## EPPO AND JUDICIAL REVIEW OF A DECISION NOT TO PROSECUTE

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## 1. Rationale of judicial review at the EU level

Taking into account the significance of the Permanent Chamber’s power to dismiss a case, as well as implemented judicial review at the EU level, it should be noted that such an approach to the issue of judicial review of a decision not to prosecute is an acceptable option. The purpose of a judicial review of a decision to dismiss a case is to prevent the arbitrary and discriminatory closure of a case and guarantee effective and equal prosecution when the preconditions for the initiation of criminal prosecution are fulfilled. This setting is a generally accepted concept for the existence of such control.

As far as EPPO is concerned, it is obvious that the new institutional organization of EPPO, as a collegiate body with a strong, centralised structure, envisages the Permanent Chamber’s authority to decide to dismiss a case. In this regard, the Permanent Chamber will be the first and practically only instance to make a *de facto* final decision of whether to prosecute or not that will directly affect the issue of the protection of EU financial interests, which is why EPPO has been established after all. Although the office of the EPPO and thus the Permanent Chamber enjoys institutional guarantees of autonomy and independence in order to objectively and impartially assess the legal preconditions for initiating criminal proceedings, there is still an understandable possibility of a wrong opinion or conclusion about the existence of the facts that constitute a criminal offense and the defendant’s guilt, which consequently generates the decision to dismiss a case. Furthermore, the Permanent Chamber’s decision will typically be based on the draft report that will be submitted to it by the EDP, and even though the hierarchical insight into the report and the case file will make its final decision in this way, there is always a latent danger of misinterpretation and, therefore, making the wrong decision.

As the Permanent Chamber’s decision to dismiss a case would practically be the final decision of the EPPO, it is necessary to provide some external control system to prevent the harmful effects of any misjudged decision. However, such a system of review should at the same time have institutional guarantees of autonomy and independence for an objective and impartial review of the specific case. As only the judicial authority undoubtedly enjoys these qualities, it is logical to entrust that review to the competent court. This ensures there is a system of checks and balances that will act, on the one hand, proactively and make it possible to eliminate the occurrence of adverse effects due to an erroneous decision of Permanent Chamber, and, on the other hand, preventively, through its very existence, affect EPPO to carefully consider all the circumstances of the case before deciding to finally dismiss it. Such a system will have a stimulating effect on EPPO’s accountability because, already having in mind that there is an independent system of review, it would make additional effort to make a lawful decision.

But the very existence of judicial review, regardless of whether it is at the national or EU level, will not be useful if it is not accessible, fast, and efficient. Therefore, these features will be considered below in the context of judicial review as prescribed by the Regulation in order to identify potential problems that may occur *pro futuro*.

## 2. *Ius standi* before the CJEU

The decision to dismiss a case, along with the decision to bring a case to judgment, is a fundamental decision to be made by the EPPO. It is even more important as it will not lead to the prosecution of the perpetrators of crime. In order to remedy the adverse consequences of such a decision, judicial review must be accessible. This means that a simple legal path must be provided to activate the supervisory powers of the court to ensure that review is indeed carried out. However, the existing system of triggering that review does not entail the confidence that it will be accessible.

Although it is clearly prescribed that EPPO, when a case is dismissed, shall officially notify *inter alia* – where appropriate under national law – the crime victims (Art. 39 (4) Regulation), there is a significant practical problem which natural or legal persons would be authorized *jus standi* before the CJEU. Namely, as it follows from the provision in question, the Regulation continues to rely on member states when determining who is considered a victim of the crime, whereas the decision to dismiss a case should be subject to judicial review in accordance with Art. 263 (4) TFEU insofar as it is contested directly on the basis of Union law (Art. 42 (3) Regulation). According to Art. 263 (4) TFEU, ‘Any natural or legal person may…institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.’ The above provision is rather broadly defined and does not provide a clear insight into who would have been legitimate to initiate a review as a natural or legal person. Further, it leaves a very narrow framework for contesting the decision to dismiss a case and only when it represents the violation of general principles of the EU, fundamental rights, the Treaties, or the Regulation. Göhler offers a potential response to that question, suggesting that such a status should be given to EU citizens with ‘identifiable status’ in a particular case and to ‘defined groups with a recognizable status’. In order to assign an ‘identifiable status’ to a certain person, two prerequisites must be met: a) that EU citizen at any time before the closure decision is made, on their own initiative or upon citation by the EPPO, pressed charges or reported facts to the EPPO on the conduct that might constitute an offence within its competence; b) the potential claimant should demonstrate at least some indication of the unlawfulness of the dismissal decision. Still, starting from the assumption that individual citizens will sometimes have no desire or opportunity to question the decision to dismiss a case, as well as that in some cases they will not be able to prove the ‘identifiable status’, Göhler suggests that ‘recognized status’ should be given to pressure groups established by EU citizens. Göhler further explains these should be groups established by EU citizens to promote and defend the public interest in the EU, and they should be institutionally independent, non-governmental, and non-profit-making. If they meet these criteria, their ‘recognized status’ should be guaranteed regardless of their earlier engagement during the pre-trial procedure but should still point to indicative evidence of the unlawfulness of the dismissal decision to protect EPPO from malicious claims. Nevertheless, it still remains an open question as to which direction the CJEU will interpret the term ‘natural’ or ‘legal persons’ and how it will build a stable practice on the issue at stake taking into account the importance of the very existence of judicial review over the decision to dismiss a case, external perception of the functioning of the judiciary in prosecuting those financially susceptible set of criminal offences, and the real public perception on the effectiveness of prosecution of those criminal offenses if the CJEU would slowly and very narrowly define the concept of a person authorized to institute judicial review.

It is undoubtedly the fact that the EU legislator entrusted the review over the decision to dismiss a case directly to the CJEU, whereby the mechanism for implementing that review is prescribed by the TFEU. However, it should be noted that this review is only optional, which means that it is primarily dependent on whether a certain ‘natural person’ or ‘legal person’ is really interested in instituting proceedings before the CJEU against an act addressed to that person or which is of direct and individual concern to them. Therefore, if such persons will not be present, or if they do not express such interest in initiating proceedings before the CJEU – which is not an unrealistic option, especially if we consider the corpus of criminal offenses closely related to EPPO – then the provisions on judicial review would remain unenforced. Starting from the goal and purpose as well as the enormity of the idea of setting up the office of the EPPO, the EU should not allow itself the luxury that the interest of prosecution of such serious criminal offenses, because of the erroneous judgments of the EPPO, would be jeopardised by conferring the initiation of judicial review to the natural or legal person under the additional condition that that decision is of direct and individual concern to them. Especially because there is always a latent danger that even the aforementioned persons with an identifiable and recognisable status can simply miscarry and not react at all. Finally, it is noted that the text of the Regulation does not foresee the possibility for such categories of persons to be informed of the dismissal decision unless they are victims of a criminal offense. Therefore, there is a real danger that they will not even know that EPPO dismissed a case, due to which they will not be able to demonstrate the existence of their legitimate interest in enforcing judicial review to dismiss a case.

## 3. Speedy decision-making process

One of the qualities every system of judicial review needs to have in making a decision to dismiss a case is a quick remedial procedure. Prescribing too many formal preconditions, prior determination of *ius standi* for a particular person, and the excessive length of the proceedings in which it decides on such an important issue as the lawfulness of the decision not to prosecute does not go along with the goal and purpose of the mere existence of that institution. National criminal procedures who are familiar with these proceedings provide very short deadlines for authorized persons to initiate procedures before the court as well as short deadlines for the court to decide on their request. One may justify such a complex review in the proceedings before the CJEU, referring to the complexity of criminal offenses under the jurisdiction of the EPPO. But practically speaking, why should the EPPO work be treated as ‘more complicated’ compared to the prosecution of national prosecutors who are facing daily crimes against life, body, and property (homicides, rape, robbery, corruption, economic crimes etc.)? The criterion of the gravity of the criminal offense and the complexity of the case certainly should not be justification for the excessive length of remedial procedures against a decision to dismiss a case.

In the literature, it is stressed that the CJEU may be overwhelmed by many requests concerning the review over the dismissal decision, and therefore, relevant studies have shown that the acquisition of the status of a person authorised to initiate proceedings against EPPO’s decision to dismiss a case should be limited to identifiable natural persons and recognisable legal persons. However, restricting the circle of persons authorised to initiate judicial review of the decision to dismiss a case simultaneously creates a negative effect of narrowing the possibilities for democratic control over the legality of criminal prosecution, which consequently could lead to legal uncertainty and loss of trust in the EU institutions and rule of law.

Consequently, one should consider strengthening the capacity of the CJEU in order to allow for a quick and easy decision-making procedure. The basis for such an intervention exists in Union law. Namely, Art. 257 TFEU stipulates that European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish specialised courts attached to the General Court to hear and determine, at first instance, certain classes of action or proceeding brought in specific areas. The EU is undoubtedly aware of the importance and complexity of the EPPO, and, hence, a number of legal consequences when it has decided to create a supranational body of criminal prosecution that should protect its interests throughout the EU. Therefore, it is quite understandable to express the necessity of the creation of a clear and consistent system of checks and balances awarded to the institution at the same EU level, which will have at least equal or greater authority than the EPPO itself, and only the court may innately have such a position. It is quite clear that the Member States will not be able to cover all the challenges of judicial review of the work of EPPO through its legislation, and obviously, there is a need for a specialized court that will have a strict competence within the work and activities of the EPPO and the decisions that it brings at the EU level. A second, simpler and more realistic option may be proposed on the basis of Chapter 16, Title III Rules of Procedure of the General Court, which provide for the possibility of establishing special chambers within the General Court. The establishment of such a chamber is much simpler than the establishment of a completely new court, and this special chamber could have a targeted competence to conduct specific procedures in a particularly narrow set of cases. There is no doubt that the procedure for reviewing the decision to dismiss a case is of the same nature and that the EPPO’s structure should include such a judicial mechanism that will implement fast-track procedures of review over a decision not to prosecute.

## 4. Possible shift towards *ex officio* judicial review of a decision not to prosecute

Reliance on an individual citizen (victim of a criminal offense) when the public prosecutor has failed in his duty to prosecute perpetrators of criminal offenses is more than a century old characteristic of many continental European countries with a hierarchical model of authority. It is not surprising, therefore, that the EU legislator has decided to rely on the citizens (victims in Art. 39 (4) Regulation and natural and legal persons with a direct interest in Art. 263 (4) TFEU) in an effort to provide supervision over EPPO. However, the enormity of the idea and vision on the EPPO, as well as the specific range of offenses for which EPPO will be competent to perform the function of criminal prosecution, simply goes beyond the seminal reason wherefore the national criminal procedures, even today, rely on the citizen in order to control the public prosecutor’s monopoly of criminal prosecution. This seminal reason is the fact that the citizen to which the state wants to rely on really feels like a victim of a criminal offense. It is not realistic to expect such a scenario in cases where EPPO is competent to prosecute. There will be very little or no citizens at all who will even have the willingness to prove the existence of their *ius standi* according to Art. 263 (4) TFEU. The reason for this is that the victims of these criminal offenses generally lack the sheer interest of the perpetrator being punished and to feel through the criminal justice system just satisfaction for the crime committed by the perpetrator of the criminal offense. Therefore, if there is no such victim who will express their particular interest in prosecution and punishment of the perpetrator, the benefit of this legal path cannot be expected, especially considering the large number of cases that will be resolved by EPPO throughout the EU. Even if some person enumerated in Art. 263 (4) TFEU indeed decides to challenge the decision to waive the criminal prosecution before the CJEU, he/she will often lack the necessary professional legal knowledge to formulate the submission at all and to submit it in a prescribed manner, from which will be apparent not only the reasons why EPPO has made a mistake in its decision but also the legal basis for establishing *ius standi* before the CJEU. Moreover, citizens will be weighted with financial and time-consuming burdens in order to prove these preconditions, which will undoubtedly require the expert assistance of the counsel. If this burden is to be borne by a citizen (by all odds, they will), we have to ask, what is their motive for unconditional concern for the financial interests of the EU? This issue becomes even more meaningful because neither have the Member States themselves invested the necessary effort to protect the EU’s financial interests because they could not or did not want to do it, so the EU had to react and protect its interests through the EPPO.

It is obvious that judicial review of a decision to dismiss a case, as envisaged by the Regulation, opens up a series of questions to which there are no concrete answers, while EPPO is soon to become a reality in the fullness of its powers in everyday practice. Perhaps the whole system of judicial review should be set on more realistic basis and prescribed in a plain and simplified procedure. A good example is a system of judicial review as provided for in the Rome Statute of the International Criminal Court (hereinafter, ‘Rome statute’). Although the rationale and foundations for the establishing of these two promoters of collective (social) interest in punishing the perpetrators of the most serious criminal offenses cannot be compared, because their conceptual basis is completely different, yet from their difference can be grasped the essential similarity. The similarity is the fact that the member states voluntarily decided to transfer part of their sovereign powers to prosecute the perpetrators of the specified criminal offenses on a supranational body of criminal prosecution in order to protect not their individual interests, but the interests of the European and International community.

Unlike the EPPO for which the Regulation has established only a facultative system of judicial review of a decision to dismiss a case assigning its initiation to individual citizens, the Rome statute established both facultative review authorizing states and the Security Council to initiate judicial review and an *ex officio* system of judicial review through the Pre-Trial Chamber that monitors the entire course of pre-trial proceedings conducted by the Office of the Prosecutor (hereinafter, ‘OTP’). However, it should be noted that the *ex officio* judicial review is ensured only if the OTP decides to dismiss a case acting on the principle of the opportunity of criminal prosecution, i.e., if, despite the fact that the prerequisites for criminal prosecution were fulfilled (Art. 53 para. 1a-b Rome statute), taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice (Art. 53 para. 1c Rome statute), or upon the investigation, the OTP concludes that prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime (Art. 53 para 2c Rome statute). In that case, the OTP is obliged to inform the State Party, Security Council, and the Pre-Trial Chamber about the decision to dismiss a case. Then, the Trial Chamber, if a state or the Security Council did not require review of such negative decisions, should commence an *ex officio* review of a decision not to prosecute; thus, the decision of the OTP shall be effective only if confirmed by the Pre-Trial Chamber (Art. 53 para. 3b Rome statute). When the Pre-Trial Chamber does not confirm the decision referred by the OTP, it shall proceed with the investigation or prosecution (Art. 110 (2) Rules of Procedure and Evidence). On the other hand, if the OTP waived the criminal prosecution by applying only the principle of the legality of the criminal prosecution (Art. 53 para. 1a-b and 53 para. 2a-b of the Rome statute), the OTP shall inform the State Party and the Security Council thereof. If the state or Security Council are unsatisfied, they may, within 90 days, request the Pre-Trial Chamber review a decision not to prosecute, and the Pre-trial Chamber may request the OTP to reconsider its decision (Art. 53. para 3a Rome Statute). When the Pre-Trial Chamber requests the OTP to review, in whole or in part, the decision not to initiate an investigation or not to prosecute, the OTP shall reconsider that decision as soon as possible (Art. 108 (2) Rules of Procedure and Evidence).

The advantages of the judicial review as envisaged in the Rome statute are multiple: a) it has been deprived of unnecessary bureaucratic search for citizens who would be individually interested in the success of supranational prosecution, b) a quick and easy procedure for initiating judicial review is envisaged, c) there are relatively short deadlines for issuing complaints and making a decision. Besides, the very existence of a judicial body authorized to *ex officio* review the decision to dismiss a case provides the assurance that the OTP, acting at the supranational level, will not be careless because of the existence of an *al pari* body that has the authority to check its work. Such a balance of power has a preventive effect on the prosecutor to be careful and responsible since maladministration can easily come to the public and become the reason for which the prosecutor could be held accountable for serious misconduct in the performance of his duty to prosecute offenders in accordance with the principle of legality of criminal prosecution.

EPPO has explicitly guaranteed the position of the body independent 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 and therefore shall act in the interest of the Union as a whole (Art. 6. Regulation). Concurrently, such a state of affairs requires the existence of a body that will be at least equally independent and able to react when EPPO breaches the core of its given authority. In the current system of judicial review of a decision to dismiss a case, it is only certain that control will be carried out by the CJEU. However, it is equally certain that there are no rigorous provisions where a clearly competent functional judicial body (specialised court or specialized chamber of the CJEU) would be determined as well as a coherent system for initiating and conducting judicial review. In order for this system to really achieve the characteristics of a desirable system of judicial review that is fast, simple, deprived of bureaucratic obstacles, and, above all, efficient, it is necessary to make important changes that will bring it closer to this ideal. Therefore, it is first necessary to choose the model of participation of the CJEU. The current state of affairs suggests that it is easiest to create a specialised chamber within the General Court and precisely define its powers and tasks in the pre-trial procedure conducted by EPPO. The next important step is to unburden natural and legal persons of the difficult task of initiating judicial review; not only do they often have no interest in doing so, but bureaucratic, financial, and time difficulties discourage them from doing it duly and efficiently. Finally, it is essential to prescribe the form of *ex officio* judicial review of the decision to dismiss a case modelled on the aforementioned comparative solution and reasonably short time limits within which the court must decide on the lawfulness of EPPO’s decision. This will ensure a harmonized system of proceedings, strengthen the transparency of the EPPO, and create a complete system of checks and balances that will, as a result of the existence of such a control system, encourage prosecutors to offer additional efforts and attention when deciding on bringing a case to judgement or to dismiss a case. This opens up space for an effective and efficient system in which the EPPO and the court, performing different but harmonized functions in the criminal proceedings, will really enable the proper and fair functioning of the criminal justice system.

4. Conclusion

The implementation of judicial review in the system of EPPO is a very complex and sensitive issue. It became problematic in 2013, when the Commission uncritically proposed that judicial review over the decision not to prosecute should be entrusted to the member states. It is clear that such a system of review couldn’t become a reality given the differences between the member states regarding the principle of legality and the principle of opportunity of criminal prosecution. Even greater diversity comes to the fore when it comes to specific procedural mechanisms to control the decision to dismiss the case.

Therefore, the text of the Regulation on enhanced cooperation was indeed greeted with great relief. This is evident from the fact that the regulation explicitly prescribed that the CJEU is competent to control the decision to dismiss a case. This has given confirmation to a number of critics in scientific and professional circles that showed that the EPPO should be considered as the EU body of criminal prosecution for the purpose of judicial review. This has been confirmed in the Permanent Chamber’s authority to make a decision not to prosecute. As the Permanent Chamber makes a decision at the EU level, it is clear and quite logical that the competence of the CJEU to review a decision to dismiss a case is also prescribed at the EU level.

Nevertheless, a number of shortcomings derive from the current system of judicial review, which is why the EU legislator has a demanding task until the final design of a coherent and harmonized judicial review of EPPO’s work. This is evident from the fact that both the Regulation and the TFEU rely solely on the citizen as the person who should give the initiative to institute judicial review of a decision to dismiss a case. But a series of obstacles flows from it: difficult or almost impossible expectations of citizens to monitor the work of EPPO, financial and time costs, and the bureaucratic process of proving *ius standi* before the CJEU, which deters citizens from the real desire to be a protector of the financial interests of the EU when the EPPO has not fulfilled its statutory duty.

Hence, this paper proposes an *ex officio* judicial review of a decision to dismiss a case. This solution is not new and has already been recognized in the work of another supranational body of criminal prosecution at the international level, i.e., the Prosecutor of the ICC. It is clear that it is difficult and almost impossible to draw parallels between these two systems of criminal prosecution, but we should not *a priori* reject the societal benefits of obviously good ideas arising from the Rome Statute of the International Criminal Court. This idea is the concentration of review within the *ex officio* jurisdiction of the judicial Pre-trial Chamber authorized to conduct review of a decision to dismiss a case. Consequently, concrete proposals for establishing a realistic system of judicial review of a decision to dismiss a case has been presented in this paper, taking into account the institutional and procedural foundations for the functioning of the EPPO at the EU level.