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Lorena Bachmaier Winter
Editor

The European Public Prosecutor's Office

The Challenges Ahead

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This book has been written within the framework of the Research Project of the Spanish Ministerio de Economía y Competitividad "Investigación y prueba en los procesos penales en Europa. La creación de una Fiscalía Europea (DER 2013-44888-P).

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Introduction: The EPPO and the Challenges Ahead

Many years have passed since the first project for a European Public Prosecutor's Office was presented by a group of prestigious academics under the name of *Corpus Iuris*[1]—a name that already intended to show the far-reaching aspirations to establish a unified legal system in the European Union—and the Council Regulation of 12 October 2017 on the establishment of the European Public Prosecutor's Office (the "EPPO") was finally adopted. The long road to a majority of Member States agreeing on the establishment of the European Public Prosecutor's Office, through the mechanism of enhanced cooperation, has not been easy. Those involved in the negotiations have gone through enthusiasm and frustration, being sometimes completely overwhelmed by the difficulties and sometimes encouraged by advancements and small areas of agreement. There is no doubt that behind this Regulation, there are years of continuous efforts and struggle, which can only be imagined by an outside observer. For academics, this project has provided much food for discussions and debates, inspired studies and made us all rethink the known structures and models of criminal justice and investigation.

Addressing the study of the European Public Prosecutor's Office within this project presented as many difficulties as attractions, among them the changing object of our study and the uncertainty of its evolution, just to mention two. In fact, we were dealing with a legal institution that had been under discussion for almost 20 years and where only a preliminary consensus was reached in 2013 when the European Commission presented a Proposal for a Regulation. In such a scenario, the possibility that there might finally be a political agreement in the European Union was unclear. The almost visceral opposition of some countries to establishing a supranational body for criminal prosecution, fearing to yield sovereign powers in such a sensitive area as criminal justice, existed alongside with the lack of interest

[1] The project of the *Corpus Iuris* can be read in M. Delmas-Marty (ed.), *Corpus Iuris*, 1997. On the diverse models for establishing a European single judicial space and the concepts of harmonisation, unification and cooperation; see U. Sieber, "Die Zukunft des Europäischen Strafrechts", 2009 *ZStW* 121, no. 1, pp. 17 ff. and also U. Sieber, "Rechtliche Ordnung in einer globalen Welt", 2010 *Rechtstheorie* 41, no. 2, pp. 180 ff.

of other Member States, who didn't see the need for such an institution, and claimed that insofar as their national systems were already acting effectively with fraud against the financial interests of the Union, the subsidiarity principle of European law was not being complied with.[2]

If all this was not enough, "Brexit" and the Greek crisis gave rise to doubt if it was the adequate moment to discuss the EPPO, where other priorities were seen as more pressing and where the EPPO could create additional tension in a European Union navigating these storms. In such a context, there were even voices stating that the project was dead and, the more optimistic, that it would be sensible to set it aside for a while.

Yet those fears were not borne out, and the decisive commitment of several countries towards "more Europe", as well as the indefatigable work of the Commission, finally made it possible to reach an agreement for the establishment of the EPPO, albeit through enhanced cooperation.

Apart from the uncertainties involved in carrying out a study of a legal institution that might never become a reality, we faced the added difficulty that the object of our study was constantly changing. In the course of the negotiations since the Proposal for a Regulation was adopted in 2013, the text has been subject to continuous changes, resulting in the initial structure of the EPPO being completely transformed: while the *Corpus Iuris* designed a powerful institution that would act within a single legal space under its own procedural rules throughout the whole investigation, and only deferring to national laws at the trial stage, such a scheme was completely abandoned. In view of the fact that this initially proposed model of the EPPO based on a vertical structure would not be accepted by all Member States, concessions were introduced towards greater collegiality in decision-making at the level of the Central Office of the EPPO. The EPPO, as Illuminati points out, has undergone a process of "renationalisation", with logical doubts as to whether such a model will be adequate for achieving the goals the EPPO was created for.

The profound changes to the EPPO during these years of negotiation also meant that we needed to modify and update the contributions to this volume. Faced with the dilemma of publishing the studies quickly or waiting for a more certain outcome, we finally opted for the latter. This caused not only delays in publishing the results but additional work. I want to express my gratitude to all the contributors to this project, not only for their patience but also for the enormous effort they have made in updating and revising their chapters, sometimes more than once.

The present study, which has been possible thanks to the funding of the project of the Spanish Ministerio de Economía y Competitividad, "Investigación y prueba en los procesos penales en Europa. La creación de una Fiscalía Europea" (DER

[2] The fears of a European Union assuming too many national competences are highlighted in the "White Paper on the Future of Europe. Reflections and Scenarios for the EU27 by 2025" of the European Commission of 1 March 2017, COM(2017)2025, p. 24: "There is far greater and quicker decision-making at EU level. Citizens have more rights derived directly from EU law. However, there is the risk of alienating parts of society which feel that the EU lacks legitimacy or has taken too much power away from national authorities."

2013-44888-P), is the result of the joint effort of renowned academic researchers, with broad expertise in European criminal law and the EPPO, enriched with the views of highly qualified practitioners—mainly, but not only, public prosecutors—who have extensive experience in international cooperation in criminal investigations and from their posts have followed closely the legislative process towards the establishment of a EPPO. Many of the topics addressed in this volume were discussed among academics and practitioners during a seminar organised jointly by the Spanish Public Prosecution Office and the research project. Our gratitude again to all those who participated and made it possible.[3]

Legal science, which is often criticised for not always using an empirical methodology—which according to Rudolph von Jhering,[4] does not prevent considering the legal studies as scientific—cannot, however, turn its back on the social reality and professional sphere where the laws are to be applied. This is why from the beginning it was considered crucial to count on the contributions of those who have followed the process of the creation of the EPPO "from within" and experienced public prosecutors. The sum of both views has provided us with a broader outlook that has proved to be very enriching.

This volume analyses the achievements made so far in the Regulation on the EPPO, as well as the compromises that had to be accepted in order to reach an agreement among the Member States. It further addresses the pending issues and future challenges the EPPO is facing in the near future (it will not start working before 2020, according to Article 120 of the Regulations). In this research, we have tried to cover the most relevant aspects of the present EPPO Regulation to offer a deeper understanding of this institution, as well as a critical analysis of pending issues, with the aim of providing guidance for implementing the EPPO and providing also a good understanding of and integration into national justice systems.

The topics that are discussed in each chapter include the two-tiered structure of the EPPO and its complex decision-making process, the definition of material competence, choice of forum, the initiation and conclusion of proceedings and the admissibility of evidence or the relationship of this EPPO with other European institutions as well as with national authorities. In most chapters, the issue of the protection of fundamental rights appears, if not as a guiding thread, as the main subject of the analysis. Despite the risk of overlap, due to the importance of the dimension of fundamental rights in any criminal procedure in order to reach the necessary balance between the defence and prosecution, several chapters have been devoted to this topic.

There are undoubtedly many other issues to be addressed, but we hope that this book at least serves to broaden the understanding of the challenges the EPPO will

[3] I want to express my special gratitude to Rosa Ana Morán, Head of the International Cooperation Unit of the General Public Prosecution Office of Spain, for co-organizing the Seminar held back in December 2015, but especially for her professionalism and continuous support.

[4] See R. Von JHERING in his opening lecture when joining his Lehrstuhl at the Vienna University on 16 October 1868, which can be read in O. Behrends (ed.) *Ist die Jurisprudenz eine Wissenschaft?,* Göttingen 1998, pp. 47–92.

face in fighting fraud against the financial interests of the European Union. It also has to be kept in mind that this institution is not aimed at protecting an administrative institution or a distant supranational body; its aim is to protect the rights of each citizen of the Union, as European taxpayers: fraud against the Union is fraud against the rest of its citizens, which explains why it is so important to ensure uniform action and protection at the level of the entire territory of the European Union.

The issue of the implementation of the EPPO Regulation at the national level, and the legislative reforms that will be required in each of the Member States for this multi-level and integrated model to work, is not addressed here and only indicated tangentially. But, undoubtedly, this is the next challenge to be faced in each State.

The first chapter of Antonio Martínez Santos analyses the fundamental principle of the independence of the EPPO and the safeguards provided in the Regulation for ensuring it. Although national public prosecution offices in EU countries are only rarely conceived of as independent institutions—and, on the contrary, it is often expressly provided that they will be subject to the principle of hierarchy—due to the supranational character of the EPPO, its independence is of foremost importance. In this vein, it is not enough to proclaim that the EPPO will act independently, but its entire structure and the distribution of functions, together with its budgetary autonomy, should safeguard its independence. After a rigorous study of the EPPO's structure, the author raises the question of whether the safeguards of the independence could not have been better drafted, since relevant issues in this regard have not been reflected in the Regulation, but are deferred to the future internal rules of procedure.

In the second chapter, David Vilas addresses the complex regulation of the material competence of the EPPO. Obviously the power of this new institution is determined by the scope of its competence, which is only specified in a generic way in Article 86.2 TFEU. Having been involved directly in the negotiations, the author has been witness to the stance of some Member States trying to reduce to a minimum the areas of competence of the EPPO. The distribution of competences between the EPPO and national authorities has always been a thorny issue, as it addresses directly the scope of powers of the EPPO and the amount of sovereign power the Member States are willing to yield. The material competence of the EPPO has finally been regulated by way of referral to Directive 2017/1371, and its exercise will depend on the seriousness of the offence and the damage caused, as well as the connection with other offences.

The third chapter is dedicated to assessing such important issues as the principle that should guide the EPPO when deciding whether or not to exercise jurisdiction or the right to evocation, as well as when the centralised EPPO should take a case from a European Delegated Prosecutor. Helmut Satzger argues very strongly that these decisions—and therefore the relationship between the national authorities and the EPPO—should be governed by the principle of complementarity, for several reasons: because applying the complementarity principle would be the most consistent approach to the principle of subsidiarity which legitimises action at Union level and because this would avoid tensions with those States that still do not see clearly that a supranational body can take over criminal cases through the evocation. Such an argument, although not free of controversy, seems very interesting.

There has been a long debate about what should be the rules for determining the jurisdiction of EPPO proceedings, the margin for choosing the jurisdiction and the criteria that should guide the decision on the choice of forum. It is not the first time that Michele Panzavolta has addressed this issue, an issue that directly affects the fundamental right to a judgement predetermined by law and the principle of criminal legality, which allows him to provide an in-depth study on this matter. The author highlights how the choice of forum—or "allocation of competences" in terms of Article 26 of the Regulation—is regulated based on vague criteria that will need to be defined at European level. This is, for example, the case with the identification of the place that is the "focus of the criminal activity", which is equivalent to the traditional *forum delicti commissi* but which is interpreted in different ways according to the different national legal systems of the EU. He also analyses the reasons why the resolution of possible conflicts of jurisdiction should have been entrusted to a European court, since national courts can only rule on their own jurisdiction and cannot decide which European Delegated Prosecutor—or better yet, the prosecutor of which State—should carry out the investigation.

Jorge Espina analyses how the relationship between the future European Public Prosecutor's Office and Eurojust will be structured, recalling that Article 86 TFEU establishes that the European Public Prosecutor's Office (EPPO) would be created "from Eurojust". Without going into all the possible interpretations, this expression could mean—about which much has been written already—the author adopts a very pragmatic approach when addressing the relationship that the EPPO and Eurojust should have according to the Regulation. Having complementary functions, Eurojust and the EPPO will benefit from close cooperation, and the author strongly contradicts those voices that argue that the EPPO does not need the support of Eurojust, being able to coordinate itself its own transnational investigations. Two elements are pointed out to explain the increased need for cooperation: first, the fact that EPPO investigations will continue to be governed by national law and, second, because interstate cooperation mechanisms will continue to be necessary, since not all Member States are participating in the enhanced cooperation of the EPPO.

Michele Caianiello dives into the issue of the closing of an investigation by the EPPO and its impact on the national level. Again, it is an aspect that affects the distribution of powers between the supranational institution and the Member States in the exercise of criminal action. The oversight of both the decision to prosecute as well as the decision not to prosecute is always one of the most delicate issues in any criminal justice system, since its regulation and compliance must serve to prevent the risks of an abusive or selective use of criminal law by any State. This author studies all the circumstances foreseen in the Regulation for closing a case as well as for transferring a case to the national authorities. Finally, he explores the consequences of the decision to close a case, as well as the elements that would allow a reopening of the investigation.

My chapter highlights some aspects of cooperation between European Delegated Prosecutors in cross-border investigations. In particular, I try to clarify how the assignment system should work and how well it will provide for more effective cooperation than the European investigation order. It should be underlined that the

EPPO, as it is now envisioned, will start working via enhanced cooperation, so that in cross-border investigations the assignment system will still coexist with mutual recognition instruments in cross-border investigations. Fragmentation has thus not been avoided completely. Finally, I discuss the impact of the referral to Directive 2013/48/EU on legal aid in the cross-border investigations within the proceedings of the EPPO.

Silvia Allegrezza and Anna Mosna analyse the problems of the admissibility of transnational evidence in EPPO procedure. The authors emphasise how the initial idea of establishing a single legal space, where the EPPO would act under its own set of rules on investigative measures that would be applied in a uniform way across the entire EU, has completely disappeared in the Regulation. Under the present system, where the idea of harmonising the investigative measures has been abandoned and the principle of *locus regit actum* has been upheld, the EPPO rather resembles an intergovernmental structure, hardly compatible with the unity of action that would be desirable.

Mercedes de Prada and Antonio Zárate delve into the implications of the entering a guilty plea at the national level in an EPPO procedure. First, they analyse the transaction model that was envisaged in the Proposal of the Commission, which would be applied uniformly in all EPPO proceedings, regardless of the State that had jurisdiction to prosecute. As the Regulation refers generically to the "simplified prosecution procedures", even if the Permanent Chambers will decide on the proposed agreement, the rules to be applied will be different in each Member State. As the authors argue, this compromised solution has prevented moving forward with legislative harmonisation in the field of negotiated justice and plea agreements. It will be important to see what the guidelines are that are adopted by the College with regard to the entering of plea agreements.

The following chapters deal with the protection of fundamental rights. The contribution of Nuria Diaz Abad compiles the EU legislation as well as the case law applicable in relation to the European Directives on the rights of suspects and defendants in criminal proceedings, while Giulio Illuminati's contribution offers a critical view of the system for the protection of fundamental rights in transnational EPPO proceedings. Faced with a powerful supranational structure such as the EPPO, the rights of the defence continue to rely on diverse regulations in the national law of each State, save the minimum harmonisation the European Directives foresee. As this author highlights, both the "renationalisation" of EPPO investigations and the referral made by the Directives on fundamental rights of suspects and defendants to national legislation fail to aid in advancing towards higher common standards of procedural safeguards. In the opinion of this author, as long as the European Union does not aspire to improve the level of protection of the defendant's rights in transnational criminal procedures, the principle of equality of arms will remain a mirage. He argues that the present system still favours efficiency in prosecution, without ensuring at the same time the rights of the defence in a supranational scenario. Stefano Ruggeri's chapter questions if the protection of the fundamental rights of the suspects and defendants are effectively safeguarded in the diverse stages of the proceedings of the EPPO. He further discusses the uncertainty regarding the moment

since when a person has the formal status of suspect, the elements that flow in the decision to institute a case and the compatibility of such decisions with the legality principle of criminal prosecution in certain countries, such as Italy. Besides offering an interesting analysis of the procedural safeguards in the EPPO Regulation, he also analyses them from a national perspective of the Italian system. Finally, he introduces the debatable question whether the procedural safeguards should also be ensured across borders *ratione personae*.

The last chapter deals with a topic of great technical complexity, but at the same time of enormous practical relevance, as it is closely connected to the exercise of the competence by the EPPO—and directly affects the EPPO's powers—namely, the exchange of information between the EPPO and national authorities and the case management system. It is a difficult issue, which goes far beyond the legal field, but Pedro Pérez Enciso has not shirked the task of analysing it in a comprehensive way. More than any other public institution, the EPPO needs to legitimise itself by acting independently but also effectively. The rules on information exchange, the channels provided for it and the case management system used are essential elements both to prevent cases being withheld from the EPPO competence and to ensure that supranational coordination is really effective.

We have before us of one of the most innovative and ambitious projects in criminal justice: a European Public Prosecutor's Office, which will act in all the States of the European Union through its decentralised bodies. The Regulation has not managed to set up its own jurisdiction or create a single legal space in the territory of the European Union to fight effectively fraud against the financial interests of the EU. The initial project, despite its coherence and its justification, might had been too premature—or too ambitious—to be accepted by the Member States, still very focused on their own internal affairs and primarily concerned with defending their own sovereign powers. It is easy to criticise this attitude of the Member States for lack of political vision and for sticking to traditional notions of sovereignty. However, caution before the unknown might also be seen as a positive stance, and it has to be accepted that major reforms have their own pace and, as history shows, their pace is usually much slower than some of us would desire.

At the moment, I believe the approval of this Regulation, despite being the result of a compromise that cannot be described as ideal and despite the failure to reach unanimity for the establishment of the future EPPO, still represents a very important achievement. The present challenge is starting this institution upon solid and transparent decisions. Its acceptance and legitimation will come demonstrating efficient, independent function, coupled with the respect of the fundamental rights of the defence. Only thus will this challenge have been worth it. A lot of work lies ahead, but there is also a lot of interest in making this institution useful and respected. The risk of it becoming a heavy bureaucratic machine, that once established needs to justify itself and its added value is there and is one of the fears expressed in recent years. But it would be worse if it became an instrument that allowed selective justice or failed because of the lack of loyal cooperation of the Member States, on whose actions the administration of justice will ultimately rely.

Only once the EPPO starts working and demonstrates its true added value, it will be time to consider whether this supranational structure should not extend its powers to fight other grave crimes also requiring a highly coordinated criminal investigation, as in the fight against international terrorism. It is a subject that I already addressed more than 15 years ago, and several voices have already claimed publicly that the EPPO should also deal with the investigation of terrorism crimes.[5] This might be the next challenge to be addressed once the EPPO is already functioning.

Freiburg i. Br., Germany
May 2018

Lorena Bachmaier Winter

[5] As clearly expressed by the President of the EU Commission Jean-Claude Juncker, in the State of the Union Address 2017, Brussels 13 September 2017, and also by the President of France in his speech on 27 September 2017 at the Sorbonne University: "Initiative pour l'Europe – Discours d'Emmanuel Macron pour une Europe souvraine, unie, démocratique", accessible under http://www.elysee.fr/declarations/article/initiative-pour-l-europe-discours-d-emmanuel-macron-pour-une-europe-souveraine-unie-democratique/.

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Lorena Bachmaier Winter is full professor at the Faculty of Law at Complutense University of Madrid. She has a degree in law (1989) and also in political science with specialization in international relations (1989) from Complutense University. She obtained her PhD in 1994 with prize for the best thesis in public law. She received the Luis Portero Human Rights Award (2015) and honorary doctorate from the University of San Pedro Perú (2015). She is Humboldt Foundation fellow, is member of the editorial board of numerous legal journals and has worked as an international expert for the Council of Europe and for the European Commission. Her research focuses mainly on European Procedural Law, criminal proceedings, human rights and civil proceedings. She has directed and participated in numerous research projects and is the author of more than 150 scientific publications in the legal field.

Michele Caianiello is full professor of criminal procedure at the University of Bologna, where he is currently also dean of the Law School of Bologna. He obtained his law degree from the University of Bologna in 1994 (with honours) and obtained his PhD from the same University in 2000. He has published extensively in the criminal law field, with focus on protection of suspects, victims, the ICC and evidence law. He is member of the editorial board of various reviews, as well as book

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Nuria Díaz Abad obtained her law degree with honours at the Universidad Pontificia Comillas (ICADE) in 1988. She has been state attorney (Abogado del Estado) since 1992, agent for Spain to the Court of Justice of the European Union (1997–2014) and head of the Spanish Delegation of the Working Group "Court of Justice" of the Council of the EU (2003–2014). She is abogado del Estado at the "Audiencia Nacional" (2018), member of the Spanish General Council for the Judiciary (2013) and president of the European Network of Councils for the Judiciary (2016). She is author of several publications in the field of administrative law and European Union Law.

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Giulio Illuminati was full professor of criminal procedure at the Faculty of Law of the University of Bologna until 2016. At present, he lectures in criminal procedure at LUISS "Guido Carli" in Rome and is co-coordinator of the Postgraduate School in Legal Profession at the University of Bologna. He has written extensively in the field of criminal procedure and has been involved in the drawing up of several pieces of Italian legislation, among those, the current Italian Code of Criminal Procedure. He is a member of the editorial board of the reviews *Cassazione Penale* (Milano)*, Revista Brasileira de Direito Processual Penal* (Porto Alegre) and *Rivista Italo-spagnola di Diritto Processuale* (Madrid).

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Anna Mosna obtained her law degree at LUISS Guido Carli University in Rome 2012. She is a PhD candidate in criminal law at the University of Luxembourg, under the co-supervision of Prof Dr Silvia Allegrezza and Prof Dr Luca Luparia. Her doctoral research focuses on money laundering operations linked to the art market. Further, she works on various topics of international and European criminal procedure, on which she has recently published.

Michele Panzavolta is associate professor at the University of Leuven where he is also vice dean for international relations. He teaches criminal law, criminal procedure and cybercrime law. He is guest lecturer at the University of Hasselt. He has previously held positions at the universities of Maastricht, Bologna and Urbino. He has also worked as a consultant for the president of the justice committee of the Italian Parliament. He is a qualified attorney in Italy. His research interests lie at the intersection between criminal law and procedure and human rights. His research focuses in particular on intelligence and cybercrime, European criminal law and forfeiture and juvenile criminal law.

Pedro Pérez Enciso obtained his law degree in 1987 at Complutense University of Madrid. Pedro Pérez Enciso started his professional career in the private sector in the legal service of a bank. Shortly after, he joined the Prosecution Service in 1990. He is currently serving a position as senior prosecutor in the International Cooperation Unit attached to the Spanish Prosecutor General's Office. Among other positions, he has served in the Antidrugs Prosecution Office in the Audiencia Nacional, and he has served as liaison magistrate in Colombia and seconded national expert in Eurojust. He is Eurojust national correspondent and responsible for the Eurojust National Coordination System; he is contact point to the European Judicial Network, IberRed and CARIN Network. His fields of expertise are the fight against organised crime, drug trafficking and money laundering, including asset recovery and judicial cooperation.

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The Status of Independence of the European Public Prosecutor's Office and Its Guarantees

Antonio Martínez Santos

Abstract The aim of this paper is to analyse the safeguards for the independence of the new EPPO, and how this topic has evolved during the long process of negotiations from the first proposal to the final adoption of the EU Regulation establishing a European Public Prosecutor's Office. This is undoubtedly one of the areas where there is great difficulty in achieving balance: on the one hand, it is true that the effectiveness of the work of the European Public Prosecutor's Office requires a status of reasonable independence with regard to Member States and the European authorities. On the other hand, however, this status of independence may collide with some particularly sensitive areas from a legal and political point of view, in particular the principle of subsidiarity, sovereignty of States, and the democratic legitimacy of European institutions.

1 Introduction

The aim of this contribution is to analyze the guarantees for the independence of the European Public Prosecutor's Office, from the Commission Proposal in 2013 to the final adopted version of the Regulation on the European Public Prosecutor's Office (EPPO) in October 2017. This is undoubtedly one of the areas where there is great difficulty in achieving balance: on the one hand, it is true that the effectiveness of the work of the EPPO requires a status of reasonable independence with regard to Member States and the European authorities. On the other hand, however, this status of independence may collide with some particularly sensitive areas from a legal and

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political point of view (in particular, the principle of subsidiarity, the sovereignty of States, and the democratic legitimacy of European institutions).

As is widely known, Article 86 TFEU merely states the possibility of establishing an EPPO through a special legislative procedure. It does not develop the organic aspects of the institution, which are merely outlined: with deliberate ambiguity, the Treaty only states that the EPPO should be created "*from Eurojust*". Much has been written about the meaning of this laconic expression in the text of the Treaty, but the truth is that according to Article 86 TFEU, nothing is defined as regards the structure (collegiate or hierarchical) of the new body, nor in terms of its legal status, the appointment of its components, or the accountability rules applicable to the EPPO and its members. In practice, this means that the European legislator had here a wide margin of action with which to approach the design of the new institution, in accordance with criteria of political and practical opportunity.

There is, however, broad consensus when considering that a future EPPO, even if it were to proceed only as a result of the implementation of the enhanced cooperation mechanism (Article 86(1) III TFEU), should be independent in order for it to function properly.[1]

Within the flow of official documents, this consensus in favor of the independence of the EPPO is reflected not only in the Commission's 2001 Green Paper and in the replies to it,[2] but also (and much more recently) in the sixth and seventh recommendations of the European Parliament's resolution of April 29, 2015,[3] as well as in the advisory opinion issued by the European Agency for Fundamental Rights.[4] It even appears in the joint statement signed by sixteen delegates of national parliaments gathered in the French National Assembly on September 17, 2014.[5]

[1] In this regard, see Ligeti and Simonato (2013), p. 12; Ligeti and Weyembergh (2015), p. 56.

[2] COM (2001) 715, section 4(1)(1). As will be seen, in this respect the Green Paper was entirely faithful to the content of Article 18 of the *Corpus Juris.* See Delmas-Marty (ed) (1997); and also the follow-up study: Delmas-Marty and Vervaele (eds) (2000).

[3] P8_TA-PROV (2015) 0173. In that resolution, the European Parliament stated that "it is crucial to ensure the establishment of a single, strong, independent EPPO that is able to investigate, prosecute and bring to court the perpetrators of criminal offences affecting the Union's financial interests", because "any weaker solution would be a cost for the Union's budget". At the same time, it stressed that "the structure of the EPPO should be fully independent of national governments and the EU institutions and protected from political influence and pressure". The EU Parliament therefore called for for "openness, objectiveness and transparency in the selection and appointment procedures for the European Chief Prosecutor, his/her deputies, the European Prosecutors and the European Delegated Prosecutors", expressing its conviction that "in order to prevent any conflicts of interests, the position of European Prosecutor should be a full-time position."

[4] FRA Opinion 1/2014 [EPPO] of 4 February 2014. On the basis of ECtHR case-law, the Agency places special emphasis on the quasi-judiciary nature of the European Public Prosecutor's Office and therefore urges the European legislator to provide clearer rules and more specific safeguards to ensure the independence, impartiality, and accountability of the EPPO. The full opinion can be consulted at: http://fra.europa.eu/sites/default/files/fra-2014-opinion-european-public-prosecutors-office_en.pdf (accessed March 2018).

[5] This joint statement (which only British, Swedish and Dutch parliamentary delegates refused to endorse), expressly states at the end: "ongoing negotiations should ensure the independence, the efficiency and the added value of the EPPO." A record of the meeting, including the full speeches of the participants, can be found at: http://www.assemblee-nationale.fr/14/europe/declaration/c0154_en.pdf (accessed March 2018).

Incidentally, the general tone of this last document was quite critical both of the Commission's Regulation proposal and of its reaction to the various parliamentary opinions which transpired in the weeks following the publication of the proposal for a Regulation, and which set in motion the "mechanism of subsidiarity control" envisaged in Articles 6 and 7 of the Second Protocol to the TFEU (the so-called 'yellow card procedure').[6]

The strong emphasis that has been put on the independence of the EPPO (both by legal scholars as well as by politicians) should not be overlooked. The general rule in legal systems of most EU Member States is that national prosecutors should be subject to a system of hierarchical dependence and ultimately subordinate either to the Ministry of Justice or to some other Government-designated authority.[7] However, this perspective must necessarily change when it comes to a criminal prosecution body called to act in an international context.[8] In this new area, the very legitimacy of the institution demands a status of independence: insofar as its existence and action presuppose a prior cession of sovereignty by the States in which it is to operate (at least in relation to the prosecution of a particular class of offenses), its decisions will only be perceived as legitimate if they are adopted in accordance with the law and apply strictly technical principles (that is to say, if they take place in a sphere protected from pressures or intrusions from persons or authorities in respect of which the cession of sovereignty has not occurred).

This is not, however, the only reason for providing the EPPO with clear safeguards to its independence. There are also powerful arguments of a practical nature: as proven by numerous studies carried out over the last few years, offences against the Union's financial interests do not constitute a real priority for the authorities of the Member States—either because of scarcity of resources, structural deficiencies, or simple criminal policy reasons.[9] This fact alone should not cause surprise, nor scandal, but certainly triggered all the initiatives to better protect the financial

[6] Fourteen national parliaments sent a reasoned opinion within the deadline provided for in Protocol II of the TFEU (which ended on 28 October 2013). The Spanish Parliament did not raise any objections or reservations, even though the Commission's proposal could lead to serious criticisms from a constitutional point of view (e.g., regarding the right to an ordinary judge predetermined by law). The Commission responded to parliamentary opinions by means of the communication of 27 November 2013 [COM (2013) 851], arguing that the 2013 proposal for a Regulation was fully in line with the principle of subsidiarity and would therefore not be withdrawn, but that the opinion of national parliaments would be taken into account in subsequent work. For an overall assessment of the "yellow card procedure" regarding the European Public Prosecutor's Office, see Fromage (2015). Opinions of the Chambers can be consulted at: http://www.ipex.eu/IPEXL-WEB/dossier/document/COM20130534.do (accessed March 2018). See also Wieczorek (2015).

[7] See Wade (2013), p. 461.

[8] An analysis that takes into account the international framework on the independence of prosecutorial authorities (and specifically the criteria of the United Nations and the Council of Europe) can be found in Symeonidou-Kastanidou (2015), pp. 256–264.

[9] See, for example, the *Euroneeds Report* of the Max Planck-Institut für ausländisches und internationales Strafrecht. The full report can be consulted at: https://www.mpicc.de/files/pdf1/euroneeds_report_jan_2011.pdf (accessed March 2018). Important in this respect are also the annual reports of OLAF, available at: https://ec.europa.eu/anti-fraud/about-us/reports_en (accessed March 2018).

interests of the Union at a supranational level whose decision-making procedures are also functionally and operationally independent of the authorities of the Member States, and therefore capable of overcoming national inactivity.

Of course, independence must necessarily be coupled with accountability, to prevent and react against possible abuses or arbitrariness, and allowing, if necessary, oversight on the use of the EPPO's powers by the subjects integrated in the EPPO, especially since we are talking about an institution which, over time, will take decisions that will directly affect the rights and liberties of the European Union's citizens.[10]

As the EPPO Regulation has been under discussion until very recently, being addressed at regular meetings held every few weeks, it is not surprising that there are significant differences between the original proposal and its final version (in fact, from the organizational point of view, the current text has little to do with the original). It would be pointless to refer in this analysis to an already discarded draft, and hence the 2013 proposal will be only taken into account for the purpose of making comparisons with the latest available documentation.

The reasons for the profound changes mentioned above are well known: following the so-called 'yellow card' procedure, and although the Commission initially stated its determination to move forward with the project, the Council felt compelled to reformulate the Regulation proposal taking into account the suggestions, comments, and objections raised by the Member States to the original text. Thus, under the Greek Presidency (first half of 2014) there was a major structural change in the draft, with the introduction of a collegiality factor in the organization of the EPPO and the removal of the principle of exclusive competence.

The Italian Presidency (second half of 2014) maintained the refurbishment carried out under the Greek Presidency, modifying various aspects of major importance (among other changes, it removed the reference to the Union as a "single legal area" which, by influence of the *Corpus Juris*, had been included in Article 25 of the original proposal).[11] Under the Presidencies of Latvia, Luxembourg, the Netherlands and Slovakia, work continued on the line opened by the Greek Presidency. Given the level of consensus reached, it was to be expected that the Regulation as such would not deviate too much from this line, at least as far as the organization and

[10] See Opinion No. 9(2014), of the Consultative Council of European Prosecutors (CCPE) to the Committee of Ministers of the Council of Europe on European norms and principles concerning prosecutors, done in Strasbourg, 17 December 2014. This Opinion contains the Charter, called "the Rome Charter". Especially interesting for our topic are paragraphs IV, V y VI of the Charter and 94 to 96 of the Explanatory Note. The document is accessible under https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCPE(2014)4&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true (last accessed 5.3.2018). At the moment of writing this article, a new opinion of the CCPE on "Independence, accountability and ethics of public prosecutors" is being discussed. Adoption is to be expected for the end of 2018.

[11] For a critical review, see Erbeznik (2015), pp. 209–221.

structure of the new EPPO are concerned, an expectation which has been indeed confirmed by the final text of the Regulation.[12]

2 What Independence for the Future European Public Prosecutor's Office?

The first question to be addressed is: how should the 'independence' of an institution such as the European Public Prosecutor's Office be understood? Is it a type of independence analogous to that attributed to the judicial bodies in a democratic State, or do we speak of something different?

In order to answer these questions, it may be fruitful to consult the various EPPO-related documents that have been published over the years.[13]

Article 18 of the *Corpus Juris* (Florence version), which concerned the status and structure of the 'European Public Prosecutor', already stated that the EPP should be "independent as regards both national authorities and Community institutions". In the corresponding paragraph of the implementing provision pertaining to this article, it was additionally proclaimed that members of the EPP should be "completely independent in the performance of their duties"; that they should "neither seek nor take instructions from any government or from any body, be it national or European", and that they were not to be permitted, during their term of office, "to engage in any other occupation, whether gainful or not".[14]

In a similar vein, the "Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor" assimilated the independence of the members of the European Public Prosecutor's Office to that of the judges of the Court of Justice of the EU. In the eyes of the Green Paper, independence should be an "essential feature" of the European Public Prosecutor's Office, warranted by the latter's status as a "specialised judicial body".

Moreover, the Green Paper stated that the EPPO should be independent "both of the parties to any dispute and of the Member States and the Community institutions and bodies". More recently, Article 5 of the proposal for a Regulation on the establishment of the European Prosecutor's Office of 17 July 2013 proclaimed that "the European Public Prosecutor's Office shall be independent. The European Public Prosecutor's Office, including the European Public Prosecutor, his/her Deputies and the staff, the European Delegated Prosecutors (EDPs) and their national staff, shall neither seek nor take instructions from any person, any Member State or any

[12] See the Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office. See also the draft contained in the Council document 9941/17, of 30 June 2017, which can be consulted at: http://db.eurocrim.org/db/en/vorgang/306/ (accessed February 2018).

[13] See extensively on United Nations and Council of Europe criteria, see Symeonidou-Kastanidou (2015), pp. 256–264.

[14] For a historical approach, see Delmas-Marty (2010), pp. 163–169.

institution, body, office or agency of the Union in the performance of their duties. The Union institutions, bodies, offices or agencies and the Member States shall respect the independence of the European Public Prosecutor's Office and shall not seek to influence it in the exercise of its tasks".

The Explanatory Memorandum of the proposal justified these provisions according to the need to ensure that the EPPO could exercise its functions and use its powers in a way that made it "immune *from any improper influence*" (emphasis added). The emphasis on the independence of the institution was also reflected in Recitals 10, 11 and 15 of the proposal.

In the final version of the text of the Regulation, former Article 5 has become Article 6. Its content is essentially the same, although certain adjustments have been made following the overall organizational changes made in the Regulation. Thus, the subjects of the independence proclaimed by the Regulation are now better detailed; and there is also a reference to the mission of the European Public Prosecutor's Office to act in the interest of the Union as a whole.

The text of the provision reads now as follows: "The EPPO shall be independent. The European Chief Prosecutor, the Deputy European Chief Prosecutors, the European Prosecutors, the EDPs, the Administrative Director, as well as 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 this Regulation. The Member States of the European Union and the institutions, bodies, offices and agencies of the Union shall respect the independence of the EPPO and shall not seek to influence it in the exercise of its tasks".

It can be said that, as it has been understood by the various official documents, the independence of the EPPO has several dimensions: on the one hand, it integrates the classic meanings of exclusive submission to law and absence of dependence on the will of the national authorities of the Member States (as well as the European authorities, institutions and bodies). But on the other hand—and this is crucial—it has also ended up incorporating an important element of attention to *the interest of the Union as a whole*: the EPPO must always act to protect the interests of the Union, disregarding private interests from companies, individuals, or States. It is necessary to insist on this point, since it is a definite departure from the parameters of intergovernmental cooperation prior to the Treaty of Lisbon (the old "Third Pillar logic"): the very purpose of the creation of the EPPO is for it to be conceived as an institution endowed with a clear European vocation, aimed at safeguarding genuinely European interests (even though, as will be seen later, the recent changes that have taken place in the organizational model of the Office unfortunately point to a certain departure from this original purpose).

3 The Guarantees of the Independence of the European Public Prosecutor's Office in the Regulation of 2017 and in the Pre-legislative Work of the Council

3.1 The Organizational Structure of the European Public Prosecutor's Office

The 2013 Regulation proposal provided for a relatively simple organization for the future EPPO, based on an outline which had two main elements: at the head of the office would be the European Chief Prosecutor along with the four Deputy European Chief Prosecutors, all appointed by the Council with the approval of the European Parliament.[15] At a lower level would be the EDPs (at least one for each Member State), chosen by the European Chief Prosecutor himself from among the lists of candidates forwarded by the States, which would constitute the real keystone of the system in the EDPs dual status as both National and European prosecutors (i.e., the so-called "double hat" system). The EPPO would also have exclusive competence in the investigation and the filing of criminal charges with respect to the crimes envisaged under Articles 12 and 13 of the 2013 proposal. It was then considered that the simpler the organization chart and the rules of attribution of competence, the more agile and efficient the institution would be in the long run, and the easier it would be to ensure its independence.[16]

This basic outline was sharply criticized by some Member States. It was said, among other arguments: that it did not respect the principle of subsidiarity, that it was not sufficiently justified from the point of view of the attainment of the objectives set out by the TFEU when establishing the possibility of creating the EPPO, that those objectives would be better achieved by providing it with a collegial structure, and that the lack of definition of the rules for attribution of ancillary competence generated legal uncertainty and opened the door to an unwanted extension of the competence of the new body.

Objections of a political nature aside, it is true that the 2013 proposal had significant technical shortcomings: for example, it did not define satisfactorily the relationship between the EPPO, the existing cooperation agencies and the authorities of the Member States, which in the long run would have given rise to quite a number of perplexities.

From the Commission's communication of 27 November 2013 onwards [COM (2013) 851], the discussions within the Council were in line with a thorough remodeling of the institution, providing it with a new structure and better defining its competences.[17] At least since December 2015, there existed broad political agreement on the content of Articles 1 to 35, which were combined into a consolidated new version of the proposal for a Regulation, drafted under the Luxembourg

[15] See Bachmaier Winter (2015) and White (2013).

[16] See Caianiello (2013), pp. 115–125.

[17] On the negotiations, see Naszczynska (2016), pp. 55–58.

Presidency of the Council.[18] From that moment onwards, the wording of these articles was "frozen" pending a full text. In the meantime, pre-legislative work focused on the second part of the proposal for a Regulation, where relevant developments occurred every few weeks.[19]

In general terms, the EPPO is now defined in the Regulation as an "indivisible body of the Union", which will operate "as one single Office with a decentralized structure" (Article 8(1)). From an organizational point of view, the EPPO will be divided into two levels: a central level and a decentralized one (Article 8(2)). The "central level" will be located at the headquarters of the institution in Luxembourg, and will consist of a number of bodies and subjects: the College, the Permanent Chambers, the European Chief Prosecutor, the Deputy European Chief Prosecutors, the so-called European Prosecutors and the Administrative Director. The 'decentralized level' will be composed of the EDPs, whose main task consists of working in and from the Member States (Article 8(4)).[20]

As regards the competence of the EPPO, it has ceased to be exclusive (as was previously envisaged in Articles 12 and 14 of the 2013 Regulation proposal) and has simply been given a preferential character with respect to that of the authorities of the Member States. In that sense, Article 25.1 of the EPPO Regulation provides that if the EPPO exercises its jurisdiction in relation to an offense falling within its scope, national authorities of the States concerned should refrain from exercising their own, and specifies that this exercise of powers by the EPPO may be carried out in two ways: either by initiating an investigation in accordance with the provisions of art. 26, or by making use of the "right of avocation" conferred by art. 27 with respect to investigations already initiated in any Member State (of those within its territorial scope of action, it is understood).

The functions and the system of appointment and removal of the following internal organs of the EPPO are discussed briefly below: the College, the Permanent Chambers, the European Chief Prosecutor, the Deputy European Chief Prosecutors, the European Prosecutors, the EDPs, the Administrative Director and the seconded national experts.

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[18] See *The Report on the State of Play* contained in Council document 15100/15 of 22 December 2015; Available at http://db.eurocrim.org/db/en/doc/2404.pdf (accessed February 2018).

[19] One of the latest information notes from the Dutch Presidency of the Council, dated 3 March 2016 (Council document 6667/16), indicates that there existed a technical agreement back then on arts. 48 to 53 (budgetary questions), 55 (collaboration of national experts), 56, 58a (common provisions for cooperation with other bodies and institutions) and 62 to 75 (general provisions on the European Public Prosecutor's Office). In addition, an announcement was made on the introduction of three further precepts relating to the "Administrative Director" of the institution, who would manage the budget and administrative and personnel aspects. In this regard, see http://db.eurocrim.org/db/en/doc/2458.pdf (accessed March 2018).

[20] See also Met-Domestici (2017), pp. 143–149.

3.1.1 The College

The College, which will be composed of the Chief European Public Prosecutor and as many European Prosecutors as participating Member States, will be the governing body responsible for the general supervision of the activities of the EPPO.[21] In this sense, its fundamental task will be to take strategic decisions and to adopt criteria regarding the general issues that may arise from the matters in which the institution is involved, in order to guarantee a certain coherence or unity of criteria of the EPPO in all its territory of operation. The College may not make operational decisions in particular cases (Article 9(2)).

It will also be up to the College to approve the internal rules of procedure of the EPPO and its future modifications (Article 21), as well as to set up the Permanent Chambers in accordance with the stipulations of the aforementioned rules of procedure (Article 9(3)).

The existence of a stable body at the apex of the organization of the EPPO operating on the basis of criteria of collegiality was not provided for in the original proposal for a Regulation published by the Commission in 2013, which aimed rather at a vertical structure, based on a hierarchical conception of the functioning of the projected institution. Certainly, the 2013 proposal made a small concession to the defenders of the principle of collegiality (as it was proclaimed both in the presentation of the document and in the accompanying press note), when providing in art. 7 for a sort of "mini-College" entrusted with the approval of the internal rules of procedure of the EPPO, and which would consist of ten members: the European Chief Prosecutor, his four Deputies and five EDPs which were meant to reflect "the demographic and geographical spectrum" of all Member States.

However, it was then firmly believed that a permanent assembly with decision-making capacity in matters of ordinary dispatch, but constituted according to national parameters (one representative per Member State), would prove to be impractical and would seriously undermine the operational capacity of the new institution in the long term, placing its independence at risk with respect to the Member States and subsequently rendering it ineffective in practice. It was also argued that the creation of a body with the characteristics of the EPPO required a different approach from that which had been used up to now to set up European cooperation agencies and institutions in criminal matters (notably Eurojust) and that in Western comparative law there are no precedents for collegiate organs of investigation and criminal prosecution, given their lack of practical usefulness.

Judging by the reactions to the 2013 Regulation proposal, none of these arguments were held to be convincing. Several of the reasoned opinions issued by the national parliaments in the weeks immediately following the publication of the proposal stated that both the principle of subsidiarity and the very legitimacy of the new

[21] The EPPO Regulation distinguishes up to three different forms of supervision, which also have a diverse content and scope: *general oversight*, *monitoring and directing* and *strict supervision*. In this regard, see Council document 15100/15 of 22 December 2015, No. 12; as well as Recital No. 23 of the Regulation.

institution required abandoning the hierarchical model for another inspired by the principle of collegiality, by bringing into its decision-making centers members who acted as nationals of the various States and who, at the same time, had a close relationship with their internal judicial systems (the closest thing to *a link* with national authorities). In its reply to the national parliaments, the Commission denied that the adoption of a hierarchical structure would in itself infringe on the principle of subsidiarity and insisted that, in any case, the EPPO is a body of the Union, which means that the actual form of its internal organization is not an issue to be clarified in terms of the application of the principle of subsidiarity.[22]

In any event, the discussions which took place within the Council after resuming the work on the draft Regulation led to the elimination of the original organizational structure and its replacement by the current collegiate model. The misgivings which, from the point of view of the independence of the EPPO, could arise from the introduction of national elements into its internal government are now addressed in two ways: on the one hand, it is stipulated that the College will not take decisions on particular matters. On the other hand, Article 6 includes all members of the College (although not the College itself as such, which may be significant) in the enumeration of beneficiaries of the statute of independence that it proclaims (further specifying, as has already been said, that they must always act in the general interest of the Union as a whole).

3.1.2 The Permanent Chambers

The EPPO Regulation provides for the creation of "Permanent Chambers" within the EPPO. Although the Permanent Chambers are key elements in the design of the Office, the Regulation does not predetermine either their number, or the way in which they are to be erected. It also does not specify their composition, or the rules for the division of competences between them, or the procedure of decision making within them. All these are meant to be issues to be dealt with in due course by the internal rules of operation adopted by the College.

Each Permanent Chamber will have two permanent members and will be chaired either by the European Chief Prosecutor, by one of the Deputy Chief Prosecutors or by the European Prosecutor appointed for that purpose.[23] The main function of the

[22] According to the Commission's reasoning, "a collegial structure is not necessarily less centralised than that of the proposal: it is merely a different way of organising the European Public Prosecutor's Office, which would in any event remain an office of the Union. Hence 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. In the Commission's view, that is not a question concerning the principle of subsidiarity". In this regard, see [COM (2013) 851], pp. 2–5.

[23] It is also envisaged that in each Chamber's deliberations on particular cases there shall also be present the European Prosecutor entrusted with the supervision of the work of the Delegated Prosecutor in charge of the case (Article 10(9)). Other European Prosecutors or other Delegated