities and may even bring about a violation of the right to a fair trial: "it can be realistically presupposed that [the members of the Permanent Chamber] will not speak the language of the case and although this is … an unsurmountable barrier for the

[49] Intervention of Ivan Korčok, President-in-Office of the Council during the debate of the European Parliament on the EPPO and Eurojust of 4 October 2016, the transcript of which is available at <www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20161004&secondRef=TOC&language=en> accessed 2 February 2020.

[50] Art 12(4).

[51] Art 26(3).

[52] Art 28(3)(b).

[53] Art 31(7) and (8). See Giuffrida (n 2) 20.

[54] Arts 34–36, 39, and 40.

[55] When the EDP suggests bringing the case to judgment, however, the Permanent Chamber cannot decide to dismiss it (Art 36(1)).

[56] It ought to be noticed that, however, in addition to the members of the Permanent Chambers, the European Prosecutor who is supervising an investigation or a prosecution shall also participate in the deliberations of the Permanent Chamber, with a few exceptions (see Art 10(9)).

functioning of the EPPO, at this point there is no solution either in the Regulation or in any other document of the Commission".[57]

More broadly, since the Regulation is strongly dependent on national law and creates a fragmented system of European investigation and prosecution, it remains to be seen whether the extensive reliance on national law and authorities will be the Achilles' heel of the EPPO or instead help grease the wheels of the new Office and contribute to the achievement of its mission. The risk looming large in this scenario is that the establishment of the EPPO may turn out to provide little added value if the Office will not be able to significantly depart from the views of national authorities and will thus not change the status quo in a significant way to improve the protection of the Union budget.[58]

4. TWO CHALLENGES STEMMING FROM THE EPPO STRUCTURE

4.1. Independence of the EPPO and its members

Albeit accountable to the European Parliament, the Commission and the Council for its general activities,[59] the EPPO shall be independent.[60] As Article 6 of the Regulation states, the members of the Office (namely, the European Chief Prosecutor and deputies, the European Prosecutors, the EDPs, the Administrative Director, and the staff of the EPPO) shall "act in the interest of the Union as a whole, as defined by law, and neither seek nor take instructions from any person external to the EPPO, any Member State of the European Union or any institution, body, office or agency of the Union in the performance of their duties under [the] Regulation".[61] The independence of the EPPO

[57] Z Đurđević, "Legislative or Regulatory Modifications to be Introduced in Participant Member States to the Enhanced Cooperation" in M Fidelbo (ed), *International Conference on Enhanced Cooperation for the Establishment of the EPPO* (Fondazione Basso 2018) 103.

[58] K Ligeti, M João Antunes and F Giuffrida, "Introduction" in K Ligeti, M João Antunes and F Giuffrida (eds), *The European Public Prosecutor's Office at Launch. Adapting National Systems, Transforming EU Criminal Law* (Wolters Kluwer & CEDAM 2020) 6–7.

[59] Art 6(2), according to which the EPPO shall issue annual reports on its general activities, which are to be transmitted to the European Parliament, national parliaments, Council, and Commission (Art 7(1)). In addition, pursuant to Art 7(2), the European Chief Prosecutor shall "appear once a year before the European Parliament and before the Council, and before national parliaments of the Member States at their request, to give account of the general activities of the EPPO, without prejudice to the EPPO's obligation of discretion and confidentiality as regards individual cases and personal data".

[60] Art 6(1).

[61] ibid, where it is also added that the Member States and the institutions, bodies, offices and agencies of the Union "shall respect the independence of the EPPO and shall not seek to

has been a central theme ever since the idea of establishing a supranational prosecutor was born. In the academic debate, in particular, clear support for an independent EPPO dates back to the *Corpus Juris*, which expressly advocated an independent EPPO and stressed the need to exclude the risk of political interference.[62]

The rules for the appointment of the European Chief Prosecutor and the European Prosecutors limit eligibility to active members of public prosecution services and the judiciary and should, in principle, ensure a sufficient degree of independence of the appointees.[63] Dismissal from the function is possible only if the Court of Justice – upon referral by the Commission, Council or European Parliament – finds that the European Chief Prosecutor or a European Prosecutor is no longer able to perform his or her duties or is guilty of serious misconduct.[64] One may however wonder whether the external independence of the EPPO can be fully safeguarded by the structure at the central level. Some concerns may be raised in that regard, as the "horizontalisation"/"collegialisation" of the central level can represent a way to introduce an intergovernmental logic in the operation of the Office and an indirect influence by the Member States.[65]

In addition, the Regulation requires that the independence of the EDPs shall be beyond doubt, even when they potentially have a double hat.[66] This choice is not so obvious if one bears in mind how public prosecutor offices are organised at the national level. By and large, three general approaches to the status of the public prosecutors may be sketched: i) systems in which the public prosecutor is attached to the executive power; ii) systems in which the public

influence it in the exercise of its tasks". For further remarks on the EPPO independence see, for instance, A Martínez Santos, "The Status of Independence of the European Public Prosecutor's Office and Its Guarantees" in Bachmaier Winter (ed) (n 19) 1–23; M João Antunes and N Brandão, "EPPO Independence and Accountability" in Ligeti, João Antunes and Giuffrida (eds) (n 58) 17–22.

[62] Art 18(2) of the *Corpus Juris* 2000.

[63] Significantly, appointments are non-renewable. See Arts 14(1) (European Chief Prosecutor) and 16(3) (European Prosecutors). This should reduce the risk of the European Chief Prosecutor or European Prosecutors indulging in obliging or opportunistic attitudes in the hope of being reappointed. For a critique, considering the complex structure of the Regulation, see JAE Vervaele, "Criminal Investigation and Prosecutions by a European Public Prosecutor's Office in the EU: Di Meliora" in R Kert and A Lehner (eds), *Vielfalt des Strafrechts im internationalen Kontext. Festschrift für Frank Höpfel zum 65. Geburstag* 673.

[64] Arts 14(5) (European Chief Prosecutor) and 16(5) (European Prosecutors).

[65] K Ligeti, "The Difficult Balance between the Different Actors Involved and the Strategical Control over the Investigation at National Level" in Fidelbo (ed) (n 57) 99. For instance, Mitsilegas notes that the introduction of the Permanent Chambers in the EPPO structure "is a clear signal to ensure ownership of the process by Member States" (Mitsilegas (n 14) 109).

[66] Art 17.

prosecutor is formally embedded in the judiciary order and independent from the executive power; and iii) systems in which the prosecutor is considered as a *sui generis* actor exercising a judicial-executive function in a position of complete independence from those branches of government.[67]

The first approach, based on a hierarchical relationship between the public prosecutor and executive power, represents a typical (although not exclusive) feature of the Napoleonic tradition[68] and can still be retraced in several continental systems such as Belgium, France, and the Netherlands. In principle, such a relationship implies the power for the government – normally the Minister of Justice – to issue orders or directives to the public prosecutor in regard to general aspects of prosecution policy or even individual cases in some circumstances. In general terms, the power of the Minister to order or direct the action of the public prosecutors is considered as a necessary counterpart of his or her political accountability for the prosecutorial policy. At the same time, however, given the sensitive nature of criminal enforcement, it may be seen as a challenge to the objectivity of the exercise of the prosecutorial function.[69]

In the countries where this approach is endorsed, the independence of the EDPs seems squarely incompatible with national principles and rules. In these Member States, therefore, national implementing legislation will have to decide how to exclude the power of the Ministry of Justice to give orders or instructions in specific cases; how to exclude reporting obligations to the Ministry on ongoing PIF investigations; and how to adequately regulate disciplinary powers in order to avoid any risk of indirect interferences. The issue of the independence of the EDPs, who remain embedded in national prosecuting structures but work under the direction – and as part – of an EU body, was very contentious in the Netherlands. This country decided to join the enhanced cooperation on the EPPO only at a later stage, i.e. after the Regulation had been approved,[70] and had taken a critical stance towards the independence of the EDPs, which runs counter to the principle according to which the Dutch

[67] Ligeti, "The Place of the Prosecutor" (n 41) 141, whereupon the following remarks draw.

[68] The strong hierarchical dependence of the prosecutor under the Napoleonic tradition was historically counterbalanced by the independent status of the investigating judge (*juge d'instruction*), the role of which within the framework of EPPO activities is discussed in section 4.2 below.

[69] For an overview of the rules on independence and accountability of public prosecutors in different European countries see, for instance, M Zwiers, *The European Public Prosecutor's Office. Analysis of a Multilevel Criminal Justice System* (Intersentia 2011) 37ff, as well as the several contributions in K Ligeti (ed), *Toward a Prosecutor for the European Union*, vol 1 (Hart 2013).

[70] Council, "Participation of the Netherlands and Malta in the Council Regulation implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ("the EPPO")", Council doc 12683/18.

prosecution service is accountable to the Minister of Justice, who is in turn accountable to the Parliament for the overall activities of the public prosecution service.[71]

The second and third approach to the public prosecutors' status assumes instead a heightened degree of independence of the public prosecutor as a starting point for its institutional position within the legal system. Such approaches have been endorsed by some civil law jurisdictions that emerged from dictatorships. Telling examples of the second approach include Italy and Portugal, whose constitutions formally qualify public prosecutors as magistrates enjoying a similar degree of independence vis-à-vis the government. Both systems opted for strong prosecutorial independence as a reaction to earlier experiences of abuse of the prosecutorial function by the ruling parties. In the same perspective, systems such as Hungary's have opted for "full independence" through a *sui generis* configuration of the prosecution service, so that it formally belongs neither to the executive branch nor to the judiciary. Under both these approaches, the independence of the public prosecutor is deemed essential to guarantee the objective exercise of the prosecutorial function.[72] In these countries, therefore, the independence of both the EPPO and its decentralised members (EDPs) does not raise any issue of incompatibility.

The more general question that the independence of the EPPO and the EDPs raises is whether the Member States, in the implementation of the Regulation, will take the opportunity to reflect on the independence of prosecutors as such. The question of independence versus subordination to the executive is an evergreen and is again under the limelight thanks to the recent case law of the Court of Justice on the public prosecutors as "issuing authorities" for the purposes of the Framework Decision on the European Arrest Warrant.[73] One

[71] For further remarks on the independence of the EDPs and the uneasy acceptance of this principle in the Netherlands see, for instance, N Franssen, "Comments on the EPPO from a Dutch Perspective" in Ligeti, João Antunes and Giuffrida (eds) (n 58) 210–212.

[72] For further remarks and references on these systems see Ligeti, "The Place of the Prosecutor" (n 41).

[73] The case law by the Court of Justice on the independence of prosecutors for the purposes of the Council Framework Decision on the European Arrest Warrant has been opened by Joined Cases C-508/18 and C-82/19 PPU, *OG and PI*, EU:C:2019:456, where the Court in essence argued that German public prosecutors do not enjoy sufficient independence to be regarded as issuing authorities. On the same day, the Court handed its judgment in Case C-509/18, *PF*, EU:C:2019:457, where it instead reached the opposite conclusion with regard to the Prosecutor General of Lithuania. For some comments on these decisions see, eg, J Graf von Luckner, "German Prosecutors Are Insufficiently Independent to Issue European Arrest Warrants" (*European Law Blog*, 11 June 2019) <https://europeanlawblog.eu/2019/06/11/german-prosecutors-are-insufficiently-independent-to-issue-european-arrest-warrants/#comments> accessed 2 February 2020. Further interesting developments on the notion of (independent) judicial authority could also take place when the CJEU will decide the much discussed

could thus expect that, since the Regulation requires the independence of the EDPs, there may be more general debates in the Member States on the extent to which they need to, or should or could, introduce the independence of public prosecutors as such, that is, even beyond the PIF domain upon which the EPPO Regulation encroaches.

4.2. Relations between the EDPs and the *juge d'instruction*

The inherent and groundbreaking feature of the EPPO Regulation is that it aims to unify – for the first time in EU law – the pretrial phase of criminal proceedings. So far, other EU instruments have mostly aimed to harmonise some aspects of this phase (e.g., defence rights) or to provide national authorities with mutual recognition instruments, which represent a key tool in the paraphernalia of prosecuting authorities across the EU. The EPPO Regulation goes, however, beyond this state of affairs as it has more intrusive consequences for Member States' legal systems and their rules on the pretrial phase. At the same time, however, one cannot help but notice that this expression ("pretrial phase") and its variants such as "pretrial procedure", while clearly referring to the phase that runs from the start of the official investigation until the trial, is regulated in rather different ways across Europe. In some Member States, the pretrial procedure constitutes a single procedural phase that starts with the opening of the official investigation, includes preparation of the indictment and the filing of charges, and runs until the beginning of the trial. Other systems divide the pretrial procedure into two distinct phases: a preparatory phase referred to as *information*, and a formal judicial investigation called *instruction*.[74] *Information* and *instruction* have the same objective – both compile the dossier and gather evidence – but the rules applicable to each phase can differ.

Civil and common law traditions still take different approaches to the matter. In common law systems, investigative activities are ordinarily carried out by the police or other law enforcement authorities autonomously. The prosecutor steps in only at the end of the investigation to decide whether to bring the case to court. England and Wales are a case in point since most investigations are independently conducted by the police. Until recent times, England and Wales did not even have a prosecution service, which was established only in 1985.[75]

Privacy International case (for the time being, only the Opinion of AG Sánchez-Bordona has been delivered, Case C-623/17, *Privacy International*, EU:C:2020:5).

[74] This is the case for Belgium, Luxembourg, and France, which all derived the structure of their procedural codes from the French Napoleonic tradition.

[75] See, for instance, T Howse, "England" in Ligeti (ed) (n 69). For further references see Ligeti, "The Place of the Prosecutor" (n 41).

Civil law systems, on the other hand, tend to assign a judicial actor to lead investigations: the public prosecutor or, in some jurisdictions, the investigating judge (*juge d'instruction*). At one end of the spectrum, several European civil law systems entrust the public prosecutor with the power to manage the investigations and direct the police: the public prosecutor can order the police to take specific investigative measures, define the investigative strategy, and in some cases carry out investigative acts himself or herself. The public prosecutors are the central actors of the pretrial phase, although for some coercive measures (interception of telecommunications, certain types of searches, etc) they need the authorisation of a pretrial judge, such as the *Ermittlungsrichter* in Germany or the *Giudice per le indagini preliminari* in Italy. It is important to highlight that rather than systematically supervising the investigation, pretrial judges in such systems are involved *ad acta* – upon request of the public prosecutor – for the authorisation of a specific measure.[76] In these systems, therefore, the implementation of the EPPO Regulation should not raise any particular problem, as the leading role of the EDPs during the investigations on PIF crimes is well compatible with the limited role of pretrial judges.

Whereas systems reformed after the 1970s, such as in Germany and Italy, endorsed this approach, in other continental systems the powers to direct investigations are not exclusive to the public prosecutor but shared with an investigating judge. That office was introduced for the first time in the French Napoleonic Code of 1808 and was subsequently endorsed by many of the continental systems influenced by that codification. The rationale behind its introduction was inspired by the inquisitorial ideal of the investigation as a search for the "material truth" – requiring an impartial investigator – and intended to counterbalance the role of the *procureur*. In contrast to Italian or German pretrial judges, the investigating judge not only authorises investigative measures but co-conducts the investigation. In France, for instance, the *juge d'instruction* conducts the *instruction*, a judicial investigation that is mandatory for serious crimes, optional for misdemeanours (*délits*), and exceptional for petty offences (*contraventions*). When an *instruction* is opened, the *juge d'instruction* can direct the police through so-called "rogatory letters" (*commissions rogatoires*). This gives the investigating judge the double, ambiguous nature of investigator and judge that has often been criticised.[77]

The *juge d'instruction* thus remains an important actor of the investigation in some Member States: it is not just an instance of control or authorisation of coercive measures but an actor who has the power to shape the investigative strategy. In those systems, the EDPs will have to share the direction of the investigative strategy with the *juge d'instruction* and coordination will be

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[76] Ligeti, "The Place of the Prosecutor" (n 41) 146.

[77] Ibid 146–147.

required. The Regulation itself does not impose any change on national criminal justice systems, since it expressly provides that EDPs may "order or *request*"[78] some investigative measures, so that there is no reason to assume that EDPs cannot continue to act like their national colleagues who need to ask the *juge d'instruction* for the adoption of some investigative measures (rather than themselves carrying out these measures).[79] In addition, the Preamble of the Regulation is clear in positing that the Regulation should be "without prejudice to Member States' national systems concerning the way in which criminal investigations are organised".[80]

It is therefore for the Member States to ensure consistency between the EDPs and the investigating judges. The key question will concern, in essence, the extent to which the EDPs will have to submit the entire file to the investigating judge. Although the Regulation does not require any amendment, the need to ensure the consistent and swift conduct of EPPO investigations may suggest legislative changes in the sense of enhancing the investigative autonomy of the public prosecutors acting as EDPs in the PIF domain.[81] In recent times, exceptions to the opening of a fully fledged *instruction* have been introduced in some systems (such as Belgium and Luxembourg), allowing the public prosecutor to present an *ad hoc* request for the authorisation of a specific investigative measure without the need to transfer the complete investigative file to the *juge d'instruction* (the so-called "*mini-instruction*").[82] It could be advisable to extend and make expressly available such an option in the EPPO proceedings.

Finally, as was the case with the public prosecutors' status, one may wonder whether the Regulation may incentivise more general reflections on the role of the *juge d'instruction* in criminal proceedings beyond the PIF domain. In other words, the adoption of the Regulation and its implementation may be the

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[78] Art 30(1) (emphasis added).

[79] See F Verbruggen, V Franssen, AL Claes and A Werding, "Implementation of the EPPO in Belgium: Making the Best of a (Politically) Forced Marriage?" (*European Law Blog*, 18 November 2019) <https://europeanlawblog.eu/2019/11/18/implementation-of-the-eppo-in-belgium-making-the-best-of-a-politically-forced-marriage/> accessed 2 February 2020); A Marletta, "It Takes Two to Tango. The Relationship between the European Public Prosecutor and the *Juge d'Instruction* from the Luxembourg Perspective" in Ligeti, João Antunes and Giuffrida (eds) (n 58) 192–194.

[80] Recital 15.

[81] The issue of how to regulate the relation between the EDPs and the investigating judges will have to be decided in Spain as well (see D Vilas Álvarez, "The EPPO Implementation. A Perspective from Spain" [2018] *eucrim* 124, 126–127). As for France, it had already been analysed by J Leblois-Happe and F Winckelmuller, "Impact of the Setting Up of a European Public Prosecutor's Office on National Judicial Systems – A French Perspective" in Asp (ed) (n 20) 288–291.

[82] See also Marletta (n 79) 192–194.

catalyst for renewed debates on whether the figure of the *juge d'instruction* is necessary for modern criminal proceedings or can, as already happened in some Member States, be suppressed.

5. CONCLUSION

One of the main objectives of the Member States during the negotiations of the EPPO Regulation was to safeguard their procedural autonomy and, as the changes in the rules on the EPPO structure show, it seems they were largely successful. Each Member State is now represented by one European Prosecutor at the European level, all the EPPO activities will pivot on the investigations and prosecutions of the EDPs, who will act mostly in accordance with national law, and the role of the central level, albeit still important, has been reduced in the final version of the text. Furthermore, the negotiators have also removed from the Regulation other innovative features that the Commission had envisaged for a strong and efficient EPPO, namely the Office's exclusive competence on PIF crimes and the "single legal area" within which the EPPO could have acted. Nevertheless, the Regulation has still a considerable impact on the Member States, which are now dealing with its implementation to ensure the EPPO can start its activities by the end of 2020/beginning of 2021.[83] Such an impact can be even more remarkable in the configuration of criminal justice actors at the national level and their respective powers, as the examples of the status of public prosecutors and their relations with the investigating judge demonstrate. This is not entirely surprising since the adoption of EU instruments of criminal justice has often provided the Member States with a window of opportunity to reflect on the potential modernisation, or at least reform, of their criminal justice systems. The EPPO Regulation can therefore have "spillover effects" in some Member States and may bring about changes in national legal orders that go well beyond the limited field of the protection of the Union's financial interests.

[83] For some remarks on the challenges that this implementation raises in some Member States see the contributions collected in Ligeti, João Antunes and Giuffrida (eds) (n 58).

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Sažetak

STRUKTURA UREDA EJT-a: OBILJEŽJA I IZAZOVI

Prije usvajanja Uredbe Vijeća (EU) 2017/1939 od 12. listopada 2017. o provedbi pojačane suradnje na uspostavi europskog javnog tužiteljstva struktura Ureda europskog javnog tužitelja bila je predmet dugih rasprava s obzirom na to da upravo njegova struktura određuje status i ovlasti ureda, ali i uređuje odnose s drugim tijelima EU-a te s nacionalnim vlastima. Važno je napomenuti da na uspješnost ostvarenja misije Ureda utječe mogućnost brzog i učinkovitog djelovanja, koje se može postići samo agilnom strukturom. Uz to predmet rasprave bio je i sam legitimitet Ureda EJT-a u očima građana EU-a prilikom stvaranja tijela koje je strukturom slično drugoj postojećoj kaznenopravnoj agenciji EU-a – Eurojustu. U konačnici treba imati na umu da države članice žele osigurati kontrolu nad svojim kaznenopravnim sustavima, a to se (bar prividno) ostvaruje upravo ispreplitanjem strukture Ureda sa strukturom nacionalnih tijela.

U radu se razmatra struktura Ureda EJT-a prema izvornom prijedlogu Komisije za Uredbu o Uredu EJT-a iz 2013. godine. Zatim se analizira trenutačno predviđena struktura Ureda Uredbom o Uredu EJT-a, pri čemu se istodobno upućuje na razlike u odnosu na prvotni prijedlog Komisije. Nakon toga autorica se usredotočuje na dva izazova koja trenutačna struktura predstavlja: na problematičnost neovisnosti Ureda EJT-a u državama članicama u kojima javni tužitelji nisu u potpunosti neovisni o izvršnoj vlasti te na otežanu provedbu Uredbe o Uredu EJT-a u sustavima u kojima istražni sudac još uvijek ima istaknutu ulogu u kaznenoj istrazi i progonu. U zaključku autorica navodi da je na strukturu Ureda EJT-a utjecalo nastojanje država članica da zadrže svoju proceduralnu autonomiju te da bi implementacija Uredbe u nekim državama članicama mogla imati „učinak prelijevanja“ i dovesti do promjena u nacionalnim pravnim sustavima koje znatno nadilaze ograničeno područje zaštite financijskih interesa EU-a.

Ključne riječi: Ured europskog javnog tužitelja, struktura Ureda EJT-a, neovisnost tužitelja, Uredba o Uredu EJT-a