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EU CRIMINAL LAW AND THE WAY FORWARD IN THE CASE OF THE FUNCTIONING OF THE EPPO

EU criminal law is a relatively new construct of the last twenty years. Despite its added value in the creation of a common legal area of freedom, security and justice, it has also shown some deficits. The deficits highlighted in this article refer to: 1) open questions about the EU “federal” structure; 2) the limits of the concept of mutual recognition in view of the limited harmonisation of procedural rights; 3) the issue of democratic accountability when adopting EU criminal law; and 4) and the issue of effective legal remedies in EU criminal law instruments. The EPPO represents a new era in EU criminal law. It creates a fully functioning “federal” prosecutorial service that is not based on the cooperation logic of Eurojust. It is an independent judicial authority with prosecutorial and punitive powers as a strong sign of “federal” sovereignty. As such, it is a significant step forward in forming a true European state. However, it is not immune to the issues raised before, and any success of the EPPO will depend on solving the same questions as those that affect EU criminal law in general. This article will try to provide some warnings and some answers for a positive solution.

Keywords: EPPO, mutual recognition, EU criminal law, harmonisation, rights of suspects

1. INTRODUCTION

EU criminal law is a relatively new construct that has existed for the last twenty years, starting as an intra-governmental form of cooperation and is now developing into fully fledged “federal” criminal law. In this regard, the EPPO represents a new turning point, not only establishing common criminal material and procedural law but setting up an operative “federal” prosecutorial agency responsible for certain kinds of offences with a strong likelihood of

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future enlargement. Thus, the EPPO is the first real EU criminal law body and represents not only a small evolutionary step but a real cognitive leap forward, and was to a certain extent politically engineered with a view to strengthening the common European project.¹ A more “evolutionary” approach would have been to educate and re-enforce national prosecution services when dealing with criminal offences against EU financial interests and establish the EPPO only once additional EU harmonisation in criminal law had been proposed and were in place (such as on admissibility of evidence and pre-trial detention). The EPPO idea has a long history covering the 1997² and 2000³ Corpus Juris studies, the 2001 Green Paper of the Commission,⁴ its integration into Article 86 TFEU, and the 2013 Commission Proposal for a Regulation on the establishment of the European Public Prosecutor’s Office,⁵ followed in 2017 by an enhanced cooperation proposal that was ultimately adopted.⁶ The mentioned proposed drafts varied in their ideas as regards the combination of supranational harmonisation and mutual recognition.⁷ In the end, a system was chosen based on enhanced cooperation,⁸ introducing a single body mirroring Eurojust with a decentralised structure (Chief European Prosecutor, European Prosecutor, College, Permanent Chambers and Delegated European Prosecutors), and covering not only fraud affecting the Union’s financial interests (PIF offences – “*protection des intérêts financiers*”) but also related offences. It did not create a fully fledged single legal area of free movement of evidence (as envisaged

¹ See F. Verbruggen, V. Franssen, A. L. Claes and A. Werding, “Implementation of the EPPO in Belgium: Making the Best of a (Politically) Forced Marriage? *European Law Blog*, 18 November 2019: “the EPPO’s creation does come across as a top-down policy choice of the political authorities, but rather as a response to a pressing request from existing prosecution services or from Eurojust”. See also M. Wade, “A European Public Prosecutor: Potential and Pitfalls” (2013) 59 *Crime, Law and Social Change*, 439-486 as regards interviews with stakeholders.

² M. Delmas-Marty (ed), *Corpus juris portent dispositions pénales pour la protection des intérêts financiers de l’Union européenne* (Economica, 1997).

³ M. Delmas-Marty and J.A.E. Vervaele (eds), *The Implementation of the Corpus Juris in the Member States* (Intersentia, 2000).

⁴ Green Paper on criminal law protection on the financial interests of the Community and the establishment of a European Prosecutor COM(2001)0715 final.

⁵ COM(2013)0534 final.

⁶ Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office (EPPO Regulation) [2017] OJ L 283/1.

⁷ K. Ligeti et al., *The European Public Prosecutor’s Office at Launch* (Wolters Kluwer – CEDAM, 2020); L. Bachmaier Winter, *The European Public Prosecutor’s Office: The Challenges Ahead* (Springer, 2018); T. Rafaraci and R. Belfiore, *EU Criminal Justice: Fundamental Rights, Transnational Proceedings and the European Public Prosecutor’s Office* (Springer, 2019); etc.

⁸ 22 Member States at the moment, possibly 23 if Sweden joins.

initially by the Commission), and, in the end, inter alia, divided judicial remedies between the Court of Justice and national courts.

However, the EPPO is not a self-standing instrument but enters into a semi-finished area of EU criminal law. Such issues have to be understood to rightly place the EPPO in such a pre-existing system, as well as to understand the additional complexity the EPPO brings to such a system. Therefore, the intention of this article is to provide, firstly, at the general level, an overview of certain legal issues that EU criminal law must, at this time, tackle (an overview where we are in EU criminal law), namely: 1) the initial flaw in the EU “federal” structure; 2) a common Area of Freedom, Security and Justice, mutual recognition and fundamental rights; 3) democratic accountability; 4) remedies in EU criminal law. And further, secondly, to show how each of these general issues of EU criminal law directly or indirectly affects or might affect the functioning of the EPPO (*argumentum a maiori ad minus*).

2. THE INITIAL FLAW IN THE EU “FEDERAL” STRUCTURE

The EU has in its legal structure an entrancing sin connected with the historical development of the EU as an economic area of free trade based on free movement of goods, services, capital and labour. However, it was the EU Court of Justice that proposed by its case law⁹ the notion of primacy (supremacy) of EU law as a typical feature of a federal state,¹⁰ and shaped it (and still is shaping it) through a dialogue with national constitutional or supreme courts. As such, it has also been accepted by political branches in the states. Even in the free trade context, such a notion was not accepted without a challenge by some constitutional courts as early as in the 1970s, most prominently through the *Bundesverfassungsgericht Solange* case law.¹¹ Consequently, the Court of Jus-

⁹ Case 6/64 *Costa v. Enel* ECLI:EU:C:1964:66.

See also the latest case law confirming it: Joined Cases C-585/18, C-624/18 and C-625/18, *A.K. and Others* ECLI:EU:C:2019:982, as regards primacy requirements on the independence of national judiciary; Case 573/17 on the EAW and execution of a foreign judgment; Case C-399/11 *Melloni* ECLI:EU:C:2013:107 – rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law in the territory of that State; Case C617/10 *Åkerberg Fransson* ECLI:EU:C:2013:105 – in a situation in which the action of the Member States is not entirely determined by EU law, a national provision that implements EU law is free as long as the primacy, unity and effectiveness of EU law are not thereby compromised, etc.

¹⁰ See, for example, Article VI, paragraph 2 of the US Constitution; Article 31 of the German *Grundgesetz*; see also F. Palermo, K. Kössler, *Comparative Federalism* (Bloomsbury, 2017).

¹¹ Bundesverfassungsgericht, BVerfGE 37, 271, 29 May 1974 (*Solange I*); BVerfGE 73, 339, 22 October 1986 (*Solange II*); BVerfGE 89, 155, 12 October 1993 (Maastricht Treaty); BvE 2/08 and Others, 30 June 2009 (Lisbon Treaty).

tice tried to solve the situation by starting to include fundamental rights as general principles into EU (EC) law and making references to the ECHR, thus entering into a dialogue with national constitutional/supreme courts.¹²

With further changes of the Treaties, primacy was not included in the Treaties as such but is at the moment only referred to in a Declaration to the Treaties referring to Court of Justice case law.¹³ Consequently, the whole structure is based on Court of Justice precedent, and supremacy is not an entirely settled issue, as the dialogue between many actors still continues, and will do so as a kind of constitutional pluralism.¹⁴ This can also be seen in some criminal law cases after Lisbon.¹⁵ And some national (constitutional) courts started adopting a more critical approach as regards certain issues of criminal law, for example, the low level of *in absentia* standards, the principle of legality, the level of fundamental rights protection, etc.¹⁶ This is understandable as criminal law, on one hand, represents the core of national sovereignty, and, on the other hand, is closely connected with fundamental rights and national constitutional law. Criminal law is usually also an evolutionary category that does not deal well with legal experiments, as basic state power (*ius puniendi*) and very basic rights of the individual are at stake.

It has to be admitted that in the EPPO Regulation supremacy to a certain extent gave way to the respect of national fundamental rights standards¹⁷ and

¹² Case 29/69 *Stauder v City of Ulm* ECLI:EU:C:1969:57.

¹³ Declaration No. 17. For in-depth analysis, see M. Kumm, V. Ferreres Comella, 'The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union (2008) 3(2-3) *International Journal of Constitutional Law* pp 473-492. However, also some federal states have a non-written primacy principle, or even federal law and federal entity law have the same legal value. See, for example, Belgium. Palermo and Kössler (n 11).

¹⁴ M. Poiares Maduro, "Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism" (2014) 1(2) *EJLS*. See in that regard also two judgments of the German *Bundesverfassungsgericht* (1 *BvR* 16/13 and 1 *BvR* 276/17) addressing the issue of its own role in the interplay between different levels of fundamental rights protection in the EU. Both judgments related to data protection and the "right to be forgotten" but have, as it seems, broader legal implications. Basically, the Court follows the *Melloni* and *Taricco* 2 CJEU theory by differentiating between fully harmonised and not fully harmonised areas of law in the EU, combined with a kind of *Bosphorus* presumption of conformity.

¹⁵ There are three areas of challenge: fundamental rights, delimitation of competences and specific constitutional provisions. Kumm and Ferreres Comella (n 14) 474-475. As regards criminal law, fundamental rights and the issue of specific constitutional provisions, such as court authorisation for certain invasive measures, especially play a role.

¹⁶ See, for example, Case C-399/11 *Melloni* ECLI:EU:C:2013:107 – higher national *in absentia* requirements; or Case C-42/17, *M.A.S., M.B.*, ECLI:EU:C:2017:936 (as a follow up of the *Taricco* case) – stricter national principle of legality (as regards time limitations).

¹⁷ Article 41(3) of the EPPO Regulation: "Without prejudice to the rights referred to in this Chapter, suspects and accused persons as well as other persons involved in the proceedings of the EPPO shall have all the procedural rights available to them under the applicable national

to national law.¹⁸ In addition, the fact that the judicial review of European public prosecutors' decisions is possible in national courts¹⁹ in relation to standards established by national law is contrary to the common EU rule on supremacy. Supremacy, as demanded by the CJEU, means precisely that EU law (including any decision of an EU institution) cannot be assessed in relation to domestic standards, but only in relation to EU standards. However, the EPPO Regulation allows for the annulment of a European prosecutor's act for being contrary to domestic standards.

Nevertheless, a "*Solange*" conflict between national (constitutional) law and the EPPO Regulation could anyhow arise. The Slovenian transposition debate on the EPPO Regulation will be used as an example.²⁰ First, a general remark on the constitutional role of the prosecutor in Slovenia is necessary. The prosecutor in Slovenia is regulated in Article 135 and 136 of the national Constitution and considered primarily as one of two equal parties to the procedure, and not as an independent (quasi) judicial body.²¹ It has to be understood that in Slovenia such views are part of a long established legal tradition. Allowing contacts between the prosecution and the defence whereby one would be subordinated to the other as regards the conduct of the investigation is perceived as inherently inquisitorial in the Slovenian system. The EPPO, on the other hand, is based primarily on the concept of the prosecutor as a quasi-judicial body actively leading the investigation. Therefore, there is potential for permanent constitutional tension between the two systems.²²

law, including the possibility to present evidence, to request the appointment of experts or expert examination and hearing of witnesses, and to request the EPPO to obtain such measures on behalf of the defence".

¹⁸ See references to "national law" in the following Articles of the EPPO Regulation: Articles 10(5), 12(3), 13(1), 22(1) and (2), 24(7), 25(3), 26(1), 27(2), 28(1), (2) and (4), 29(1), 30, 31(8), 33(1), 34(8), 36(5) and (7), 38, 39(4), 40, 41(2) and (3), 42(1), 43(1), 45(2), 46, 80(1)(c), 104(5), 106(1), 107(3), 108(5).

¹⁹ Recital 88 and Article 42 of the EPPO Regulation.

²⁰ The author of the article participated as a criminal law professor in the debates of the expert group established by the Slovenian Justice Ministry composed of practitioners (judges, prosecutors, the Bar Association), and academia.

²¹ Slovenian Constitutional Court, Case U-I-42/12.

²² The Slovenian criminal procedure has been historically suspicious of the police/prosecutorial phase of the procedure. Therefore, from the 1950s onwards under the former common federal Yugoslav CPA the formal gathering of personal evidence (interrogation of witnesses and suspects) was given to the investigating judge only. This changed in Slovenia for the police in 2003 – they can formally interrogate if a lawyer is present. However, it does not apply to the prosecutor. Several attempts by Slovenian governments (2008, 2012, 2016 and 2018) to abolish such a model failed due to resistance by practitioners, academia and the public.

The format²³ chosen in Slovenia was to amend the Criminal Procedural Act (CPA) (draft Amendment CPA-O) whereby amendments relating to the EPPO constituted only part of the proposed changes, making the debate less focused. Inside the expert group, several possible preliminary drafts for further debate were prepared. Of the three general possibilities – namely, abolishing judicial investigation for all offences, subordinating the EPPO to the investigative judge, or introducing special provisions and procedure for EPPO offences only – the majority decided for the third one, abolishing judicial investigation only for EPPO offences.²⁴ However, several participants of the expert group raised the issue that the national level of guarantees and protection of rights of suspects has to be same in both procedures – EPPO cases and non-EPPO cases – in view of the basic constitutional principle of equality before the law (Article 14 of the Slovenian Constitution). So, non-regression of the rights of the suspect was placed as a condition. In that regard, the idea that delegated prosecutors could interrogate under Slovenian national law the suspect was absolutely rejected as this is not possible under the Slovenian system. In addition, limited access by the suspect to the prosecutorial case file was criticised, as such limitations do not exist as regards the investigating judge’s case file, and issues on the legal nature of the decision to prosecute were raised (the terminology used: either “notification” or “decision”) in view of the right to appeal against a formal decision to prosecute (not against a notification). It was also agreed that a short analysis of the pending/adopted EPPO legislation of other Member States (e.g. Belgian, French, etc.) having an investigating judge would be provided by the ministry, which never happened.

Despite this, the Ministry presented, without previously informing the expert group, a text for inter-ministry consultations,²⁵ introducing the lowest possible evidence level for the start of an EPPO investigation (the level used in the national system for police action in the so-called pre-criminal procedure),²⁶ a prosecutorial interrogation,²⁷ subordinating the suspect to the prosecutor as

²³ Changes as regards the nomination and work of European and Delegated European Prosecutors were introduced beforehand with a change of the Prosecutor’s Office Act – POA (Amendment POA-C, Official Gazette, No. 36/19).

²⁴ The proposed new Article a165a of the CPA. Although now in front of district courts (for offences of up to three years of imprisonment), no judicial investigation exists. And according to Article 170(6) CPA in front of circuit courts a request for judicial investigation is not obligatory and based on an assessment of the prosecutor for offences of up to eight years of imprisonment or if a plea bargaining agreement has been reached. Above a possible sentence of eight years, judicial investigation must take place or consent by the investigation judge is necessary not to carry it out).

²⁵ Draft Law No. EVA 2019-2030-0039, Version of 4 June 2020.

²⁶ Not clarified in the draft law itself but in the explanatory note.

²⁷ Proposed draft Article a165a(8).

regards his or her evidence-gathering proposals,²⁸ disregarding the notion of legal remedy, and subordinating the investigating judge (as a judicial body) to the EPPO as regards requests made by the EPPO on individual investigative measure that the prosecutor cannot order himself/herself by national law.²⁹ Consequently, the main aspects of the expert group debates were not followed, and an uproar took place (the Bar Association and academia were especially active) that led to substantial corrections of the draft text. The second version³⁰ abolished the idea of different powers for Delegated European Prosecutors in comparison with national prosecutors, e.g. interrogation of suspects and subordination in evidence gathering. However, at the same time, the provision subordinating the investigating judge to the prosecutor as regards requested investigative measures was kept and no legal remedies introduced. This means basically that in EPPO cases the investigating judge is much more limited in conducting a critical assessment and has to agree with the prosecution, or in the best case the law is unclear on the issue. Hence, the problem of separation of powers could arise, as the prosecutor is not, in the Slovenian system, part of the judicial branch but part of the executive one, although with autonomy within it. Such a solution was justified by the ministry by reference to the demands of the EPPO Regulation. Such an example shows that the EPPO is not immune to possible “Solange” disputes in the future due to the very different understanding of the EPPO Regulation text and the intent of the EU legislature.³¹

3. A COMMON AREA OF FREEDOM, SECURITY AND JUSTICE, MUTUAL RECOGNITION AND FUNDAMENTAL RIGHTS

The EU Charter of Fundamental Rights, as an EU constitutional bill of such rights, gained with the Lisbon Treaty the same status as the Treaties.³² However, the application to Member States is limited to situations in which a Member State implements EU law.³³ Therefore, it allows for the duality of fundamental rights standards in Member States, one regarding pure national situations and the other referring to the application of EU law. The Court is attempting to bridge the divide by means of a very broad interpretation of what

²⁸ Proposed draft Article 165a(5).

²⁹ Proposed draft Article

³⁰ Draft Law No. EVA 2019-2030-0039, Version of 21 July 2020.

³¹ This was clearly shown in the national Slovenian expert group as regards a cacophony of opinions on obligations stemming from particular provisions of the EPPO Regulation.

³² Article 6 TEU.

³³ Article 51 of the Charter.

the expression “when they implement EU law” means.³⁴ The Charter also states that rights that are the same as in the ECHR shall be as a minimum interpreted as those in the ECHR, but can also be higher. Such a provision is helpful as regards providing a safety net and coherence between the two instruments. However, it has to be understood that the ECHR represents only a common minimum of 47 European states with a very different level of democracy and understanding of fundamental rights. For example, the ECtHR defines the right to remain silent and the right to a lawyer as relative rights.³⁵ It defines only some guidance as regards the admissibility of evidence,³⁶ and has often had lower standards as regards intrusions into privacy in comparison with some national constitutional systems.³⁷ Consequently, a very low interpretation of the Charter standards in a “federal” common area of justice creates the phenomenon of “checkerboard laws” as fundamentally opposed notions in a common (“virtual”) legal area, and a race to the bottom.³⁸ This can be clearly indicated through certain harmonisation directives on criminal procedural

³⁴ Case C-617/10 Åkerberg Fransson, 26 February 2013, paras 36-37) – for a national measure to be involved in the implementation of EU law, it is necessary to determine, inter alia, whether the national legislation at issue is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of directly affecting EU law; and whether there are specific rules of EU law on the matter or rules which are capable of affecting it; Case C-206/13 *Siragusa*, 6 March 2014 – the penalty of demolition does not constitute an unjustified and disproportionate infringement of the right to property guaranteed under Article 17 of the Charter (no implementation of EU law); Case C-265/13 *Torrallbo Marcos*, 27 March 2014 – national legislation setting judicial and registration fees for the lodging of an appeal in employment law cases which governs, in general, certain fees connected with the administration of justice is not intended to implement the provisions of EU law; Case C – 411/10, *N.S. and Others*, 21 December 2011 – a Member State which exercises the discretion conferred by Article 3(2) of the Dublin II Regulation must be regarded as implementing EU law within the meaning of Article 51(1) of the Charter; etc.

See https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-05/fiche_thematique_-_charte_-_en.pdf.

³⁵ See *John Murray v UK*, App. no. 18731/91, judgment of 8 February 1996; *Ibrahim and Others v. UK*, App. nos 50541/08, 50571/08, 50573/08 and 40351/09, judgment of 13 September 2016; etc.

³⁶ Clear only in Article 3 ECHR (prohibition of torture, inhuman and degrading treatment) – *Gäfgen v. Germany*, App. no. 22978/05, 1 June 2010 – establishing a clear theory on Article 3 ECHR violations.

³⁷ *Benedik v Slovenia*, App. no 62357/14, 24.4.2018 – violation was found but only based on the particularities of the Slovenian system as regards the necessity for court authorisation for dynamic IP addresses. See also *Big Brother Watch and Others v UK*, App. nos 8170/13 62322/14 24960/15, 13 September 2018 – bulk interception as such is compatible (however, a violation was found in the case due to oversight).

³⁸ R Dworkin, *Law's Empire* (Harvard University Press, 2001) pp 179–186. See also A Erbežnik, ‘The Principle of Mutual Recognition as a Utilitarian Solution and the Way Forward’ (2012) 2 *EuCLR*, pp 3-19.

law, applicable also to EPPO proceedings.³⁹ For example, Directive 2013/48/EU on access to a lawyer provides exemptions as regards access to a lawyer in the initial police phase.⁴⁰ Such a possibility is below the (constitutional) requirements in several Member States. In the negotiations, the European Parliament tried to solve the situation with a recital referring to ECtHR case law, hoping for the further development of the *Salduz* case law on access to a lawyer in the pre-trial phase.⁴¹ However, the opposite happened and the ECtHR used the Directive in its argumentation to relax its own standards on access to a lawyer.⁴² In addition, the Commission evaluation report showed serious deficiencies as regards the transposition of the mentioned Directive.⁴³ All criminal law practitioners know that the police interrogation phase in a criminal procedure can be most detrimental to the rights of the suspect. Such an anomaly was well analysed in the US in the 1950s by the US Supreme Court in the pre-Miranda and Miranda case law. Not allowing the presence of a lawyer in this phase can be considered as very rudimentary, if not even inquisitorial and unfair. Defining the EU standard as low as indicated above can lead to problems in the common judicial area and can create mistrust. How should a judicial authority from Member State A acknowledge a judicial decision from

³⁹ Article 41 of the EPPO Regulation.

⁴⁰ Article 3(6) of Directive 2013/48/EU: “In exceptional circumstances and only at the pre-trial stage, Member States may temporarily derogate from the application of the rights provided for in paragraph 3 to the extent justified in the light of the particular circumstances of the case, on the basis of one of the following compelling reasons: (a) where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person; or (b) where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings.”

⁴¹ Recital 53: “Member States should ensure that the provisions of this Directive, where they correspond to rights guaranteed by the ECHR, are implemented consistently with those of the ECHR and as developed by case-law of the European Court of Human Rights.”

⁴² *Ibrahim and Others* (n 50) para. 259: “The Court notes, in this regard, that Directive 2013/48/EU, which enshrines the right to legal assistance, provides for an exception to this right in exceptional circumstances where, inter alia, there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person...”

⁴³ Commission report on the implementation of Directive 2013/48/EU (COM(2019)560, 11: “Only five Member States chose not to make use of any of these possibilities to derogate. Derogations were identified in 20 other Member States, justified by risks to individuals or for investigation needs. However, the correctness of the Directive’s transposition is beyond doubt in only a small number of those Member States, meaning that potential conformity issues were identified in a number of them. Looking at the Member States with conformity issues, it can be seen that some of the derogations they lay down in are in line with the Directive, while others raise concerns. For example, national legislation reflecting the situations described in Article 3(6) might not clearly state that all the derogations should be applied only in exceptional circumstances and to the extent justified in the light of the particular circumstances of the case. Another concern is that the possibility to derogate may go beyond the pre-trial stage of the proceedings.”

Member State B if it goes against its core understanding of a fair procedure? In this regard, EU legislation based only on an ECHR minimum is not helpful. On the contrary, it creates even more problems, as such harmonisation prevents the use of higher national standards as refusal grounds,⁴⁴ and even triggered in the past the lowering of standards in some Member States. This is a logic based on bad examples, not good ones. The EP tried to solve this by introducing into mutual recognition “fundamental rights clauses” based on Article 6 TEU, and not only the Charter, to provide additional criteria as regards national constitutions (“common constitutional traditions”).⁴⁵ This allows for the dispersion of tensions between the different levels of fundamental rights. However, some Member States and the Commission started to oppose this in legislative trilogues based on the argument that it might hamper mutual recognition,⁴⁶ and, in addition, even going further in some recent legislative proposals by proposing to delete the executing authority completely and introducing, for example, direct contacts between an issuing authority in Member State A and a private provider in Member State B.⁴⁷

The same issues might apply in EPPO procedures, where procedures will be conducted in different Member States according to national law, and the same agency will provide different fundamental rights protection in different Member States or, if they decide to provide the same standards based on harmonisation directives, this could create problems if the standard is very low for Member States with higher standards. At the same time, the EPPO foresees a kind of “light” mutual recognition cooperation between different delegated prosecutors in different Member States despite substantial differences in the understanding of some basic concepts in criminal law, such as the admissibility of evidence and exclusionary rule.⁴⁸

⁴⁴ *Melloni* (n 17).

⁴⁵ See Article 11(1)(f) of the EIO Directive 2014/41/EU: “there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State’s obligations in accordance with Article 6 TEU and the Charter”.

⁴⁶ In Regulation (EU) 1805/2018 on mutual recognition of freezing and confiscation orders only a downgraded version of the clause was agreed – see Articles 8(1)(f) and 19(1)(h): “in exceptional situations, there are substantial grounds to believe, on the basis of specific and objective evidence, that the execution of the freezing order would, in the particular circumstances of the case, entail a manifest breach of a relevant fundamental right as set out in the Charter, in particular the right to an effective remedy, the right to a fair trial or the right of defence”.

⁴⁷ See the proposed e-evidence package: Proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters COM/2018/225 final – 2018/0108 (COD) and Proposal for a Directive laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings COM/2018/226 final – 2018/0107 (COD).

⁴⁸ Article 31 of the EPPO Regulation providing for a fast track procedure between delegated European prosecutors in different Member State.

4. DEMOCRATIC ACCOUNTABILITY AND THE ADOPTION OF EU CRIMINAL LAW

One of the long-standing issues in the European Union is how to avoid criticism as regards democratic deficit, namely, *inter alia*, the governance of non-elected technocrats outside any real political control.⁴⁹ The more the EU became a “federally” structured entity, the more it became necessary to provide for democratic oversight. In this regard, several answers were given in the past, such as enhancing the role of the European Parliament, becoming, from a consultative assembly, a real decision-making parliamentary body. However, in the field of criminal law under the former third pillar created by the Maastricht Treaty and further defined by the Amsterdam Treaty, the role of the European Parliament was not satisfactory. It was the governments’ representatives alone who took decisions on EU criminal law by unanimity.⁵⁰ The role of the European Parliament was a mere consultative one. And the only obligation for the EU Council was to await the prescribed deadline for such an opinion. Despite this huge democratic deficit, not acceptable at national level,⁵¹ a whole variety of far-reaching instruments was adopted.⁵² One of the aims of the Lisbon Treaty was to remedy such a situation by increasing democratic oversight at several levels, namely by abolishing the pillar structure and introducing the ordinary legislative procedure in all areas (thus increasing the role of the European Parliament), to enhance the role of national parliaments,⁵³ to provide a

⁴⁹ There is no common definition of “democratic deficit”. However, the following elements are part of it: an increase in executive power and a decrease in national parliamentary control; a weak European Parliament; no real “European” elections; the EU being very abstract and distant for voters; EU policy does not reflect voter preferences. See A. Follesdal, S. Hix, “Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik” (2006) 44(3) *JCMS* pp 533-562. See also A. Moravcsik, “In Defence of the ‘Democratic Deficit’” (2002) 40(4) *JCSM* pp 603-624.

⁵⁰ Article 39 of the former TEU. Unanimity could be seen as at least an implicit democratic control tool when used.

⁵¹ Basically, the executive alone in the framework of the EU Council was adopting legislation without any checks.

⁵² For example, Framework Decision 2002/584/JHA on the European Arrest Warrant, Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, etc., as well as measures on criminal material law, such as Council Framework Decision of 13 June 2002 on combating terrorism, Council Framework Decision of 19 July 2002 on combating trafficking in human beings, etc.

⁵³ Protocols No 1 and 2 on national parliaments.

role for a *European populus*⁵⁴ and to provide for more transparency of EU institutions.⁵⁵ In addition, specifically in the area of criminal law, it was intended to find a better balance between efficiency and fundamental rights, as most pre-Lisbon criminal law instruments were not balanced in that regard.

Criminal law is a very special branch of law directly connected with the core of state prerogatives, power and its existence, and includes, *inter alia*, direct physical measures against the individual. As such it needs external control. In an environment where an individual had an extensive if not absolute power against another individual (for example, as regards the restraint of liberty by a European Arrest Warrant, the wiretapping of an apartment based on a European Investigation Order, or the confiscation of almost all property based on mutual recognition of freezing and confiscation) deviations can quickly happen and an elaborate system of democratic and judicial control is necessary to prevent them.⁵⁶ In addition, modern society has a negative potential to fall into the trap of bureaucratisation as a possible tool of mass violation of fundamental rights (administrative genocide).⁵⁷ Therefore, any adoption of criminal law measures needs a strong democratic element in its adoption. With new prerogatives in the field of criminal law, the EU significantly altered its legal structure and nature. Thus, previous tolerance of the “democratic deficit” is no longer acceptable. It will be shown that such an element was missing in the EPPO legislative procedure due to a Treaty limitation, although the European Parliament attempted to neutralise it. In addition, the Commission also took a “light” approach to Treaty provisions as regards national parliaments and their opinions from an argumentative (content) perspective, the main message being that issues would be addressed during the legislative procedure.⁵⁸

The establishment of the EPPO was based on Article 86 TFEU, while it should have been developed from Eurojust, an institution based on intra-governmental cooperation. The democratic role of the European parliament was limited by the Treaties to consent only at the end of the procedure, and the ordinary legislative co-decision procedure, the norm after Lisbon in the area

⁵⁴ Article 11(4) TEU – citizens’ initiative.

⁵⁵ Article 15 TFEU and more transparency in legislative procedures.

⁵⁶ This was shown by the 1971 Zimbardo’s Stanford prison experiment. See P. Zimbardo, *The Lucifer Effect* (Random House, 2008).

⁵⁷ See, in that regard, Z. Bauman, *Modernity and the Holocaust* (Cornell University Press, 2001). See also, for example, *Kurić and Others v. Slovenia*, App. no. 26828/06, Judgment of 26 June 2012.

⁵⁸ The national parliaments of fourteen Member States expressed a critical opinion and 11 submitted a reasoned opinion triggering a “yellow card” procedure. However, the Commission answered on 13 pages only: (COM(2013) 851).

See <https://europeanlawblog.eu/2013/11/04/national-parliaments-issue-yellow-card-against-the-european-public-prosecutors-office/>

of EU criminal law, did not apply.⁵⁹ It is questionable if a judicial body with law enforcement powers should be created without any meaningful involvement of a parliamentary body, especially in view of democratic accountability. Regardless, the EP tried through the EPPO negotiations to make its preferences known through interim reports (in the framework of the consent procedure)⁶⁰ and additional non-binding political resolutions.⁶¹ In its documents the EP highlighted the following issues:

- strong political support for establishing the EPPO and (at that time) to finalise the now adopted PIF Directive;⁶²
- full independence of the EPPO based on highly professional staff, in line with checks and balances by judicial review by the Court of Justice and oversight by the European Parliament and national parliaments;
- clarification of competencies between EPPO, OLAF and Eurojust;
- EPPO priority to prosecute PIF offences with clarification of EPPO and national competences: (a) multiple offences (one organised group committing several crimes) and (b) mixed offences (more than one criminal offence committed in one criminal act); the final decision in a competence dispute shall be taken by a court, such as the Court of Justice;
- a clarification of the notion of ancillary competence based on specific criteria;⁶³

⁵⁹ The EP raised this issue stating: “Reminds the Council and Commission that it is of the utmost importance that the European Parliament, co-legislator in substantive and procedural criminal matters, remains closely involved in the process of establishment of the European Public Prosecutor’s Office and that its position is duly taken into account at all stages of the procedure; to that end, intends to maintain frequent contacts with the Commission and Council with a view to successful collaboration; is fully aware of the complexity of the task and of the need for a reasonable timeframe within which to fulfil it, and undertakes to express its views, where necessary in further interim reports, on future developments regarding the EPPO.”

⁶⁰ European Parliament, Resolution of 12 March 2014 on the proposal for a Council regulation on the establishment of the European Public Prosecutor’s Office (COM(2013)0534 – 2013/0255(APP)) with an annex making specific proposals for changes; and EP, Resolution of 29 April 2015 on the proposal for a Council regulation on the establishment of the European Public Prosecutor’s Office. The possibility of interim reports in the case of the consent procedure is foreseen in Rule 105(5) of the EP Rules of procedure: “Where Parliament’s consent is required, the committee responsible may, at any time, present an interim report to Parliament, including a motion for a resolution containing recommendations for the modification or the implementation of the proposed act”.

⁶¹ European Parliament, Resolution of 5 October 2016 on the European Public Prosecutor’s Office and Eurojust (2016/2750(RSP)).

⁶² Directive (EU) 2017/1371 of 5 July 2017 on the fight against fraud to the Union’s financial interests by means of criminal law [2017] OJ L 198/29.

⁶³ Those were: (a) the particular conduct simultaneously constitutes an offence affecting the Union’s financial interests and other offences; (b) the offences affecting the Union’s financial interests are predominant and the others are merely ancillary; (c) and the other offences

- prevention of “forum shopping” by determining jurisdiction criteria clearly in advance and the possibility of judicial review in that regard;
- raising the issue of sufficient investigative tools that are uniform, precisely identified and compatible with the legal systems of the Member States where they are implemented, and at the same time recalling the EIO criteria; criteria for the use of investigative measures should be spelled out in more detail in order to ensure that “forum shopping” is excluded;
- effective judicial control in line with Article 47 of the Charter and any operational decision affecting third parties should be subject to judicial review before a competent national court, and that direct judicial review by the European Court of Justice should be possible;
- respect of fundamental rights as enshrined in Article 6 TEU,⁶⁴ especially as regards procedural rights of suspects;
- clear and uniform rules on admissibility in line with the EU Charter and the ECHR;
- the financing issue and doubts as regards the cost-efficiency argument put forward in the proposal, and no effect on other agencies (the use of the Eurojust infrastructure and OLAF staff).

Specifically as regards effective judicial remedies, the Parliament stated that “the right to an effective judicial remedy should be upheld at all times in respect of the European Public Prosecutor’s activity throughout the Union; therefore, decisions taken by the European Public Prosecutor should be subject to judicial review before the competent court; in this regard, decisions taken by the European Public Prosecutor before or independently from the trial, such as those described in Articles 27, 28 and 29 concerning competence, dismissal of cases or transactions, should be subject to the remedies available before the Union courts”. This implied a much broader understanding of remedies as provided explicitly in the proposed EPPO Regulation, not limited only to individual investigative measures but against the investigation as such, as will be further analysed below. On the other hand, some of the EP concerns were taken into account, such as the clearer delimitation of EPPO offences. Perhaps, even fully fledged EP involvement would not have created a significantly different result. However, some past examples show that the EP could in a fully fledged legislative procedure significantly modify an initial proposal, for example the whole concept of the European Investigation Order

would be barred from further trying and punishment if they were not prosecuted and brought to judgment together with the offences affecting the Union’s financial interests.

⁶⁴ The EP specifically mentioned the three levels of fundamental rights protection, namely the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights, and the constitutional traditions of the Member States.

in Directive 2016/343/EU on certain aspects on the presumption of innocence as regards deletion of the reversal of burden of proof in certain cases, etc. But from a democratic perspective (the involvement of citizens through their representatives), it is essential that the European Parliament is fully involved in EU criminal law. Any potential future changes of the Treaties could address Article 86 in that regard.

5 ENHANCED COOPERATION – THE WAY IN AND WAY OUT

The Treaty provides in several provisions that a group of Member States gets further in their integration attempts, thereby splintering the common legal area and introducing asymmetric solutions. There is an option in the Treaty which allows a group of at least nine nations to implement measures (in the framework of the Treaties) if all Member States fail to reach agreement. Other EU countries hold the right to join later. It was first introduced by the 1999 Amsterdam Treaty⁶⁵ and is now regulated in Article 20 TEU and Articles 326-334 TFEU in a general manner, as well as in Articles 82, 83, 86 and 97 as a possibility in criminal law and police cooperation. It has been applied until now in the areas of a European unitary patent, divorce law, property regime rules for international couples, defence, as well as for the EPPO.⁶⁶ In this regard, the EPPO was adopted under such provisions with 22 participating Member States. While the procedure for joining enhanced cooperation is clear,

⁶⁵ The term “closer cooperation” was used in the past. See Articles 43-45 on general provisions, Articles 27a-27a on CFSP, Articles 40 and 40a TEU on police and judicial cooperation in criminal matters, and Article 11 as regards the former first pillar. It was criticised that it was very difficult to establish the criteria. These were: a) furthering the objectives of the Union and protecting and serving its interests; (b) respect of the principles of the Treaties and the single institutional framework of the Union; (c) use as a last resort; (d) involving at least a majority of the Member States; (e) not affecting the “*acquis communautaire*” and the measures adopted under the other provisions of the Treaties; (f) not affecting the competences, rights, obligations and interests of those Member States which do not participate therein; (g) open to all Member States and allowing them to become parties to the cooperation at any time, provided that they comply with the basic decision and with the decisions taken within that framework; (h) complying with the specific additional criteria laid down in Article 11 of the Treaty establishing the European Community and Article 40 of this Treaty, depending on the area concerned, and authorised by the Council in accordance with the procedures laid down therein.

Consequently, the option was not used before the Lisbon Treaty. F. Amtenbrink, D. Kochenov, “Towards a More Flexible Approach to Enhanced Cooperation” in A. Ott and E. Vos (eds), *50 Years of European Integration: Foundations and Perspectives* (T.M.C. Asser Press, 2009) pp 181–200.

⁶⁶ See also https://ec.europa.eu/commission/sites/beta-political/files/enhanced-cooperation-factsheet-tallinn_en.pdf.

it is unclear if a participating Member State can leave it again. It seems that this is possible in the phase of establishing enhanced cooperation.⁶⁷ However, it is not certain what happens once the system operates. For example, the EPPO does not provide explicitly for legal remedies against the investigation as such. It could happen that a constitutional court of a Member State where such a remedy is obligatory finds a violation of national constitutional rules. As a consequence, the constitution would have to be amended or the Member States would have to leave enhanced cooperation.

6. JUDICIAL REMEDIES IN GENERAL AND AS REGARDS THE EPPO

The issue of judicial remedies is an on-going one as regards EU criminal law. Most EU criminal law instruments, either on mutual recognition or as regards the harmonisation of procedural rights, have extremely abstract and open definitions, referring finally to “national law”. In this regard, the original version of Framework Decision 2002/584/JHA on the European Arrest Warrant was lacking a specific article on legal remedies.⁶⁸ Other mutual recognition instruments tried to go further. Directive 2014/41/EU on the European Investigation Order introduced Article 14 on legal remedies whereby the classical mutual recognition text, namely that “the substantive reasons for issuing the EIO may be challenged only in an action brought in the issuing State” was supplemented with the addition “without prejudice to the guarantees of fundamental rights in the executing State”. However, other instruments following the EIO did not follow this example due to the strong resistance of some Member States in view of a more automatic approach to mutual recognition.⁶⁹ As regards harmonisation directives on procedural rights, certain progress was achieved by Directive 2013/48/EU on access to a lawyer, adding to national law an additional reference to the fairness of the procedure and defence rights.⁷⁰

⁶⁷ For example, Estonia left the financial transaction tax as regards enhanced cooperation. It seems that the reasoning is that this is possible as long as no substantive act has been adopted according to the Council Legal Service. Council, doc. 6524/11.

⁶⁸ In Article 11 it referred only to the rights of the requested person, namely the right to information and to legal counsel. It was supplemented with the provisions of Directive 2013/48/EU on the right to a lawyer.

⁶⁹ See, for example, Regulation 2018/1805/EU on mutual recognition of freezing and confiscation orders (Article 33). The author of this article has been directly involved in legislative trilogues for the last ten years and was a witness to a change of attitudes on the issue of legal remedies.

⁷⁰ Article 12(2): “Without prejudice to national rules and systems on the admissibility of evidence, Member States shall ensure that, in criminal proceedings, in the assessment of state-

However, the problem of other harmonisation directives on procedural rights is the lack of a clear remedy in the case of violation. For example, Directive 2012/13/EU on right to information in criminal proceedings introduced an EU-wide “Miranda type” rule (warnings for the suspect) but fell short of mentioning any remedies. A step forward was achieved in Regulation 2016/343/EU on certain aspects of the presumption of innocence whereby a provision referring to national law, defence rights and fairness of proceedings was supplemented by two recitals, due to the insistence of the EP, that might present a kind of EU exclusionary rule (as a legal remedy) *in statu nascendi*.⁷¹ In this regard, it is a pity that the CJEU did not follow the notion of AG Bot in the *Gavanozov* case⁷² that the non-existence of effective substantive remedies prevents a Member State from taking part in mutual recognition as an issuing state. Such a notion would have forced Member States to take a different attitude towards the issue of remedies.

Similarly, one of the issues as regards the establishment of the EPPO was the issue of judicial remedies. The Commission proposed a solution whereby the EPPO would not be subject to the CJEU, and where, “when adopting procedural measures in the performance of its functions, the European Public Prosecutor’s Office shall be as a national authority for the purpose of judicial review”, and, further, “where provisions of national law are rendered applicable by this Regulation, such provisions shall not be considered as provisions of Union law for the purpose of Article 267 of the Treaty”, namely the exclusion of the preliminary reference procedure.⁷³ In this regard, a reference to Article 86(3) was made providing for creating rules applicable to the judicial review of procedural measures taken by it in the performance of its functions. Due to heavy criticism, the final text introduced a solution where only certain measures are subject to the Court of Justice:

- (a) procedural acts intended to provide legal effects towards third parties shall be reviewed by national courts; the same applies for failure to act in such cases; a preliminary procedure is possible as regards: in so far as such a question of validity is raised directly on the basis of Union law; or the interpretation or the validity of Union law, including the EPPO

ments made by suspects or accused persons or of evidence obtained in breach of their right to a lawyer or in cases where a derogation to this right was authorised in accordance with Article 3(6), the rights of the defence and the fairness of the proceedings are respected.”

⁷¹ See Recital 45 clarifying that evidence stemming from torture is absolutely prohibited and referring to ECHR case law on Article 3 ECHR and the UN Convention against Torture.

⁷² Case C- 324/17 *Gavanozov* ECLI:EU:C:2019:312, as regards “precluding the legislation of a Member State, such as the Bulgarian legislation, which does not provide for a legal remedy against the substantive reasons for an investigative measure indicated in an EIO, and the issuance of an EIO by the authorities of that Member State”.

⁷³ Article 36 and Recitals 36-39 of the EPPO initial proposal.

Regulation; or the interpretation of Articles 22 and 25 of this Regulation in relation to any conflict of competence between the EPPO and the competent national authorities;

(b) dismissal decisions are subject to direct action at the CJEU (based on Article 263 TFEU).⁷⁴

The text provides for remedies in front of national courts against individual investigative measures. However, the text is silent on the question of a remedy against investigation as such. Such a remedy might be a requirement under Article 19(1) TEU⁷⁵ and might be a constitutional requirement in some Member States, where a duty exists to provide the suspect with a legal remedy against prosecutorial investigation, on one hand (Croatia, Austria), and is also an issue in Member States with an investigating judge (Belgium, Luxembourg, France, Spain, Slovenia).⁷⁶ In such cases, a legal remedy under national law could be understood as compatible with the EPPO Regulation in view of references to “national law” in the operative part of the Regulation,⁷⁷ the terminology used,⁷⁸ and additional clarifications in the recitals, especially as regards the autonomy of national procedural systems⁷⁹ and respect for national constitutions.⁸⁰ Conse-

⁷⁴ Recitals 87-89 and Article 42 of EPPO Regulation 2017/1939.

⁷⁵ Article 19(1), second subparagraph: “Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law”. See Case C619/18 *Commission v. Poland (Independence of the Supreme Court)* 4 June 2019 (42): the Court affirmed that, as regards the material scope of the second subparagraph of Article 19(1) TEU, that provision refers to “the fields covered by Union law”, irrespective of whether the Member States implement Union law within the meaning of Article 51(1) of the Charter.

⁷⁶ See A. Novokmet, “The European Public Prosecutor’s Office and the Judicial Review of Criminal Prosecution (2017) 8(3) *NJECL* pp 374-402; see also Z. Đurđević, “Legislative or Regulatory Modifications to Be Introduced in Participant Member States to the Enhanced Cooperation” (2018) International Conference on Enhanced Cooperation for the Establishment of the EPPO; as regards integration into the Spanish system, see D. Vilas Álvarez, “The EPPO Implementation: A Perspective from Spain” (2018) 2 *eurim* pp 124-130.

⁷⁷ In this regard, it is not a real Regulation but a hybrid. Such references are made, for example, in Article 5(3) as regards the general use of national law for cases not regulated (“National law shall apply to the extent that a matter is not regulated by this Regulation”), and on specific issues Articles 10(3), Article 12(3), 13(1), 22, 24(1) and (7), 25(3), 26(1), 27(2), 28, 29, 30, 31(8), 33(1), 34(8), 36(6) and (7), 38, 39(4), 40, 41, 42(1), 43(1), 45(2), 46, 107(3), 108. Such hybrids are not a novelty. See, for example, also (EU) 2018/1805 on the mutual recognition of freezing orders and confiscation orders [2018] OJ L 303/1.

⁷⁸ Article 28 has to be read together with Article 30 using the wording “the European Delegated Prosecutors are entitled to order or request”. In a system with investigating judges, this could amount to a punctual intervention or the lead being taken by the investigating judge, where this is “neither imposed, nor excluded by the Regulation”. See Verbruggen et al. (n 1).

⁷⁹ Recital 15: “This Regulation is without prejudice to Member States’ national systems concerning the way in which criminal investigations are organised.”

⁸⁰ Recital 80: “[...] This Regulation respects the fundamental rights and observes the principles recognised by Article 6 TEU and in the Charter, in particular Title VI thereof,

quently, the EPPO will not be used to alter national systems by abolishing the investigating judge, where such an institution exists. In such systems, it has a meaning and value to guarantee a fair and impartial procedure, especially if the suspect does not have a lawyer.⁸¹ In such systems, the most elegant solution is to include the EPPO in the national system in the same way as a national prosecutor.⁸² In the opposite case, a situation could arise where some suspects (for national cases) have the right to an assessment of the investigation, while other suspects (for EPPO cases) do not on the same territory for similar offences (equality before the law).⁸³ However, a much better solution would be an EU-wide explicit remedy provided either in a uniform way by national courts or by the Court of Justice to provide uniform standards to suspects in all EPPO participating Member States. It is true that the Regulation is silent on the issue, as Member States have not explicitly decided to develop such a uniform standard in view of the fact that national systems differ significantly.

However, not providing for judicial (court) oversight of the EPPO investigation as such could create a clash between national (constitutional) requirements in some Member States, such as those providing for an investigating magis-

by international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by Member States' constitutions in their respective fields of application. In line with those principles, and in respecting the different legal systems and traditions of the Member States as provided for in Article 67(1) TFEU, nothing in this Regulation may be interpreted as prohibiting the courts from applying the fundamental principles of national law on fairness of the procedure that they apply in their national systems, including in common law systems”.

This recital was inspired by a similar recital in the EIO Directive 2014/41/EU.

⁸¹ In Slovenia, an attempt was made in 2017 to abolish the investigating judge. However, strong resistance was put up by practitioners, academics (including the author of this article), prosecutors and even the police. Consequently, the Parliament rejected the proposed legislation. In the Slovenian system, the investigating judge is not a function reminiscent of the inquisitorial system but provides for a balanced pre-trial phase, as he or she is not party to the procedure. In this regard, the claim that a prosecutorial investigation is more accusatorial by nature is wrong, as in such systems one party is exposed to the “mercy” of the other party. And this is not an accusatorial but an inquisitorial feature.

⁸² See Verbruggen et al. (n 1). In this regard, it is proposed that the Chief Federal prosecutor is also a delegated prosecutor (to integrate both systems and prevent contradictions).

⁸³ In Slovenia, a group was established in 2019 at the Ministry of Justice to prepare the draft legislation. However, there were ideas to exclude judicial investigation by law in all cases as regards the delegated EPP. Already now in Slovenia, for offences with imprisonment for up to three years, no judicial investigation is conducted. And for offences with imprisonment from three years up to eight years the prosecutor can decide to skip judicial investigation if enough evidence for a charge has been collected. And for offences with imprisonment for over eight years, the investigating judge can agree not to conduct an investigation (Article 170 of the Criminal Procedural Code).

trate,⁸⁴ as well as those with police/prosecutorial investigations with a special court remedy as regards the decision to introduce an investigation. For example, the Croatian Constitutional Court annulled substantial parts of the Croatian Criminal Procedure Act because, *inter alia*, it did not provide for a special judicial (court) remedy against the introduction of an investigation.⁸⁵ It could be debated whether a court remedy against the introduction of an EPPO investigation could perhaps even be considered a common constitutional tradition in at least some Member States (e.g. Austria, Croatia, Slovenia) in line with Article 6 TEU.⁸⁶ Yet, such a requirement for a judicial remedy is not a purely technical rule but, as seen above, an inherent part of the constitutional law of some Member States. The problem might also arise at the phase of recognition of a judgment. In such a case, states which demanded such remedy as a constitutional issue might have problems in accepting judicial decisions decided in systems that lack such judicial protection. Besides, as the EPPO might start procedures on different suspects on the same criminal act in different Member States⁸⁷ (for example, in the case of carousel VAT fraud) there is also the question of equality before the law, as for the same criminal act co-defendants would have different rights.⁸⁸

It is true as stated above that the EPPO Regulation does not explicitly prohibit judicial control of an investigation if it is provided for by national law. However, the Slovenian example of transposing the EPPO mentioned above (to which the author was a direct witness) shows that at least some Members States interpret the silence of the Regulation as an order not to introduce legal remedy. And in the debate of the Slovenian expert group, the ministry stated that they understood the Commission that not to introduce a judicial remedy was to apply the Regulation in a correct way. Consequently, it seems that there is a need for further clarifications of the Regulation in this regard. A judicial remedy against the investigation as such in all Member States would also mean a more guaranteed approach. In this regard Member States should be open to learn from each other and sometimes overcome a kind of invisible barrier of being taken seriously only based on size and influence. It should be

⁸⁴ The Slovenian Justice Minister specifically raised this issue at the JHA Council on 15 June 2015.

⁸⁵ Decision of the Croatian Constitutional in Case U-I-448-2009, 19 July 2012, stating that court (judicial) review is an inherent part of the Croatian Constitution, as in that regard the Croatian obligatory legal standards are higher than in other states or as required by the minimum ECHR standards. The same applies to the “new” Austrian criminal procedure.

⁸⁶ A. Erbežnik, “European Public Prosecutor’s Office (EPPO) – Too Much, Too Soon and Without Legitimacy?” (2015) 2 *EuCLR* pp 209-221.

⁸⁷ See Article 26(5) of the EPPO Regulation.

⁸⁸ The problem of EPPO is that it is a federal prosecutor without federal courts, like in the United States.

rational arguments that count, and there are many who are for judicial control of the investigation.

7. CONCLUSIONS: WHERE ARE EU CRIMINAL LAW AND THE EPPO HEADING?

EU criminal law has become to a certain extent a tool to promote further EU integration. However, in some Member States this can lead to a lowering of certain basic standards in criminal law, including fundamental rights. When proposing legislation and debating it, the sensitive legal structure of the EU, as mentioned above, has to be taken into account, such as a delimitation of competences and the subsidiarity principle, or the still existing huge divergence in the understanding of the basic principles of criminal law (despite the achieved harmonisation). Consequently, creating a unitary system based on very low common denominators has to be avoided. To be fair, it has to be said, that as regards the EPPO, it seems that in order to avoid lowering Member States' fundamental rights standards, the Regulation even appears to give up on the supremacy of EU law, as understood in other areas of EU law. Thus, it allows for the control of an EU act (the procedural act of the EPPO) that is against national standards. However, even this approach is not without pitfalls, such as unequal standards for EPPO cases, the danger of "forum shopping", etc. In addition, a common area of freedom, security, and justice cannot exist if some Member States do not respect the rule of law.⁸⁹ Consequently, the challenges and issues identified in this article have to undergo intelligent legislative design. Semi-backed legislative proposals should not be put on the table and vigorously defended with a kind of religious zeal.⁹⁰ Often legislative instruments and actions have to be accompanied by police and judicial training, adequate funding (as for Eurojust) and exchange of best practices. The same applies to the EPPO and its future. As shown above, some substantial legal issues affecting EU criminal law have affected or might also affect in the future the EPPO. In this regard no EPPO extension should be envisaged until the system is fully operational and any potential legal lacunae clarified.⁹¹ Con-

⁸⁹ The CJEU has already indicated that Member States for whom a violation of Article 7(2) would have been established are not able to participate in mutual recognition. However, it is still open to what extent the Article 7(1) procedures shall be taken into account. Case C-216/18 PPU *LM* of 25 July 2018.

⁹⁰ See, for example, the debates on the e-Evidence package where an acting judge of the ECtHR clearly stated that the Commission proposal raises serious doubts as regards ECHR conformity. However, the Commission never reacted to such criticism.

⁹¹ The Commission already proposed an extension of the EPPO to terrorism: Commission, 'A Europe that protects: an initiative to extend the competences of the European Public Pros-

sequently, EU criminal law is at a crossroads. It might be proposed, drafted and applied in an intelligent and rational way with awareness that common satisfactory harmonisation at a high level has not yet been achieved, but at the same time safeguarding the primacy of EU law, or it may become an ideology of blind trust that does not tolerate any doubts and remains at a very low common level of fundamental rights. In this sense, the EPPO Regulation has some elements that can go both ways. On one hand, it is positive that more reference is given to national law, and, on the other hand, this can endanger equality of proceedings, trigger “forum shopping” and endanger primacy. Only time can tell how EU criminal law in general and EPPO in particular will develop.

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Sažetak

KAZNENO PRAVO EU-a I DALJNI KORACI U VEZI S RADOM UREDA EJT-a

Kazneno pravo EU-a relativno je nova pravna konstrukcija nastala u posljednjih dvadeset godina. Iako je imalo iznimno pozitivnu ulogu u kreiranju zajedničkog područja slobode, sigurnosti i pravde, u isto je vrijeme razotkrilo specifične nedostatke. Kao takvi u ovom će članku biti analizirani: 1) pitanje "federalne" strukture i načela nadređenosti prava EU-a, 2) granice uzajamnog priznavanja, pri čemu se uzima u obzir ograničena harmonizacija proceduralnih prava, 3) demokratska kontrola pri donošenju kaznenog prava EU-a, pogotovo u vezi s ulogom Europskog parlamenta i nacionalnih parlamenata, te 4) pitanje učinkovitih pravnih lijekova u instrumentima kaznenog prava EU-a. Ured europskog javnog tužitelja predstavlja novo razdoblje u razvoju kaznenog prava EU-a. Uspostavlja djelatnu tužiteljsku službu, koja se ne temelji na logici suradnje, kao npr. Eurojust, nego predstavlja nezavisno pravosuđno tijelo s ovlastima progona i kažnjavanja kao znacima "federalne" suverenosti. Posljedično predstavlja velik korak naprijed u ostvarivanju prave europske savezne države. Kao takav nije imun na probleme koji su bili prikazani u vezi s kaznenim pravom EU-a općenito. U članku su prikazani problemi koji mogu nastati pri prijenosu Uredbe o Uredu EJT-a u nacionalne sustave u vezi s načelima iz nacionalnog ustava (npr. načelo jednakosti ili podjele vlasti), pogotovo u sustavima s istražnim sucem kao u slučaju slovenskog prijenosa. Nadalje će biti istaknut problem mogućnosti *forum shoppinga* zbog relativno nizke usklađenosti nekih proceduralnih jamstava na razini EU-a (npr. pravo na odvjetnika). Bit će upozoreno da kazneno pravo kao represivno pravo mora uključivati u punoj mjeri parlamentarna tijela kao kritiku čl. 86 i postupka u vezi s nacionalnim parlamentima. Bit će analiziran problem nepostojanja pravnog lijeka protiv istrage Ureda EJT-a kao takve, gdje se pravna praznina uredbe može pogrešno tumačiti kao zabrana takva lijeka. Na kraju će biti navedena upozorenja i rješenja za pozitivne odgovore u vezi s Uredom EJT-a.

Ključne riječi: Ured EJT-a, uzajamno priznavanje, kazneno pravo EU-a, harmonizacija, prava osumnjičenika