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The European public prosecutor's office and the judicial review of criminal prosecution

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Abstract
In relation to the pending negotiations over the establishment of a European public prosecutor's office (hereinafter, EPPO) as well as its role and structure, one often faces the question of the accountability and judicial review of the prosecutor's prosecutorial and investigative functions. More precisely, it seems that it is not clear who should exercise the review, what needs to be reviewed and when such a review should be engaged. Moreover, the draft provisions on the judicial review have been amended several times. This article is aimed at depicting the current state of the subject matter and the main issues under discussion with an emphasis on the issue of judicial review of criminal prosecution in pretrial proceedings. The starting point is the hypothesis that the EPPO's decision to initiate an investigation really represents a decision on the initiation of criminal prosecution, and as such, it needs to be subject to judicial review. This hypothesis is substantiated by the right to effective judicial review enshrined in Article 47 of the Charter of fundametnal rights of the EU, the right to judicial review in the Treaty on the Functioning of the European Union and an analysis of the principle of mandatory prosecution considering the impact of investigations initiated by the EPPO on the fundamental human rights of suspected persons.

Keywords
European public prosecutor's office, criminal prosecution, principle of mandatory prosecution, pretrial procedure, judicial review

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Introduction

Since the European Commission presented a proposal for a Council Regulation on the Establishment of the European public prosecutor's office (EPPO; hereinafter, Commission's Proposal)[1] in July 2013, there has been significant progress in establishing a body that is to be in charge of the systematic prosecution of the perpetrators of crimes against the financial interests of the European Union[2] (hereinafter, EU).[3] By doing so, the EU has not only interfered with the jealously guarded sovereignty of the member states in regard to the prosecution and punishment of the perpetrators[4] but has also embraced a heavy burden of responsibility, which the position of a body in charge of ex officio prosecution implies.[5]

Although the proposal has opened up a vast space for questions, the issue of judicial review of criminal prosecution is particularly emphasized within the context of the establishment of the EPPO.[6] This is an exceptionally delicate and complex issue that not only encompasses granting citizens the right to judicial review over criminal prosecution and the establishment of a body in charge of EPPO review but also a complicated estimate of the scope of the EPPO's autonomous powers. Furthermore, it establishes a line which, if the prosecutor crosses it by any action or intervention focused on initiating and conducting criminal proceedings that interferes with an individual's rights and freedoms, indicates the right of that individual to insist on judicial review over the pertaining prosecution. One should not forget that the EPPO was devised as a

1. Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, 17 July 2013, COM (2013) 534 final. The last version publicly available of the draft Regulation at the time of writing is document 5766/17, 31 January 2017.
2. L.B. Winter, 'The Potential Contribution of a European Public Prosecutor in Light of the Proposal for a Regulation of 17 July 2013', *European Journal of Crime, Criminal Law and Criminal Justice* 2 (2015), pp. 126–144.
3. The idea of establishing an EPPO has been developing for years, first in the 1997 Corpus Juris, which resulted in a mini-criminal code for the protection of the Community's financial interests, and then in the 2001 Green Paper on criminal law protection of the financial interests of the community and the establishment of a European Prosecutor. Later, in 2004, the establishment of an EPPO was proposed in Article III-274 of the Constitutional Treaty, but since the ratification thereof did not end well, the legal ground for the establishment of an EPPO was finally brought to daylight in Article 86 of the TFEU. V. Mitsilegas, *EU Criminal Law* (Oxford: Hart, 2009), pp. 229–231.
4. However, this restrains criminal law sovereignty only as far as allowed by the narrow scope of criminal offences over which the jurisdiction of the EPPO will be exerted. Yet, there is no doubt that this made the member states recognize the inefficiency and insufficiency of the autonomous national prosecution of the perpetrators of crimes against the Union's financial interests. Z. Đurđević, 'Criminal Law Protection of the European Union's Financial Interests (according to the working Draft Proposal of the Criminal Code of 21 October 2010.)', *Croatian Annual of Criminal Law and Practice* 2 (2010), p. 770.
5. It is certain that the biggest responsibility of the EU in this view refers to the issue of achieving a perfect balance between the aspiration to efficient criminal prosecution and the yearning for fundamental human rights and freedoms protection. What is crucial here is the institutional design of the EPPO and the issue of its autonomy and independence from national governments and from EU institutions on the one hand and, on the other hand, which body would be competent (and to what extent) for reviewing criminal prosecution and investigation by the EPPO in order to prevent arbitrary criminal prosecution. For a detailed analysis of the three ideal-type models of the institutional design of the EPPO, see K. Ligeti and M. Simonato, 'The European Public Prosecutor's Office: Towards a Truly European Prosecution Service?' *New Journal of European Criminal Law* 1–2 (2013), pp. 12–17.
6. For analysis of the scope and type of judicial involvement in investigations initiated by the EPPO see Z. Đurđević, 'Judicial Control in Pre-Trial Criminal Procedure Conducted by the European Public Prosecutor's Office', in K. Ligeti, ed., *Towards a Prosecutor for the European Union* (Oxford: Hart, 2013), pp. 988–1002.

supranational body empowered to initiate and conduct criminal proceedings.[7] Such a body represents a challenge to the EU since its broad range of powers entails an imminent danger of abuse, which innocent citizens are exposed to.[8] Therefore, the legitimacy of its existence will largely depend on the legality of its every action and measure and on the extent to which the fundamental rights of an individual are respected on the occasion of undertaking those actions and measures since the EPPO must not build up its superior position at the expense of fundamental rights granted in the most relevant documents on human rights and freedoms protection.

Given the scope of the EPPO's powers, effective judicial review is vital. The European Commission was aware of that fact and envisaged judicial review in Article 36 of its Proposal, stipulating that procedural acts of the EPPO, which are intended to produce legal effects vis-à-vis third parties, shall be subject to review by the competent national courts in accordance with the requirements and procedures laid down by national law.[9] However, this proposal has faced much criticism among scientists and experts, mostly for the breach of the principle of subsidiarity,[10] due to which the draft provisions on judicial review have been amended several times.[11] Secondly, the Commission's Proposal confines the judicial review to the EPPO's coercive measures and acts.[12] Still, many neglect the fact that the EPPO has combined the role of an investigator with the role of a prosecutor (undertaking criminal prosecution; initiating, conducting and discontinuing investigations), and its decisions may, due to their nature, lead to a restriction of the fundamental rights of an individual.[13] Taking into account the aforementioned, the legal design of judicial review and its rationales remain unclear.

7. Z. Đurđević, 'The Lisbon Treaty: Turning Point in the Development of Criminal Law in Europe', *Croatian Annual of Criminal Law and Practice* 2 (2008), pp. 1077–1127.
8. Kaiafa-Gbandi identifies three main risks for the rights of suspects and defendants in planning the core of EPPO features: giving priority to penal repression without always maintaining a balance of individuals' rights, allowing for weakening of the rights of suspects and defendants and building upon a complex system of applicable laws on the EPPO's tasks with a multi-level structure. M. Kaiafa-Gbandi, 'The Establishment of EPPO and the Rights of Suspects and Defendants: Reflections upon the Commission's 2013 Proposal and the Council's Amendments', in P. Asp, ed., *The European Public Prosecutor's Office – Legal and Criminal Policy Perspectives* (Stockholm: Jure Bokhandel, 2015), p. 241.
9. CJEU has jurisdiction, under Article 267 TFEU, to give preliminary rulings concerning the validity of the EPPO's procedural acts, in so far as such a question of validity is raised before any court or tribunal of an MS directly on the basis of Union law (Article 36(2) a)); the interpretation or validity of provisions of Union law, including this Regulation (Article 36(2) b)) and the interpretation of Articles 17 and 20 in relation to any conflict of competence between the EPPO and the competent national authorities (Article 36(2) c)). A. Weyembergh and C. Briere, *Towards a European Public Prosecutor's Office (EPPO)*, Study for the LIBE Committee (Brussels, 2016), pp. 37–38.
10. For a detailed analysis of the objections raised by national parliaments, see D. Fromage, 'The Second Yellow Card on the EPPO Proposal: An Encouraging Development for Member State Parliaments?' *Yearbook of European Law* 1 (2016), pp. 13–19.
11. K. Ligeti and A. Weyembergh, 'The European Public Prosecutor's Office: Certain Constitutional Issues', in L.H. Erkelens, A.W.H. Meij and M. Pawlik, eds., *The European Public Prosecutor's Office: An Extended Arm or a Two-Headed Dragon?* (The Hague: T.M.C. Asser Press, 2015), pp. 68–69.
12. Y. Bot, 'Judicial Review on EPPO: European and Members States Jurisdictions', in V. Bazzocchi, ed., *EPPO and OLAF Investigations: The Judicial Review and Procedural Guarantees* (Rome: Fondazione Basso, 2015), pp. 41–45.
13. Pawlik and Klip warn that not all investigations will ultimately lead to a charge and court proceedings, but the rights and obligations of the individuals could still be compromised. M. Pawlik and A. Klip, 'A Disappointing First Draft for a European Public Prosecutor's Office', in L.H. Erkelens, A.W.H. Meij and M. Pawlik, eds., *The European Public Prosecutor's Office: An Extended Arm or a Two-Headed Dragon?* (The Hague: T.M.C. Asser Press, 2015), pp. 189–190.

This article addresses the question of judicial review regarding the EPPO's role as a prosecutor and attempts to answer two key questions: (1) Does the Charter of Fundamental Rights of the EU (hereinafter, Charter) open up space for judicial review of the EPPO's role as a prosecutor? (2) Which phase of pretrial proceedings may be suitable for reviewing decisions on the initiation of criminal investigations for the purpose of verifying the compliance of those decisions with the principle of mandatory prosecution? In search of answers to these questions, the author elaborates the necessity of judicial review of criminal prosecution in the investigative phase, offers a comparative overview of judicial review of criminal prosecution in some EU member states and international law, elucidates the right to effective judicial protection stated in Article 47 of the Charter and the right to judicial review laid down in the TFEU and analyses the principle of mandatory prosecution mentioned in the Commission's Proposal.

The right to judicial review of the EPPO's prosecutorial decisions: Setting the parameters

Today, the right to judicial review represents an indisputable and fundamental human right granted by Article 6 of the European Convention on Human Rights (hereinafter, ECHR) and Article 47 of the Charter.[14] At the international level, it ensures that every act of interference with an individual's rights and freedoms shall be subject to judicial review. These rights and freedoms are particularly susceptible to violation in criminal proceedings. Therefore, criminal proceedings, particularly investigations as the first phase thereof, must be subject to judicial review since a criminal investigation involves acts that impinge upon the human rights of individuals.[15]

Like any other prosecutor in the model of prosecutorial investigation, the EPPO unites two important functions. These are the prosecutorial and investigative functions. The prosecutorial function refers to the prosecutor's power to make a decision to instigate, continue and discontinue criminal prosecution in pretrial proceedings and to act as a prosecutor before the court.[16] On the other hand, the investigative function implies taking actions and measures focused on collecting evidence for the prosecution,[17] which, by their nature, can be more or less coercive (wiretapping, search of property, seizure of documents, etc.) or not coercive at all (interrogation of witnesses, etc.).[18] While the Commission's Proposal in Article 25 sets out the types and conditions of investigation and other measures that the EPPO will be able to use and at the same time determines judicial authorization for each of them,[19] it provides no answer to the question of whether judicial review should extend to prosecutorial decisions to instigate and conduct a criminal investigation in the pretrial phase.[20] Nevertheless, the author holds that the prosecutor's decisions to initiate

14. M. Borraccetti, 'Fair Trial, Due Process and Rights of Defence in the EU Legal Order', in G. Di Federico, ed., *The EU Charter of Fundamental Rights* (New York: Springer, 2011), pp. 95–107.
15. Đurđević, 'Judicial Control', p. 987.
16. Op. cit., p. 988.
17. Op. cit., p. 989.
18. Op. cit., p. 991.
19. The requirements and procedures of ex-ante judicial authorisation are not harmonised and thus fully depend on national law. M. Luchtman and J. Vervaele, 'European Agencies for Criminal Justice and Shared Enforcement (Eurojust and the European Public Prosecutor's Office)', *Utrecht Law Review* 5 (2014), p. 140.
20. Some authors actively oppose such a possibility, noting that the judicial review of a decision to instigate an investigation would paralyse the pretrial procedure and incapacitate efficient investigations from the very beginning. See Bot, 'Judicial Review on EPPO', p. 42.

criminal prosecution, that is, to instigate and conduct an investigation must be subject to judicial review.[21] The legal grounds for such a standpoint can be derived from primary law of the EU such as the principle of judicial review enshrined in Article 47 of the Charter, Articles 86(3) and 263(4) of the TFEU and the principle of mandatory prosecution provided for in Article 16(1) of the Commission's Proposal.

Criminal prosecution vs. judicial review

Someone will surely ask why there should be judicial review of criminal prosecution. Bear in mind that criminal prosecution is one of the activities of every legally appointed prosecutor and consists of giving an initiative for the criminal procedure institution and undertaking all the procedural actions aimed at pronouncing a verdict and punishing the perpetrator. It seems that nothing is controversial here. However, the contemporary European prosecutor is no longer a mere party to criminal proceedings who proposes the court to initiate and conduct the criminal procedure. Today, there is a widespread view of the public prosecutor as 'the master of pretrial proceedings – *dominus litis*'. Now, the prosecutor is not only a party to criminal proceedings but also a public (repressive) body that autonomously assesses the existence of the legal requirements for criminal prosecution, opens and runs the investigation, manages the actions in pretrial proceedings and finally decides on the issue of an indictment. The paradigm of criminal procedure has changed. The court neither makes a decision on investigation initiation nor runs the investigation, and during the pretrial proceedings, it mostly appears in the role of a Patron of human rights and freedoms when a decision on undertaking a particular coercive measure or action needs to be made. The aforementioned implies that the former principle of separation of functions – according to which the prosecutor was supposed to give an initiative for criminal prosecution (i.e. a request for opening investigation) and the court ex officio was expected to verify that legal requirements for criminal prosecution and to initiate and conduct investigation had been met – has been abandoned and was eventually substituted by the merger of the investigative and the prosecutorial functions in the institution of a public prosecutor.[22]

Despite this radical turn, the common perception of the goal and purpose of criminal procedure has not changed, so today, prosecutorial investigation still encompasses some undisputed procedural standards that are common within the judicial investigation system. Therefore, a number of institutional issues have emerged: the autonomy of the prosecutor in the process of checking the legal requirements for the prosecution institution (legality or opportunity), impartiality in investigation (obtaining inculpatory and exculpatory evidence with equal diligence), the scope of the prosecutor's powers of prosecution and investigation and the moment when individuals acquire the right to judicial protection from unlawful prosecution and investigation.[23]

The requirements for instituting criminal prosecution are contained in the principle of mandatory prosecution and the principle of opportunity of criminal prosecution. No matter if the prosecutor must (mandatory) or can (opportunity) initiate criminal prosecution after he or she has

21. For a judicial review on dismissal decisions, see J. Göhler, 'Who Shall Be in Control of the European Public Prosecutor's Dismissal Decisions?' *New Journal of European Criminal Law* 1 (2015), pp. 102–125.
22. J. Hodgson, *French Criminal Justice*: *A Comparative Account of the Investigation and Prosecution of Crime in France* (London: Bloomsbury, 2005), p. 209.
23. D. Salas, 'The Role of the Judge', in M. Delmas-Marty and J. R. Spencer, eds., *European Criminal Procedures* (Cambridge: Cambridge University Press, 2002), pp. 497–498.

established that the respective legal requirements (preconditions) have been met, he or she must be objective in the decision-making process.[24] This guarantees that all the perpetrators are treated equally without discrimination on any grounds. Yet, such initial objectivity can sometimes be challenged since the prosecutor does not enjoy the level of independence that is typical of the judiciary. Indeed, the Public Prosecutor's Office is usually organized as a monocratic and hierarchical body in which lower rank prosecutors are not completely independent in their work.[25] Furthermore, there is always pressure put on the prosecutor by the political executive branch of government.[26] Therefore, there is a possibility that the public prosecutor will misinterpret the circumstances and initiate criminal prosecution (i.e. instigate an investigation) even though the respective legal requirements have not been met. In such a case, he or she violates the right of a citizen to be prosecuted only when the legal requirements for prosecution have been met. The initiation of criminal prosecution entails a number of negative consequences for prosecuted citizens that extend to their private and family life, reputation within society and professional career. Hence, the requirements for criminal prosecution initiation not only concern the prosecutor but also every prosecuted citizen. Citizens should know under which conditions repressive authorities are entitled to restrain their fundamental rights and freedoms, and the initiation of criminal prosecution undoubtedly implies such restriction. If, within the new model of criminal procedure, the court is not entitled to verify on its own initiative that the legal requirements for criminal prosecution have been met, it should be given such a control power on the initiative of the defendant, the party who is most interested in protection from unlawful initiation of investigation.

A request that the prosecutor conduct his or her investigations in an impartial manner and seek all relevant evidence, whether inculpatory or exculpatory, represents one of the greatest challenges of the prosecutorial investigation system.[27] That request has been preserved in contemporary criminal procedures as a relic of the past in which an investigating judge conducted the investigation as an independent and impartial judicial authority. Attributing an investigating judge with the investigative function provided both the prosecutor and the defendant with the classical status of parties to criminal proceedings who had equal participative rights in the investigation (to take part in the investigative action and propose its implementation), and the fact that the court was impartial guaranteed an objective examination of all the circumstances of the case. Still, the idea of impartial investigation cannot be easily put into practice. The public prosecutor cannot be impartial since his or her position fulfils the investigative and the prosecutorial function, which, at the same time, psychologically clogs his or her ability to be objective when assessing the legal requirements for the initiation of criminal prosecution and impartiality when conducting an investigation. Actually, before the commencement of criminal procedure, the public prosecutor has to be convinced, at least to some degree, of the defendant's guilt, and that initial suspicion towards the defendant burdens the prosecutor with the nearly impossible task of an impartial investigation of the crime and the defendant's guilt. Thus, it is logical that once an investigation is commenced, the prosecutor will be inclined towards proving that guilt. Therefore, there is a danger that the

24. T. Weigend, 'A Judge by Another Name', in E. Luna and M. Wade, eds., *The Prosecutor in Transnational Perspective* (Oxford: Oxford University Press, 2012), pp. 383–385.
25. For a comparative overview of Switzerland, Germany and France, see G. Gwladys, *Public Prosecutors in the United States and Europe* (New York: Springer, 2014), pp. 171–182, 263–266, 287–291.
26. S.M. Boyne, *The German Prosecution Service* (Berlin: Springer, 2014), p. 36.
27. See G.J. Kjelby, 'Some Aspects of and Perspectives on the Public Prosecutor's Objectivity According to ECtHR Case-Law', *Bergen Journal of Criminal Law and Criminal Justice* 1 (2015), pp. 61–83.

investigation will not be impartial and that the public prosecutor will not be consistent in respecting objectivity and impartiality standards when evaluating the facts that favour the defendant and indicate mitigating circumstances.

Taking into consideration all of the above, some form of control over the work of the public prosecutor must exist. The starting point of this article is the assumption that a review of the investigation and prosecution must be established within the judicial system. The grounds for this assumption refer to the principle of judicial review that permeates the International Covenant on Civil and Political Rights, the ECHR, Charter and national constitutions of EU member states. The fact that prosecutorial investigation implies a combination of the investigative and prosecutorial functions of the public prosecutor leads to the question of the limits of the public prosecutor's power in instigating and conducting investigations and of the moment when the court is supposed to exercise authority over the prosecutor's actions. The answer to this question is hidden behind the principle of judicial review, which imposes the requirement that every limitation of human rights and freedoms shall be subject to judicial review. More precisely, every criminal procedure must precisely and clearly define when an investigation against a citizen shall be opened, how long it shall last, and under which conditions the respective citizen could be brought before the court for the sake of determining his or her culpability and the possible pronouncement of a penalty or other measures envisaged by law. The essence of this assertion is the necessity to determine in advance under which conditions repressive government bodies may interfere with fundamental human rights and freedoms, restrain them and eventually suspend them for prosecutorial purposes. However, the mere existence of those preconditions cannot alone safeguard the peaceful everyday life of innocent citizens unless it is accompanied by an independent and impartial mechanism for controlling the fulfilment of the legal requirements for the initiation of criminal prosecution. Hence, citizens' safety can only be ensured with a mechanism of judicial review, which should be well formulated and have a preventive character, meaning that its mere existence will indirectly urge prosecutorial bodies to invest additional efforts towards the careful consideration of all the circumstances relevant for making the decision to initiate an investigation. On the other hand, if such preventive action does not fulfil its purpose and prosecutorial bodies deliberately or negligently fail to meet the minimum requirements that need to be fulfilled in every instance of criminal procedure, then one should formulate a legal remedy that can be used by citizens to activate judicial review and thus prevent the violation of the fundamental rights of an individual resulting from the unlawful action of prosecutorial bodies.

The position of the court and, particularly, proper judicial protection of the rights of citizens from their unlawful and unfounded violation are of utmost importance in terms of devising any criminal procedure and represent the key factors that affect the establishment of a balance between the aspiration of effective criminal procedure and the requirement of protecting citizens' human rights as well as the defendant's rights in criminal proceedings. That mission is to be accomplished by the legislator, who must carefully weigh all the conflicting interests and choose an ideal role for the court in criminal proceedings. Still, the legislator needs to be very meticulous so as to avoid the unwanted situation in which, due to excessive concentration of its powers, the court sides with one of the parties and thus goes beyond the domain of an autonomous, independent and impartial authority. It would make no sense if judicial review paralysed the repressive system and slowed down the criminal proceedings from their very beginning due to the exorbitant control over the activity of the court. For that reason, it is necessary to provide both for truly efficient judicial review of criminal prosecution and protection from the defendant's malicious intentions to hold up the criminal proceedings or hamper their implementation. Good examples of 'non-intrusive but

efficient judicial review' can be found in Austrian and Croatian solutions reached within the field of positive law. Research of the case law in those two countries has demonstrated that bare regulation of the defendant's right to an efficient legal remedy against unlawful criminal prosecution has a preventive effect on the work of the public prosecutor, so the defendant and his or her attorney often do not even opt for a legal remedy since they are obviously convinced of the lawfulness of the decision to instigate an investigation.[28]

Comparative overview of judicial review of criminal prosecution in some EU member states and international law

Austria

Austria reformed its criminal procedure and embraced prosecutorial investigation in 2008.[29] Pretrial proceedings are regulated in such a way that there is no division into an informal proceeding stage, aimed at the examination of whether a criminal offence has been committed and clarification as to who is the perpetrator, and investigation as a formal proceeding stage.[30] Simply put, the public prosecutor does not make a special, formal decision to open an investigation; rather, investigation and criminal prosecution are deemed initiated as soon as the police and public prosecutor's office commences with investigative activities for the purpose of clarifying the suspicion that a crime has been committed by a known or unknown person or undertakes a coercive measure against a suspect[31] (§ 1 (2) of the Austrian Code of Criminal Procedure, hereinafter, StPO).[32]

Judicial review of criminal prosecution in the investigative phase in Austria is best illustrated through the so-called application for the discontinuation of an investigation (Antrag auf Einstellung, § 108 of the StPO).[33] In fact, an application for the discontinuation of an investigation is a legal remedy that may be used by the accused person to challenge the lawfulness of criminal prosecution in the investigative phase or, in other words, to determine whether the public prosecutor has properly applied the legal requirements laid down in the principle of mandatory prosecution. For instance, § 108 of the StPO stipulates that the court shall discontinue the investigation following an application of the accused person: (a) if it, based on the application or outcome of the investigation, establishes that the offence, due to which the investigation has been conducted, does not constitute a crime or if some other legal ground makes further prosecution of the accused person inadmissible; or (b) if the existing suspicion of a crime, considering its urgency and substantiality and the duration and scope of the investigation do not justify investigation

28. See below Austria and Croatia.
29. Until then, the country had preferred judicial investigation, which was introduced by the so-called Glaser Code of Criminal Procedure in 1873. R. Moss, 'Grundlinien und Standortbestimmung das österreichischen Strafprozeßrechts', in H. Jung, ed. *Der Strafprozeß im Spiegel ausländischer Verfahrensordnungen: Frankreich, Österreich, Schweiz, UdSSR, USA* (Berlin: Walter de Gruyter, 1990), pp. 47–83.
30. F.A. Koenig and C. Pilnacek, 'Das neue Strafverfahren-Überblick und Begriffe', *Österreichische Juristenzeitung* 3 (2008), p. 10.
31. C. Pilnacek and W. Pleischl, *Das neue Vorverfahren, Leitfaden zum Strafprozessreformgesetz* (Vienna: Manz, 2005), p. 77.
32. Strafprozeßordnung 1975 (StPO) StF: BGBl. Nr. 631/1975 (WV), Zuletzt geändert durch: BGBl. I Nr. 92/2016 (VfGH).
33. C. Bertel and A. Venier, *Strafprozessrecht* (Vienna: Manz, 2011), p. 70.

continuation and further clarification of the state of the facts is not likely to deepen the suspicion. The above grounds for the discontinuation of an investigation include the same positive (initial suspicion – Anfangsverdacht einer Straftat, § 2 (1) of the StPO) and negative requirements (§ 190 of the StPO) that shall be considered by the public prosecutor before initiating criminal investigation. The StPO highlights the importance of the judicial review of criminal prosecution, which is revealed by the fact that the court is entitled to consider the existence of certain verifiable facts. More precisely, it can question the evidence based on which one may assume that a person has committed a criminal offence. Accordingly, if the public prosecutor has initiated an investigation despite the fact that there was no initial suspicion or despite procedural obstacles to investigation initiation, then it shall be deemed that he or she has violated the subjective right of the accused person to be prosecuted only if it is necessary.[34] The purpose of this legal remedy is to provide the accused person with the right to an individual request that an investigation interfering with his or her rights and freedoms may not be initiated and conducted unless the legal requirements for prosecution have been met.[35]

Croatia

Like Austria, Croatia reformed its criminal procedure in 2008 and introduced prosecutorial investigation.[36] The original text of the Criminal Procedure Act was comprehensively amended in 2013.[37] The amendment was urged by the Constitutional Court of the Republic of Croatia, which, after assessing the constitutionality of particular provisions of the said Act, imposed on the legislator the constitutional duty to incorporate a mechanism of judicial protection from unlawful criminal prosecution into the pretrial proceeding structure.[38] Unlike the Austrian legislator, the Croatian legislator clearly differentiates between the informal stage of pretrial proceedings and investigation as the formal stage thereof. Inquiry is aimed at the verification of the suspicion that a crime has been committed and elucidation as to who is the perpetrator, including collecting data necessary for the initiation of prosecution. On the other hand, investigation as the formal stage of pretrial proceedings shall commence with a public prosecutor's decree on investigation if the reasonable suspicion that a particular person has committed a crime has been ascertained and if there are no legal obstacles to the criminal prosecution of that person (Article 217 (1) of the Criminal Procedure Act, hereinafter, CPA). The goal of investigation is to produce enough evidence to bring charges against the suspect or to discontinue the criminal procedure (Article 228 (1) of the CPA).

34. A. Venier, 'Einstellung und Anklage im neuen Strafprozessrecht', *Österreichische Juristenzeitung* 78 (2007), p. 907. As cited in Z. Đurđević, 'Judicial Control of Criminal Prosecution and Investigation: Comparative and Constitutional Aspects', *Croatian Annual of Criminal Law and Practice* 1 (2010), p. 14.
35. Research into Austrian judicial practice in 2011 revealed that this legal remedy is applied in a very small amount of cases, and therefore, it does not jeopardise effective investigation. A. Birklbauer, W. Stangl, R. Soyer, et al., *Die Rechtspraxis des Ermittlungsverfahrens nach der Strafprozessreform, Eine rechtstatsächliche Untersuchung* (Vienna: Neuer Wissenschaftlicher Verlag, 2011), pp. 130–132.
36. B. Pavišić, 'The New Croatian Criminal Procedure Act', *Croatian Annual of Criminal Law and Practice* 2 (2008), pp. 489–602.
37. The Criminal Procedure Act of 18 December 2008, Official Gazette no. 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17.
38. Z. Đurđević, 'Decision of the Constitutional Court of the Republic of Croatia on the Compliance with the Constitution of the Criminal Procedure Act', *Croatian Annual of Criminal Law and Practice* 2 (2012), pp. 409–438.

Since investigation commences with a decree on investigation, the Croatian legislator envisaged the possibility of opting for judicial review of a criminal prosecution from the moment of the delivery of the decree to a suspect.[39] Precisely, the public prosecutor shall provide the suspect with a decree of investigation accompanied with the information on his or her rights within 8 days after the issue of the decree,[40] and the suspect may lodge an appeal against the decree and submit it to the judge of the investigation within the subsequent 8 days (Article 218 of the CPA). An appeal against investigation initiation is a special legal remedy that ensures judicial review of criminal prosecution in the investigative phase. It is said to be special since the court, when deciding on the suspect's appeal, also evaluates the public prosecutor's assessment of the fulfilment of requirements stated in the principle of mandatory prosecution (reasonable suspicion that a person has committed a criminal offence) and considers possible procedural obstacles to criminal prosecution.[41] Consequently, the court shall revoke the decree on investigation if (1) the offence the defendant is charged with is not an offence subject to public prosecution; (2) there are circumstances that exclude the defendant's culpability unless he or she committed the offence in the state of diminished mental capacity; (3) the period of limitation for the institution of prosecution has expired, the offence is amnestied or pardoned, or other circumstances exist barring prosecution; and (4) there are no reasonable grounds that the defendant committed the offence (Article 218 (3) (3) of the CPA). The judicial review is in this case only a possibility and comes subsequently since it is up to the accused person to opt for this legal remedy. The presented solution seems to be a well-balanced measure regarding the court's participation in the pretrial proceedings since the imposition of judicial review of criminal prosecution provides citizens with the possibility to require judicial protection if they regard their prosecution as unlawful. At the same time, the existence of the right to judicial review of criminal prosecution does not affect the efficiency of investigation because the court does not review all the decisions in initiating investigation but only those covered by the defendant's appeal. This has been demonstrated by the latest research into Croatian judicial practice, which has revealed that only 20% of the total instituted investigations have been appealed.[42]

Rome statute of the international criminal court

The Rome Statute of the International Criminal Court (hereinafter, Rome Statute) also promotes a model of prosecutorial investigation. However, unlike Austria and Croatia, which have institutionalized optional and subsequent judicial review of criminal prosecution, the Rome Statute sets forth mandatory ex officio judicial review of criminal prosecution, which shall be instigated every time the office of the prosecutor (hereinafter, OTP) decides to initiate investigation *proprio motu*

39. The moment of informing a person about his or her status of an accused person is defined by taking account of the autonomous term of a criminal charge in the light of Article 6 of the European Convention on Human Rights.
40. The Public Prosecutor may postpone the delivery of the decision to open an investigation up to one month if the delivery would endanger life, body or property to a great extent. This applies under the condition that the investigation is conducted due to particular serious crimes exhaustively defined by law (Article 218.a of the CPA).
41. A. Novokmet, 'Judicial Review of Criminal Prosecution According to the Amendments to the Criminal Procedure Act', *Croatian Annual of Criminal Law and Practice* 2 (2013), pp. 592–594.
42. A. Novokmet and M. Jukić, 'Judicial Review of Preliminary Proceedings: Examination of the Case Law of the Courts in Osijek, Split, Rijeka, Varaždin and Zagreb', *Croatian Annual of Criminal Law and Practice* 2 (2015), p. 478.

(Article 15 (1) of the Rome Statute).[43] In terms of pretrial proceedings, the Rome Statute clearly differentiates between preliminary examination and investigation.[44] Preliminary examination is the stage of pretrial proceedings in which the prosecutor confirms the suspicion of the commitment of a crime by analysing the seriousness of the information received to decide whether there is enough information to provide a reasonable basis to open an investigation. Investigation constitutes the second stage of pretrial proceedings, which are initiated when the prosecutor establishes that the statutory requirements for criminal procedure commencement have been met. If the prosecutor concludes that there is a reasonable basis for proceeding with an investigation, he or she shall submit a request for authorization of an investigation (Article 15 (3) of the Rome Statute) to the Pre-Trial Chamber. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers there to be a reasonable basis for proceeding with an investigation and that the case appears to fall within the jurisdiction of the court, it shall authorize the commencement of the investigation (Article 15 (4) of the Rome Statute).[45] In this context, the Pre-Trial Chamber plays the role of a judicial authority in charge of ex officio review of criminal prosecution preceding the issue of an order for investigation.[46] What is reviewed here is the request for the authorization to investigate, and the main task of the Pre-Trial Chamber is to examine the lawfulness and grounds for the initiation of an investigation and, subsequently, for criminal procedure. When reviewing the request, the Pre-Trial Chamber is expected to consider the existence of formal and substantive requirements (preconditions) for conducting an investigation. The formal requirements include the fulfilment of preconditions to the exercise of jurisdiction (Article 12 of the Rome Statute) and the absence of procedural obstacles to instituting and bringing criminal proceedings (Article 17 of the Rome Statute), while the substantive requirements refer to a reasonable basis that a criminal offence within the jurisdiction of the court has been committed (Article 15 (3) (4) of the Rome Statute).[47] This kind of review appears as the prior judicial review of the lawfulness and grounds for criminal prosecution, which prevents the prosecutor from making a decision to initiate investigation in situations in which he or she acts on his or her own initiative based on the findings obtained from sources other than a state party or the Security Council. That way, the earliest stages of proceedings are also monitored by the court, which contributes to the establishment of a peculiar system of prosecution in which the initial decision to open investigation is made by the court and not by the prosecutor.[48]

43. There are three ways to trigger the jurisdiction of the ICC: (a) situation referred to the prosecutor by a state party, (b) a situation referred to the prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations and (c) the prosecutor's initiation of an investigation *proprio motu*. W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010), pp. 293–305.
44. According to Safferling, one should differentiate between the pre-investigation and the investigation phase. C. Safferling, 'The Rights and Interests of the Defence in the Pre-Trial Phase', *Journal of International Criminal Justice* 3 (2011), pp. 652–653.
45. G. Turone, 'Powers and Duties of the Prosecutor', in A. Cassese, P. Gaeta and J. R.W.D. Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), p. 1161.
46. H. Olasolo, 'The Prosecutor of the ICC before the Initiation of Investigations: A Quasi-Judicial or a Political Body?' *International Criminal Law Review* 3 (2003), p. 101.
47. V. Röben, 'The Procedure of the ICC: Status and Function of the Prosecutor', *Max Planck Yearbook of United Nations Law* 7 (2003), p. 525.
48. The reason for introducing judicial control of criminal prosecution hides behind the criticism of numerous states that a prosecutor with broad proprio motu powers might initiate overzealous or politically motivated prosecutions targeting unfairly or in bad faith highly sensitive political situations, becoming a 'lone ranger running wild'. S.A. Fernandez de Gurmendi, 'The Role of the International Prosecutor', in R.S.K. Lee, ed., *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations and Results* (The Hague: Kluwer Law International, 1999), p. 181; A.

The right to the judicial review of a decision to prosecute and the EU charter of fundamental rights

In its Article 47,[49] the Charter explicitly states that everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal.[50] This clause proclaims the principle of judicial review as a fundamental human right and establishes the right of citizens to require judicial protection from unlawful interference with their fundamental rights and freedoms by Union institutions, bodies, offices and agencies (Article 51 of the Charter).[51] In several places, the Commission's Proposal makes reference to the Charter as a common basis for the protection of rights of suspected persons in criminal proceedings, particularly during pretrial and trial phases, emphasizing that the EPPO's activities should in all instances be carried out with full respect for those rights.[52]

The issue of the exercise of the right to judicial protection from unlawful criminal prosecution in the investigation phase especially arises within the context of the Commission's Proposal. This results from the fact that the Commission's Proposal explicitly sets forth only the review of the EPPO's investigative powers, whereas the exercise of such a review belongs to the jurisdiction of national courts in the member states (Article 36(1)). Hence, along with the right to efficient judicial review, there is the question as to whether the EPPO's decision to initiate an investigation against a certain person and proceed therewith can be subject to judicial review. What is vital for providing an answer to this question is clarification about whether the decision for the initiation of an investigation falls within the EPPO's discretion or is related to human rights and subject to judicial review.[53]

The Commission's Proposal has not envisaged the possibility of the judicial review of a decision to initiate an investigation. Such a position can be compared to the Model Rules for the Procedure of the EPPO (hereinafter, Model Rules)[54] wherein the right to review a decision on investigation initiation was not mentioned either (Rule 21(2) Model Rules). The relating reasoning relied on the idea that the ECHR does not establish standards for the review of pretrial decisions because the mere initiation of an investigation does not by itself affect fundamental rights.[55] Such a stance can be only partially accepted. It is true that the ECHR has not introduced the right to judicial review of criminal prosecution in the pretrial phase, but the European Court of Human

M. Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court', *The American Journal of International Law* 3 (2003), p. 513.

49. For detailed analysis of Article 47 of the Charter see: P. Aalto et al., 'Article 47 – Right to an Effective Remedy and to a Fair Trial', in S. Peers, T. Hervey, J. Kenner and A. Ward, eds., *The EU Charter of Fundamental Rights: A Commentary* (Oxford: Hart, 2014), pp. 1240–1319.
50. The Court of Justice enshrined that right in its judgment of 15 May 1986 as a general principle of Union law, Case 222/84 *Johnston* [1986] ECR 1651.
51. The right to effective judicial protection enshrined in Article 47 of the Charter seems to be, judging by its content, broader than the guarantee envisaged in Article 6(1) thereof since, contrary to Article 6 (1) of the ECHR, which limits the right to a fair trial to civil and criminal law cases, Article 47 (2) of the Charter applies to all contentious matters. G. Sanna, 'Article 47 of the EU Charter of Fundamental Rights and Its Impact on Judicial Cooperation in Civil and Commercial Matters', in G. Di Federico, ed., *The EU Charter of Fundamental Rights* (Dordrecht: Springer, 2011), p. 164.
52. Preamble, recital 73.
53. Đurđević, 'Judicial Control', p. 1010.
54. 'Model Rules for the Procedure of the EPPO'. Available at: http://eppo-project.eu (accessed 20 February 2017).
55. 'Model Rules', p. 16.

Rights (ECtHR) has indeed considered the legality of the institution and duration of prosecutorial investigation in different cases[56] and shaped its own perception of the extent to which the exercise of the prosecutor's powers affect the fundamental rights of an individual. In the case of *Stepuleac v. Moldova*,[57] the ECtHR was invited to decide both on the legality of the arrest and on the fulfilment of requirements for the initiation of an investigation since the requirement of reasonable suspicion that a certain person has committed a criminal offence actually pertains to the degree of probability needed for arrest and for initiating a criminal investigation. The ECtHR pointed that the 'reasonableness' of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention, which is laid down in Article 5 § 1 (c) of the Convention. Having a reasonable suspicion presupposes the existence of facts or information that would satisfy an objective observer that the person concerned may have committed the offence.[58] The ECtHR conducted its own review and determined the absence of any ground for initiation of the criminal investigation against the applicant, and it is unclear as to why the applicant's name was included in the prosecutorial decision at the very start of the investigation before further evidence could be obtained (§ 70).[59] Accordingly, Đurđević draws the following conclusion:

> Although the Court has examined the reasonable suspicion of having committed an offence from the aspect of deprivation of liberty by arrest, it is clear that it has also established it as the ground for the initiation of a criminal investigation. Prosecutorial decisions on the initiation of a criminal investigation have to be based on the 'facts or information which would satisfy an objective observer' that a suspect may have committed the offence. As such, they are objective, verifiable and subject to judicial review.[60]

Besides, violation of the right to trial within a reasonable time is another factor based on which the ECtHR has a chance to review the legitimacy and proportionality of commencing and continuing an investigation. Since the ECtHR autonomously interprets the terms of accusation (charges) for a criminal offence, this court deems irrelevant whether the obstruction of proceedings appeared during the informal preliminary investigation[61] or formally initiated investigation. Instead, the ECtHR sheds light on what action the body in charge of the prosecution brought to the obstruction of proceedings.[62]

All the aforementioned suggests that the ECtHR has really generated the assumption that the rights and freedoms of an individual can be breached if he or she is being investigated without reasonable grounds for undertaking criminal prosecution and if the investigation lasts unreasonably long so that it has come to an obstruction of the proceedings.[63] Although individuals are not

56. Đurđević, 'Judicial Control', p. 1002.
57. *Stepuleac v. Moldova*, App no 8207/06 (ECHR, 6 November 2007).
58. *Stepuleac v. Moldova*, App no 8207/06 (ECHR, 6 November 2007), § 68.
59. Đurđević, 'Judicial Control', p. 1003.
60. Op. cit.
61. *Corigliano v. Italy*, App no 8304/78 (ECHR, 10 December 1982) § 49, 50. *Corigliano v. Italy*, App no 8304/78 (ECHR, 10 December 1982) § 49, 50.
62. *Reinhardt and Slimane-Kaïd* [1999] 28 EHRR 59, § 100; *Pélissier and Sassi v France*, [2000] 30 EHRR 715, § 73., Đurđević, 'Judicial Control'.
63. Concerning the scope of judicial control, Nowak emphasises that it starts from the beginning of the proceedings at the pretrail stage and extends to the entirety of the proceedings in the pretrail stage, especially at their ad personam phase. C. Nowak, 'Judicial Control of the Prosecutor's Activities in the Light of the ECHR', *Eucrim* 2 (2014), p. 61.

explicitly granted the right to judicial protection from the initiation of an investigation, the ECtHR has nonetheless introduced indirect supranational judicial review of the requirements for initiating and conducting an investigation.[64] Owing to the fact that the Charter, in its Article 52(3), clearly mentions the rights that correspond to the rights guaranteed by the ECHR and that the meaning and scope of those rights shall be the same as those laid down by the ECHR, it should be believed that the right to judicial review of criminal prosecution established through the case law of the ECtHR should be recognized as a right enshrined in the Charter. However, the ECHR and its jurisprudence of the ECtHR constitute the lowest common denominator, and the Court of Justice of the European Union (CJEU) should gradually ascend towards higher levels of protection considering the common constitutional traditions of the member states as interpreted by national courts.[65] It should be noted that the CJEU took a rather broad attitude towards the right of access to a court in the *Transocean*[66] case, accentuating that a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his or her point of view known. This is especially so in the case of conditions which, as in this case, impose considerable obligations with far-reaching effects.[67] De Hert points out that this ruling seems to be broader recognition of the right of access to a court for claimants in any proceedings including penalty procedures.[68] Maybe the most apparent example of CJEU judgments that have acknowledged the right to effective judicial protection as enshrined in the Charter is the *Kadi*[69] case in which the court underlined that the Courts of the EU must, in accordance with the powers conferred on them by the Treaties, ensure the review – in principle, the full review – of the lawfulness of all Union acts in the light of the fundamental rights forming an integral part of the EU legal order.[70] Those fundamental rights include, inter alia, respect for the rights of the defence and the right to effective judicial protection.[71] With such a standpoint, the court not only puts forward a request for the establishment of judicial review over the legality of EU bodies and institutions but also affirms the right of citizens to demand judicial review over a particular act of an EU body if they look upon it as violation of their fundamental rights and freedoms.[72]

If, based on the presented standpoints, it comes to a precise regulation of the EPPO procedures in line with the Commission's Proposal, one may conclude that there is enough space to extend the judicial review of criminal prosecution to the EPPO's decision on investigation initiation despite

64. Z. Đurđević, 'Judicial control of criminal prosecution and investigation: comparative and constitutional aspects', *Croatian Annual of Criminal Law and Practice* 1 (2010), p. 10.
65. A. Kargopoulos, 'Fundamental Rights, National Identity and EU Criminal Law', in V. Mitsilegas, M. Bergström and T. Konstadinides, eds., *Research Handbook on EU Criminal Law* (Cheltenham: Edward Elgar, 2016), p. 142.
66. Case C-17/74 *Transocean Marine Paint v. Commission* [1974] ECR 1063.
67. Case C-17/74 *Transocean Marine Paint v. Commission* [1974] ECR 1063, § 15.
68. P. De Hert, 'EU Criminal Law and Fundamental Rights', in V. Mitsilegas, M. Bergström and T. Konstadinides, eds., *Research Handbook on EU Criminal Law* (Cheltenham: Edward Elgar, 2016), p. 118.
69. Joined Cases C-584/10 P, C-593/10 P, C-595/10 P *Commission and Others v. Kadi* [2008] ECR I-6351.
70. Joined Cases C-584/10 P, C-593/10 P, C-595/10 P *Commission and Others v. Kadi* [2008] ECR I-6351, § 97.
71. Joined Cases C-584/10 P, C-593/10 P, C-595/10 P *Commission and Others v. Kadi* [2008] ECR I-6351, § 98. For detailed analysis, see V. Mitsilegas, *EU Criminal Law after Lisbon* (Oxford: Hart, 2016), p. 254 ff.
72. Hufnagel stresses that one could go even further and claim that the denial of EU-level judicial review of the EPPO's decisions would be contrary to the rule of law and an infringement of the right to effective judicial protection. S. Hufnagel, 'EPPO, Judicial Review and Human Rights: Is the New Agency Benefiting from Lessons Learned?', in V. Bazzocchi, ed., *EPPO and OLAF Investigations: The Judicial Review and Procedural Guarantee*s (Rome: Fondazione Basso, 2015), p. 62.

the fact that the Commission's Proposal notes that criminal prosecution follows investigation completion, meaning a case is brought to judgment, in particular the power to present trial pleas (Article 30). This assertion is underpinned by Article 22(1) of the Commission's Proposal, which lays down the requirement of reasonable grounds for investigation initiation, bearing the same relevance for individual investigative measures (Article 25(3)). The current solution may lead to legal insecurity since even though the procedural commencement of investigation is clearly defined, it lacks regulation of the prosecutor's duty to inform the suspect that he or she is being investigated, specification of maximum investigation duration and a guarantee of the right to judicial review of criminal prosecution in the investigative phase. As repressive bodies may, through their activities and measures, interfere with an individual's freedoms only if such interventions are legitimate and necessary for the criminal proceedings, there is a need for the establishment of a mechanism for the review of reasonable grounds for initiating, conducting and continuing an investigation in order to prevent citizens in a democratic society from being excessively burdened with the criminal procedure. To sum up, the EPPO's decision to initiate an investigation after meeting the requirements for undertaking prosecution can and shall be subject to judicial review. This is even more evident if one takes into consideration that particular national systems greatly differ in guaranteeing and prescribing judicial review of investigation initiation and have no common viewpoint thereon. In order to prevent citizens from being unlawfully prosecuted, it seems there is justification for setting forth such a review at the EU level.

Open question of the right to judicial review of prosecutorial decisions with regard to the TFEU and commission's proposal

Treaty on the functioning of the EU

Article 86 of the TFEU. When it comes to primary law of the EU, the right to judicial review of the EPPO's decisions is granted in Article 86 of the TFEU. This Article represents a basis for founding an EPPO as a supranational body that shall be responsible for investigating, prosecuting and bringing to judgment the perpetrators of offences against the Union's financial interests (Article 86(2) TFEU).[73] The establishment of such a powerful body in charge of criminal prosecution requires careful regulation of institutional and functional rules applicable to the EPPO that have to be governed by a special legal act and among which an important place is reserved for judicial review of procedural measures taken by the EPPO in the performance of its functions (Article 86(3) of the TFEU).[74]

In the light of Article 86 of the TFEU, there are two relevant elements having great influence on the judicial review over the EPPO's decisions. Namely, Article 86(2) of the TFEU stipulates that the EPPO shall exercise the functions of a prosecutor in the competent courts of the member states, whereas Article 86(3) stipulates that the rules applicable to the EPPO, the conditions governing the performance of its functions, the rules of procedure applicable to its activities – including those

73. For an analysis of the functionality of the proposal for the establishment of an EPPO in relation to its purpose, see A. Suominen, 'The Functionality of EPPO', in P. Asp, ed., *The European Public Prosecutor's Office – Legal and Criminal Policy Perspectives* (Stockholm: Jure Bokhandel, 2015), pp. 88–111.

74. Mitsilegas brings forth that Article 86 is drafted in rather general terms. Therefore, it opens up many questions with regard to the precise powers and structure of the EPPO. V. Mitsilegas, 'The European Public Prosecutor's Office Facing National Legal Diversity', in C. Nowak, ed., *The European Public Prosecutor's Office and National Authorities* (Milan: Wolters Kluwer, 2016), p. 12.

governing the admissibility of evidence – and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions shall be regulated by EU law.[75] The aforementioned imposes two important conclusions: The first one refers to the formulation of how it will 'exercise the functions of prosecutor in the competent courts of the Member States', which comprises the phase of bringing charges and presenting them at court; and the second one involves handling the case by the EPPO during pretrial proceedings, including judicial review thereof regulated at the EU level.[76]

Correspondingly, the TFEU does envisage judicial review over the EPPO's activities in the pretrial phase. Although Article 82(2) of the TFEU mentions that the EPPO 'exercises the functions of prosecutor in the competent courts of the Member States', the author believes that it starts performing the functions of a prosecutor long before the moment of making decisions on a suspect's indictment and the choice of jurisdiction as stated in the Commission's Proposal.[77] This assertion complies with Article 86(3) of the TFEU, which stipulates that the Regulation is expected to lay down rules applicable to the judicial review of procedural measures taken by the EPPO in the performance of its functions. The term procedural measures is fairly broad and vague, ensuring that the TFEU has provided the Commission with a wide 'margin of appreciation' to deal with the issue of the extent of judicial review over the EPPO's acts and decisions by means of regulation. Yet, the Commission's Proposal envisages limited judicial review only over the EPPO's investigative powers while supervision over its prosecutorial function with respect to the instigation or discontinuation of an investigation during the pretrial phase is fully omitted. There is no clue as to why such a review is not envisaged.[78] In that sense, the Commission's Proposal is not compliant with Article 86(3) of the TFEU because the former does not clear up which procedural measures are undertaken by the EPPO and which of its functions are engaged therein. Furthermore, Article 86(3) indicates a plurality of functions, whereas the Commission's Proposal mentions only judicial review of investigative activities and measures.[79] Generally, until the adoption of the Commission's Proposal, the question of judicial review of a decision to prosecute, that is, to instigate criminal investigation, had not been much discussed in the literature referred to. In fact, as far as the preparatory stage is concerned, the Green Paper on the establishment of a European Prosecutor recommends only judicial review of particular coercive acts involving the restriction of

75. Although the EPPO was meant to be an EU body whose actions and measures should exercise great influence on fundamental human rights, the Commission's Proposal only declaratively prescribes judicial review of investigative activities, and its exercise is fully conceded to national authorities. This is a rather controversial issue with many open questions to be discussed. See A.W.H. Meij, 'Some Explorations into the EPPO's Administrative Structure and Judicial Review', in L.H. Erkelens, A.W.H. Meij and M. Pawlik, eds., *The European Public Prosecutor's Office: An Extended Arm or a Two-Headed Dragon?* (The Hague: T.M.C. Asser Press, 2015), pp. 112–113.
76. K. Ligeti, 'The European Public Prosecutor's Office', in V. Mitsilegas, M. Bergström and T. Konstadinides, eds., *Research Handbook on EU Criminal Law* (Cheltenham: Edward Elgar, 2016), p. 486.
77. Preamble, recital 68.
78. Erbežnik rightly points out that:
    Not providing for judicial (court) oversight of the EPPO investigation as such could create a direct clash between national (constitutional) requirements in at least some Member States such as the ones providing for an investigating magistrate and the ones with police/prosecutorial investigations with a special court remedy as regards the decision to introduce an investigation as such.
    A. Erbežnik, 'European Public Prosecutor's Office (EPPO) – Too Much, Too Soon, and without Legitimacy?' *European Criminal Law Review* 2 (2015), p. 216.
79. Preamble, recital 77.

fundamental rights, while at the end of this stage, it allows judicial review of indictment in terms of whether the evidence is sufficient and admissible or not and whether proper procedure has been followed.[80] Similarly, the Model Rules for the Procedure of the EPPO provide the right to judicial review over coercive investigation measures (Rule 7), judicial review over undue denial by the EPPO to perform the investigative act on behalf of the defence (Rule 15) and judicial review against a decision of the EPPO to restrict access to reports of those investigative measures at which the suspect or his or her lawyer had the right to be present (Rule 16).[81] On the other hand, the Model Rules explicitly disqualify judicial review of a decision to initiate an investigation (Rule 21(2)),[82] but the same document provides persons under investigation with the possibility, if at least 2 years have passed since the commencement of the investigation, to request a ruling from the European court as to whether it is reasonable for the investigation to continue (Rule 21(3)).[83]

Nevertheless, the most persuasive proof of the incompliance of the Commission's Proposal with Article 86(3) of the TFEU refers to Preamble 78, which sets forth that '. . . acts undertaken by the EPPO in the course of its investigations are closely related to the prosecution which may result therefrom' and that '. . . national courts should be entrusted with the judicial review[84] of all procedural acts of the EPPO which are intended to produce legal effects vis-à-vis third parties'.[85] Hence, what pops up as the key question in this view is the point in the investigation to which the EPPO's autonomous powers are exercised and when its operations substantially affect the legal position of a citizen in charging him or her with a criminal offence. The determination of that moment is of exceptional importance since this virtually affects the exercise of the procedural rights of the defence granted in Article 35 of the Commission's Proposal and the conclusion about whether the initiation of an investigation in itself affects fundamental rights or not.[86] Precisely, if a person (suspect) has no idea that he or she is under investigation, he or she will not have a chance to find out about the charges against him or her and thus will not be able to exercise his or her procedural rights during the investigation. Undoubtedly, the greatest structural drawback of the models of public prosecutor investigations, including investigations commenced by the EPPO, is

80. The Green Paper on criminal law protection of the financial interests of the Community and the establishment of a European Prosecutor, 2001, COM (2001) 715 final, 60–61, 70–71.
81. Model Rules, 7, 12, 13, 22, 29.
82. It was argued that mere initiation of an investigation does not by itself affect fundamental rights, and therefore, the decision of the EPPO to open an official investigation is not susceptible to legal challenge. Preamble, recital, p. 16.
83. Preamble, recital, p. 16.
84. Csúri argues that the assumption that the EPPO would be a national authority for the purpose of judicial review requires a more convincing justification as the EPPO will be anything but a national authority. A. Csúri, 'The Proposed European Public Prosecutor's Office – from a Trojan Horse to a White Elephant?' *Cambridge Yearbook of European Legal Studies* 18 (2016), pp. 141–142.
85. Inghelram logically accentuates that:
national courts have no jurisdiction to determine that the acts of EU institutions, bodies, offices or agencies are invalid. Therefore, it is questionable whether a regulation could transfer the competence of analysing the validity of investigative (and other) acts of an EPPO to national courts.
J.F.H. Inghelram, 'Fundamental Rights, the European Anti-Fraud Office (OLAF) and a European Public Prosecutor's Office (EPPO): Some Selected Issues', *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 1 (2012), p. 81.
86. It has been quite a while since the ECtHR developed the perception that:
. . . even if the primary purpose of Article 6 of the ECHR, as far as criminal proceedings are concerned, is to ensure a fair trial by a 'tribunal' competent to determine 'any criminal charge', it does not follow that Article 6 has no application to pre-trial proceedings. (*Imbrioscia v. Switzerland* [1994] 17 EHRR 441, § 36)

the cumulating of the function of criminal prosecution and investigation in the hands of one person.[87] This problem can also be identified in the Commission's Proposal, which, under the term of investigation, denotes all the activities of the EPPO during the pretrial phase. An investigation initiated by the EPPO includes a mixture of informal operations that aim merely to clarify whether a criminal offence has been committed or not and who is the perpetrator. These operations are interwoven with investigative operations against, in most cases, one particular person, and its results may be used as proof before a court. However, the Commission's Proposal does not deem criminal prosecution as having started yet at that moment. An investigation regulated in such a way represents a unilateral act by the EPPO, aimed at making an independent decision on initiating and conducting an investigation and on the moment of commencing with investigative activities against a certain person without having a duty to inform that person about the investigation commencement and minimum defence safeguards.

In democratic systems, a criminal offence is a personal offence, and so it is the person who must be protected from the very beginning of the investigation.[88] In that light, the Commission's Proposal, or more precisely, its Article 35, sets out procedural safeguards for the suspects involved in an investigation initiated by the EPPO and the right to information and access to the case materials as provided for in Directive 2012/13/EU (Article 35(2b) of the Commission's Proposal) appears as one of the minimum rights of the defence. Then, Article 35(3) clearly prescribes that suspects shall have all the procedural rights available to them under the applicable national law, which encompasses the right to be informed of the charge.[89] Still, the essential question is when a person becomes a suspect in the sense of the Commission's Proposal. Is it the moment of undertaking the first investigative action, the moment of arrest or the first formal interrogation in the capacity of a suspect?[90] The Commission's Proposal gives no answer to these questions

87. The aggregation of the investigative and prosecutorial function of the prosecutor psychologically clogs his ability to be objective when assessing reasonable grounds for criminal prosecution and impartiality when conducting an investigation despite the fact that the Commission's Proposal stipulates that the investigations and prosecutions of the EPPO should be guided by the principles of proportionality, impartiality and fairness towards the suspect with an obligation to seek all types of evidence, inculpatory as well as exculpatory (Preamble, recital 55). The EPPO's initial presumption of the suspect's guilt, that is, the existence of reasonable grounds that the suspect has committed a crime, constitutes the basic requirement for the initiation of criminal proceedings (Article 22(1)). Thus, it cannot be expected that the prosecutor, who is supposed to believe in the suspect's guilt, will be impartial, so it is very likely that a pending investigation will continue in the same way as it was initiated and that at the end of the investigation, there will be many more pieces of evidence blaming the suspect than those exonerating him or her. A. Novokmet, *Judicial Control of Accusation* (Zagreb: Croatian Association for Criminal Sciences and Practice, Ministry of the Interior and Faculty of Law Osijek, 2015), p. 17.
88. F. Ferraro, 'Background Paper', in V. Bazzocchi, ed., *EPPO and OLAF Investigations: The Judicial Review and Procedural Guarantees* (Rome: Fondazione Basso, 2015), p. 7.
89. Directive 2012/13/EU on the right to information in criminal proceedings lays down that information should be provided 'promptly' and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence. J. Hodgson, 'Criminal Procedure in Europe's Area of Freedom, Security and Justice: The Rights of the Suspect', in V. Mitsilegas, M. Bergström and T. Konstadinides, eds., *Research Handbook on EU Criminal Law* (Cheltenham: Edward Elgar, 2016), pp. 177–178.
90. The ECtHR resolved this issue much earlier in the case of *Deweer v. Belgium*. It emphasized that:
the prominent place held in a democratic society by the right to a fair trial prompts the Court to prefer a 'substantive' rather than a 'formal' conception of the 'charge' contemplated by Article 6 par. 1 of the ECHR. The Court is compelled to look behind the appearances and investigate the realities of the procedure in question.
Furthermore,
The 'charge' could, for the purposes of Article 6 par. 1 of the ECHR, be defined as the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence or from some other act

whatsoever.[91] Such a state of facts provides the EPPO with the leeway to choose the manner and moment when a person becomes a suspect, so it may happen that this moment shortly precedes the issue of the indictment when the pretrial phase is practically over.[92] There have been efforts to find a solution for this deficient regulation of the Commission's Proposal in national legal systems, claiming that without prejudice to the rights provided in the Commission's Proposal, suspects and accused persons as well as other persons involved in proceedings of the EPPO shall have all the procedural rights available to them under the applicable national law (Article 35(3) of the Commission's Proposal). This claim is not so trustworthy since the procedural rights of the defence in the investigative phase differ considerably between some member states. For instance, the Austrian police and public prosecutor are obliged to inform every suspect as soon as possible that he or she is being investigated on the suspicion that he or she has committed a criminal offence and about his or her fundamental rights in the proceedings (§ 50 StPO).[93] In Croatia, the public prosecutor shall provide the suspect with a decision on the commenced investigation within 8 days from the date of issue, and an instruction on legal remedy shall be incorporated therein (Article 218 CPA). Unlike the Austrian and Croatian equivalents, the German StPO does not bind the public prosecutor to inform the suspect about the commencement and continuation of the investigation, and this creates an opportunity for the police and public prosecutor to keep pretending that they have not singled out a person who could have committed the crime until they reckon that they are in the most favourable position procedurally to notify the suspect about the accusation. In such a case, the notification may ensue from formal interrogation or from the application of the procedural coercion measure.[94] This suggests that pretrial proceedings in particular member states have not been harmonized in terms of the moment when a person acquires the status of a suspect (accused person) and is instructed about the procedural rights of the defence. That is the reason why Article 35(3) of the Commission's Proposal is in principle not a satisfactory solution for this problem from the aspect of the EPPO, and thus, the Regulation itself should unambiguously define the procedural rights of the suspect's defence and the minimum guarantee provided thereto regarding the segments of the proceedings where there is a danger that these rights will not be respected due to considerably different solutions for such situations in particular member states. An adequate solution for this problem represents a necessary requirement for prescribing the right to judicial protection from unlawful criminal prosecution in pretrial proceedings.

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which carries the implication of such an allegation and which likewise substantially affects the situation of the suspect. (*Deweer v Belgium* [1980] 2 EHRR 239, § 44)

91. However, these answers can be deduced from a case instituted before the ECtHR, the case of *Foti v. Italy*:
... one must begin by ascertaining from which moment the person was 'charged'; this may have occurred on a date prior to the case coming before the trial court such as the date of the arrest, the date when the person concerned was officially notified that he would be prosecuted, or the date when the preliminary investigations were opened. (*Foti v. Italy* [1982] 5 EHRR 313, § 52)
92. Pawlik and Klip, 'A Disappointing First Draft', p. 189.
93. The information may be postponed only if there are special circumstances giving rise to the risk that otherwise, the purpose of the investigations may be jeopardised (e.g. wiretapping or telephone calls). R. Kert and A. Lehner, 'Austria', in K. Ligeti, ed., *Towards a Prosecutor for the European Union* (Oxford: Hart, 2013), p. 51.
94. Beulke asserts that one should engage in the establishment of standards for making the suspect aware of the suspicion that he or she has committed a criminal offence in order to prevent the bodies conducting criminal prosecution from arbitrarily depriving the suspect of the possibility of the exercising his or her procedural rights. W. Beulke, *Strafprozessrecht* (Heidelberg: C.F. Müller, 2010), p. 70.

Bearing in mind the aforementioned, one may conclude that the proposed concept of pretrial proceedings in which criminal prosecution and investigation merge into the body of an EPPO makes it impossible to draw a line between investigation and formal criminal prosecution. Also, it is not possible to really differentiate between an investigation of a crime committed by an unknown person and criminal prosecution against the perpetrator of a criminal offence. In fact, every action or measure undertaken by the EPPO within an investigation concentrated on clearing up the initial suspicion supported by reasonable grounds to believe that an offence is being or has been committed inevitably leads to directing this investigation to a concrete person. The standard of reasonable grounds to believe that an offence is being or has been committed is not only intended for the EPPO as a requirement for investigation initiation but also for citizens as a guarantee that they will not be unlawfully prosecuted. This is an objective and verifiably requirement that is subject to judicial review in all the instances of undertaking coercive measures (Article 25 of the Commission's Proposal), so there is no reason for restraining this practice when it comes to criminal prosecution against a certain person.

Action of annulment (Article 263 of the TFEU). Although the Commission's Proposal, probably due to the standpoint assumed in the Model Rules that initiation of an investigation does not by itself affect fundamental rights, does not provide the possibility for judicial review of a decision to prosecute, that is, to instigate investigation, EU primary law does involve a specific mechanism that can in the near future become a useful tool for effective EU judicial review of the EPPO's investigative acts and decisions. This mechanism is called the action of annulment and is enshrined in Article 263 of the TFEU.

According to Article 263(4) of the TFEU, any natural or legal person may institute proceedings against an act addressed to that person or that is of direct and individual concern to them and against a regulatory act that is of direct concern to them and does not entail implementing measures.[95] The core of this legal instrument is built on the review of the legality of acts adopted by European institutions, bodies, offices or organizations that may result in the annulment of the act concerned.[96] When it comes to the EPPO and the legality of its decisions, one may pose the following question: Does the EPPO's decision to initiate an investigation represent an act of the EU body, the legality and background of which can be subject to review by the CJEU?

Before answering this question, one needs to point to the case of *Deutsche Post and Germany v. Commission*[97] in which the CJEU held that when an action for annulment is brought by a natural or legal person, the action fails unless the binding legal effects of the contested act are capable of affecting the interests of the applicant by bringing about a distinct change in its legal position.[98] Still, when interpreting this criterion, the CJEU took a rather restrictive view, so in

95. The definition of a reviewable act was developed in the ERTA case in which the CJEU held that an action for annulment is available against all measures adopted by institutions, whatever their nature or form, that are intended to have legal effects. A.H. Türk, *Judicial Review in EU Law* (Cheltenham: Edward Elgar, 2010), 12.
96. For an overview of the different kinds of judicial review in relation to OLAF, see J.F.H. Inghelram, 'Judicial Review of Investigative Acts of the European Anti-fraud Office (OLAF): A Search for a Balance', *Common Market Law Review* 2 (2012), pp. 601–627.
97. Joined Cases C-463/10 P and C-475/10 P *Deutsche Post and Germany v. Commission* [2011] ECR I-9639.
98. See indicatively: K. Laenaerts, I. Maselis and K. Gutman, *EU Procedural Law* (Oxford: Oxford University Press, 2014), p. 269.

the *Tillack*[99] case, the Court of First Instance noted that sharing the information between OLAF and German and Belgian judicial authorities concerning suspicions of bribery and breach of professional secrecy, which later resulted in opening an investigation, does not bring about a distinct change in the applicant's legal position.[100] The Court explained that the possible initiation of legal proceedings following the forwarding of information by OLAF, and the subsequent legal acts, is the sole and entire responsibility of the national authorities.[101] Interestingly, the European Ombudsman stated that by making allegations of bribery without a factual basis that was both sufficient and available for public scrutiny, OLAF had gone beyond what was proportionate to the purpose pursued by its action and that constituted an instance of maladministration.[102] Later on, the ECtHR concluded that the measures complained of were to be considered disproportionate and, accordingly, that they breached the applicant's right to freedom of expression enshrined in Article 10 of the ECHR.[103] It could be reasoned that the case law of the CJEU is fairly inflexible in regard to the recognition of *ius standi* of a natural person contesting acts of EU bodies despite the fact that a seemingly usual exchange of information at the level of OLAF and national authorities led to serious interference with an individual's rights and freedoms, which resulted not only in the initiation of an official investigation but also in violation of the right to freedom of expression under Article 10 of the ECHR due to a search having been made of the house of the suspect without there having been reasonable grounds on which to do so.[104] The commentators assert that this decision of the CJEU 'shielded OLAF from judicial scrutiny, routinely declaring inadmissibility of the action for annulment',[105] and that this practice should not be continued with regard to the EPPO; so, the case law of the Court of Justice regarding OLAF should be seen here as a bad example of judicial review.[106]

Even though the Commission's Proposal explicitly promotes that procedural acts of the EPPO that are intended to produce legal effects vis-à-vis third parties shall be subject to review by the competent national courts in accordance with the requirements and procedures laid down by national law (Article 36 (1) of the Commission's Proposal), this idea cannot be implemented in practice since the real status of the EPPO outmatches the exclusively 'national' character of its decisions, actions and measures. It is actually a 'legal fiction'[107] incorporated into the Commission's Proposal to avoid the cornerstones of EU judicial review such as action for annulment (Article 263), action against a failure to act (Article 265), action for damages (Article 268) and preliminary ruling procedures (Article 267) of the TFEU. Hence, such a strict formulation of the regulation stated in Article 36 is simply unsustainable with respect to what the EPPO truly is – a

99. Case T-193/04, *Hans-Martin Tillack v. Commission* [2006] ECR II-3995.
100. Case T-193/04, *Hans-Martin Tillack v. Commission* [2006] ECR II-3995, § 68.
101. Case T-193/04, *Hans-Martin Tillack v. Commission* [2006] ECR II-3995, § 70.
102. Case T-193/04, *Hans-Martin Tillack v. Commission* [2006] ECR II-3995, § 21.
103. Judgment *Tillack v. Belgium* [2007] no. 20477/05, ECtHR.
104. Covolo notices that in certain cases, the court already declared OLAF accountable for having violated the presumption of innocence, the right to access the file and the rights to be informed and to be heard. But, when it comes to reviewing the legality of OLAF's decision to close an investigation and the final report and decision by which it forwards information to national judicial authorities, all these acts were qualified as preparatory, and national authorities are free to decide according to the domestic legislation what has to be done with information communicated by OLAF. V. Covolo, 'The Legal Framework of OLAF Investigations', *New Journal of European Criminal Law* 2 (2011), p. 215.
105. Mitsilegas, *EU Criminal Law after Lisbon*, p. 117.
106. Hufnagel, 'EPPO, Judicial Review and Human Rights', p. 63.
107. Ligeti, 'The European Public Prosecutor's Office', p. 496.

body in charge of criminal prosecution, established by the EU to undertake criminal prosecution[108] of the perpetrators of criminal offences committed against the financial interests of the EU instead of national legal systems that are not capable of handling them in an efficient way.[109] Accordingly, the EPPO is a prosecutor with supranational powers to prosecute the perpetrators of criminal offences. Consequently, when undertaking criminal prosecution, the EPPO does not act as a national but as a European prosecutor, and its actions are carried out in a single EU area. Thereby, the EPPO can lean on the assistance of the member states, but the legal effects of its actions and measures interfering with an individual's rights and freedoms go beyond national procedural rules and require judicial review on the EU level.[110]

The aforementioned implies that it is vital to answer the question as to whether the EPPO's decision to initiate an investigation represents a decision to prosecute or not and whether such a decision can be subject to judicial review through the action of annulment under Article 263 of the TFEU. The answer to this question is very demanding since it requires consideration of the legal nature of a decision to initiate an investigation and the extent of the distinct change in the legal position of the affected individuals. The EPPO's decision to initiate an investigation is an act through which the EPPO observes that there is a required level of suspicion that empowers it to initiate the investigation. This level of suspicion appears in the Commission's Proposal as reasonable grounds to believe that an offence is being or has been committed (Article 22). Suspicion based on the reasonable grounds criterion is a probability standard substantiated with concrete facts that guide the EPPO to the conclusion that a criminal offence has been committed and that it should undertake an investigation and measures in order to back the suspicion and direct it towards a concrete person. Since criminal procedure can be conducted only against a certain person and investigative actions and measures are oriented towards seeking reasonable grounds for bringing a charge against him or her, the prosecutor's engagement encompasses both investigative activities and criminal prosecution, which results in the preparation and issue of an indictment. What is to be concluded is that separation of criminal prosecution from investigation is not possible because these functions concur and do not overlap. Therefore, the EPPO's decision to initiate an investigation implies a binding legal effect for the individual concerned since introducing him or her to the investigation turns him or her into an accused person, which undoubtedly represents a distinct change in his or her legal position. It should not be forgotten that the investigative phase has a major impact on the outcome of criminal procedure due to the fact that the evidence obtained during the pretrial proceedings will guide and govern the discussion at the main hearing.[111] That is

108. J.F.H. Inghelram, 'Search and Seizure Measures and Their Review', in L.H. Erkelens, A.W.H. Meij and M. Pawlik, eds., *The European Public Prosecutor's Office: An Extended Arm or a Two-Headed Dragon?* (The Hague: T.M.C. Asser Press, 2015), pp. 132–133.

109. The Commission's Proposal highlights the need to establish a coherent 'European system' for the investigation and prosecution of offences affecting the Union's financial interests and to regulate the fundamental features of the EPPO as a 'new Union office' with investigation and prosecution functions and a 'new Union body' with legal personality, and so on, Commission's Proposal, p. 5. Therefore, Ligeti sensibly points out that 'Assimilating the EPPO to a national authority is in stark contrast with the Preamble to the Commission's Proposal that proclaims in several instances that the EPPO is a European judicial body.' Ligeti, 'The European Public Prosecutor's Office', p. 497.

110. Mitsilegas singles out that 'it would be contrary to the rule of law and a challenge to effective judicial protection if acts of an EU body which may have profound consequences for fundamental human rights were shielded from EU judicial scrutiny' (Mitsilegas, *EU Criminal Law after Lisbon*, p. 116).

111. The view that investigation activities greatly influence the outcome of the trial was integrated into the case law of the ECtHR long ago:

why the procedural rights of the defence must be respected from the very beginning of the procedure, and to ensure respect for them, the accused has to be notified about the charges against him or her.[112] This is particularly important since it is not likely that, concerning the dominant role of the prosecutor (who should be objective and impartial pursuant to Article 5 (4) of the Commission's Proposal)[113] in pretrial proceedings, the interests of the defence will be taken into account in the same way as those of the prosecutor. The reason is hidden in the EPPO's basic duty to prosecute the perpetrators of criminal offences against the EU's financial interests. In order to perform its duty, the EPPO, prior to criminal procedure initiation, has to be convinced of the suspect's guilt at least to some extent, and this initial suspicion creates the serious burden of seeking objective and impartial clarification regarding the crime and the suspect's guilt. From then onwards exists the danger that the investigation will be prejudiced and that the EPPO will not be consistent in meeting the objectivity and impartiality requirements when evaluating the facts favouring the suspect or mitigating circumstances. On the other hand, the EPPO's decision to initiate an investigation can be arbitrary and unlawful from the beginning if the prosecutor has misjudged the reasonable grounds for investigation initiation. Such a wrong judgment may lead to a groundless restriction of the fundamental rights and freedoms of an individual every time the EPPO undertakes investigative activities and measures based on an unlawful legal act in investigation initiation and thus illegitimately exposes him or her to criminal prosecution that is neither necessary nor justified. It is beyond any doubt that in the above cases, a decision on investigation initiation represents an act with a binding legal effect[114] and brings a distinct change in the suspect's legal position,[115] due to which the suspect should be provided with the possibility of opting for judicial protection when he or she believes that the decision for investigation initiation is ill founded since the requirements for criminal prosecution initiation were not met.

Proposal for a regulation on the establishment of an EPPO and the principle of mandatory prosecution

In its Article 4, the Commission's Proposal sets forth that the basic assignment of the EPPO is to combat criminal offences affecting the financial interests of the Union. While performing its basic

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The investigation proceedings are of great importance for the preparation of the trial because they determine the framework in which the offence charged will be considered at the trial. Furthermore, it cannot be excluded that evidence obtained in the investigating proceedings will be relied on in the judgment. It is therefore essential for the defence, whether it is assured by the accused himself or with the assistance of a chosen or official defence counsel, that the basis for its defence activity can be laid already at this stage. (*Can v. Austria*, European Commission of Human Rights, Report of the Commission, 12 July 1984, no. 9300/81, § 50)

112. This right is granted in the Commission's Proposal, but it does not specify the time period in which the person has to be informed. According to Directive 2012/13/EU on the right to information in criminal proceedings, the delivery of information is considered 'prompt' when the guarantees under Article 6 of the Directive arise at the latest before the first official interview of the suspect or accused person by the police or by another competent authority. S. Allegrezza and V. Covolo, 'The Directive 2012/13/EU on the Right to Information in Criminal Proceedings: Status Quo or Step Forward?' in Z. Đurđević and E. Ivičević Karas, eds., *European Criminal Procedure Law in Service of Protection of the Union Financial Interests: State of Play and Challenges* (Croatia: Croatian Association of European Criminal Law, 2016), p. 45.
113. Preamble, recital 55.
114. Laenaerts et al., *EU Procedural Law*, pp. 260–261.
115. Laenaerts et al., *EU Procedural Law*, pp. 260–261.

function, the EPPO is entitled to investigate, prosecute and bring to judgment the perpetrators of crimes affecting the financial interests of the Union. However, this assignment is not unlimited with respect to its scope, and the EPPO is not permitted to unilaterally decide on when, against whom and under which conditions to undertake criminal prosecution. Therefore, the Commission's Proposal in Article 22(1) explicitly employs the principle of mandatory prosecution, meaning the EPPO is obliged to undertake criminal prosecution, that is, initiate an investigation where there are reasonable grounds to believe that an offence within the competence of the EPPO is being or has been committed.[116] The reasonable grounds criterion refers to the EPPO's initial belief that there are facts implying that a criminal offence has been committed, which precedes a decision on investigation initiation. By defining the above duty of the EPPO, the Commission's Proposal promotes legal certainty and zero tolerance towards offences affecting the Union's financial interests. Simultaneously, there is the demand that investigations and prosecutions initiated by the EPPO should be guided by the principles of proportionality, impartiality and fairness towards the suspect, including the obligation to seek all types of evidence, inculpatory as well as exculpatory.[117]

The principle of mandatory prosecution formulated in such a way is aimed at treating all the perpetrators of criminal offences equally by the EPPO without discriminating against them on any grounds, in other words, initiating and conducting criminal prosecution only when there are reasonable grounds that an offence within the competence of the EPPO is being or has been committed (Article 22)[118] and when there are no procedural obstacles for procedure initiation (Article 33(1)).[119] Yet, the principle of mandatory prosecution does not appear only as a principle prescribing when the prosecutor has the right and duty to undertake criminal prosecution but also is a guarantee that the prosecutor will not be inconsistent in his dealings and that he will undertake prosecution only when there are reasonable grounds for doing so.[120] This also guarantees that citizens are in advance acquainted with the conditions under which repressive bodies and the EPPO are entitled to interfere with their fundamental rights and freedoms.[121] That way, the danger of the autocracy of the authorities is minimized.[122] Such an autocracy would exist if the authorities were provided with overbroad powers to assess in a concrete case whether it makes sense to undertake

116. V. Alexandrova, 'Presentation of the Commission's Proposal on the Establishment of the European Public Prosecutor's Office', in L.H. Erkelens, A.W.H. Meij and M. Pawlik, eds., *The European Public Prosecutor's Office: An Extended Arm or a Two-Headed Dragon?* (The Hague: T.M.C. Asser Press, 2015), p. 17.
117. Preamble, recital 55.
118. On the advantages and flaws of insisting on the principle of mandatory prosecution; see A. Biehler et al., *Analysis of the Green Paper on Criminal-Law Protection of the Financial Interests of the Community and the Establishment of a European Prosecutor* (Freiburg: Max Planck Institute of Foreign and International Criminal Law, 2002), pp. 21–23.
119. M-L. Marstaller, 'The Legality Principle: An Effective Way to Minimise the European Prosecutors' Influence on Substantive Criminalisation?' *European Criminal Law Review* 2 (2016), p. 171.
120. L. Hamran and E. Szabova, 'European Public Prosecutor's Office-Cui Bono?', *New Journal of European Criminal Law* 1–2 (2013), pp. 52–54.
121. Vervaele stresses that the suspect has to know for which offences and under which legal requirement judicial authorities can use their investigative and prosecutorial powers. J.A.E. Vervaele, 'The Material Scope of Competence of the European Public Prosecutor's Office: Lex uncerta and unpraevia', *ERA Forum Journal of the Academy of European Law* 1 (2014), p. 86.
122. D. Krapac, *Kazneno procesno pravo*, Institucije [Criminal Procedural Law, Vol. 1: Institutions], (Zagreb: Narodne novine, 2014), p. 100.

criminal prosecution of a person or not, which might in the end result in discriminatory conduct towards particular categories of crimes or perpetrators.[123]

Despite the above purpose derived from the principle of mandatory prosecution, the Commission's Proposal remains, to say the least, blurry. Namely, Article 22(1) sets out that the prosecutor shall initiate an investigation, but it attributes no relevance to criminal prosecution since it shall, pursuant to the Commission's Proposal, ensue from a completed investigation (Article 30). Still, the EPPO's investigative activities have all the features of criminal prosecution because the prosecutor thus creates factual grounds and produces evidence for indictment issue, and the undertaken investigative measures and actions fall within criminal procedure since they will constitute the body of evidence later on at the main hearing. To sum up, it does not suffice to envisage an instrument of judicial review over particular coercive actions and measures, but in order to prevent unlawful prosecution of innocent persons, one should also exercise review at the level of the legal requirements for the commencement and continuation of an investigation.[124] Besides, a commenced investigation challenges a number of the procedural rights of the defence (the right to be notified about the charges, the right to remain silent, the right to counsel, the right of access to the case file, etc.), which the defence is entitled to in criminal procedure for the purpose of the efficient performance of the defence function. The defence has to be informed of these rights and has to be provided with the conditions ensuring a timely and proper exercise thereof.

However, the Commission's Proposal does not say anything about the moment when the EPPO shall notify the suspect that he or she is under investigation, nor does it mention when he or she acquires the status of an accused person. This is particularly evident in Article 35(3) of the Commission's Proposal, which prescribes that suspects and accused persons shall have the rights of defence under the applicable national law. Nevertheless, the moment of notification about a criminal charge in the investigative phase is not defined by the Commission's Proposal. Moreover, investigation initiation requires the existence of reasonable grounds to believe that an offence within the competence of the EPPO is being or has been committed. Surely, such an investigation will lead to a situation in which the burden of suspicion falls upon a particular person, but deciding on the moment when it should happen is entirely up to the EPPO's discretion, whereupon it has no duty to notify the suspect thereof nor to provide him or her with a written decision on the commenced investigation to inform him or her about the nature of and reasons for the charges brought against him or her.

The aforementioned entails that, pursuant to the Commission's Proposal, bringing the case before the competent national court with an indictment represents the moment when the prosecutorial powers of the EPPO are activated, whereas the undertaken actions and measures represent criminal prosecution. Interestingly, the Commission's Proposal explicitly determines that '. . . acts undertaken by the European Public Prosecutor's Office in the course of its investigations are closely related to the prosecution which may result therefrom[125] . . . ' and that 'any suspected person in respect of whom the EPPO initiates an investigation should benefit from the rights of defence already provided for in the relevant Union legislation[126] . . . ', but despite that, there is a

123. Krapac, *Kazneno procesno pravo*, pp. 100–101.

124. The negative consequences of investigation initiation exist not only during the investigation but also upon discontinuation thereof by the EPPO. In the event of investigation discontinuation, the obviously innocent suspect has to live with all the repercussions of investigation initiation such as a damaged reputation, job loss, financial losses and the like.

125. Preamble, recital 78.

126. Preamble, recital 76.

question mark over the exercise of these rights since the Commission's Proposal leaves too much space for discretionary decision-making.[127]

Although being independent and autonomous in assessing the reasonable grounds for investigation initiation in principle, the EPPO is in essence a prosecuting body and is expected to promote the prosecution of the perpetrators of criminal offences. Therefore, it lacks real and legal guarantees of independence and impartiality that are usually typical for judicial power. Hence, there is a latent danger that the EPPO, designated to prosecute every perpetrator of a criminal offence, can misjudge the grounds for investigation initiation and thus violate the principle of mandatory prosecution, which can result in the unlawful prosecution of an innocent person. From that moment, the accused person is likely to face a number of negative consequences for his or her private and family life, particularly so in the event of criminal procedure. The accused citizen should immediately have at his or her disposal instruments aimed at examining the legality and grounds for initiation of investigation that enable him or her to require intervention from the court to intervene already at the dawn of the criminal procedure in order to prevent the violation of his or her fundamental human rights and freedoms in case the minimum legal requirements for criminal prosecution initiation are not met.

Instead of a conclusion

Every criminal procedure, including procedures initiated by the EPPO, is repressive by nature. This means that when aiming to disclose a crime, find the perpetrator and obtain evidence needed to make a decision on indictment issues, a legal regulation is employed to legitimize actions and measures that interfere with human rights and freedoms. Today, all the criminal procedures involve the investigative phase, which is aimed at creating grounds for a decision as to whether charges against a person will be brought and presented at court or the procedure will be discontinued. This fact itself largely depicts the character of investigation as an utterly repressive phase of the procedure in which the respect for human rights and the fundamental rights of the defence are challenged. For that reason, all the criminal procedures prescribe a threshold for investigation initiation as the lower limit of guarantees aimed at providing citizens in a dispute with the state with protection. The state should never go beyond that limit; otherwise, it may result in the unlawful prosecution of a person and the limitation of his or her fundamental rights and freedoms. Simply said, the state's right to prosecute and to exercise its *ius puniendi* should not collide with the subjective right of citizens to be lawfully prosecuted. Such security can be provided only by criminal procedure in which the central place is reserved for the judicial review standard, which imposes the requirement that every restriction of an individual's fundamental rights by the state shall be subject to judicial review.

The conducted analysis of the Commission's Proposal reveals that the Proposal promotes only review of the EPPO's investigative powers, whereas the suspect has no right to apply for a judicial review of the criminal prosecution in the investigative phase despite the fact that the reasonable grounds for investigation initiation are verifiable and there is judicial review of this requirement when undertaking particular coercive actions and measures. From the perspective of the right to

127. W. Geelhoed, 'Embedding the European Public Prosecutor's Office in Jurisdictions with a Wide Scope of Prosecutorial Discretion: The Dutch Example', in C. Nowak, ed., *The European Public Prosecutor's Office and National Authorities* (Milan: Wolters Kluwer, 2016), pp. 92–94.

efficient judicial review enshrined in Article 47 of the Charter, one may pose the question of whether the EPPO's decision on investigation initiation is subject to judicial review or not, that is, if citizens are entitled to demand judicial review of such a decision if they believe that the requirements for undertaking criminal prosecution are not met.

The suspect's right to apply for judicial review arises from several provisions of the Charter. These provisions refer to Article 20, which states 'everyone is equal before the law'; Article 47(1), which states 'everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal'; and Article 51, which stipulates 'the provisions of this Charter are addressed to the institutions and bodies of the Union . . . they shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers'. Article 52(3) of the Charter contains rights that correspond to rights guaranteed by the ECHR, and the meaning and scope of those rights are the same as those laid down in the said Convention. Taking into consideration the above provisions, one can draw the following conclusions:

A. While interpreting the Convention, the ECtHR established a mechanism for controlling criminal prosecution in pretrial proceedings and opened up the possibility for judicial review of decisions on investigation initiation. Although the ECHR does not explicitly guarantee the right to judicial review of investigation, it should be noted that the ECHR is a living instrument that is interpreted by the ECtHR on a case-by-case basis. This court defines the meaning and scope of the rights proclaimed in the ECHR, which means that the text of the Convention does not become obsolete as time passes. On the contrary, it remains useful and appropriate for dealing with any new issue appearing before the ECtHR.[128] Since the Charter contains rights that correspond to rights guaranteed by the ECHR and Union law could provide more extensive protection, it is beyond any doubt that the right to judicial review of criminal prosecution is inherent in the Charter of Fundamental Rights of the EU.
B. The EPPO is a European prosecuting body, and its decision on investigation initiation represents an act in relation to which the Charter grants citizens the right to judicial review thereof. Therefore, a decision on conducting investigation is an act of criminal prosecution that becomes legally relevant for a person at the moment when he or she is notified thereof. From that moment, the accused person shall be granted the right to an efficient judicial review of the criminal prosecution.
C. The EPPO's fundamental principle is the principle of mandatory prosecution, and the Commission's Proposal employs it to ensure the systematic prosecution of every perpetrator of a criminal offence against the Union's financial interests. Consistent respect for this principle contributes to the equality of all persons before the law. In other words, it means that the EPPO will not be guided by daily politics and that it will only commence with criminal prosecution when it ascertains that there are reasonable grounds for the initiation of an investigation. This duty of the EPPO corresponds to the right of citizens to be informed of the exact conditions under which repressive bodies are entitled to restrain their human rights and freedoms by initiating criminal prosecution. Therefore, it is necessary both to prescribe

128. G. Letsas, 'The ECHR as a Living Instrument: Its Meaning and its Legitimacy', in A. Føllesdal, B. Peters and G. Ulfstein, eds., *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge: Cambridge University Press, 2013), pp. 106–142.

the right of citizens to be notified that they are under investigation and to ensure the efficient exercise of that right. The Commission's Proposal only partially grants that right to suspects. Namely, it grants suspects the right to be notified that they are under investigation, but it does not envisage a procedural mechanism that would require the EPPO to deliver such a notification. To change this situation, the Commission's Proposal should specify exactly when the EPPO shall deliver a notice on investigation initiation. Whether this will include the delivery of a written decision on investigation initiation or the delivery of a notice to the suspect that he or she is under investigation is a matter of choice, but the right to notice of charges should not only be guaranteed by a Directive or Commission Proposal, but a Commission Proposal should exactly determine a deadline by which the EPPO shall deliver such a notice, calculating from the date of the adoption of a decision to conduct an investigation.[129]

D. The basic requirement for the investigation initiation pertains to reasonable grounds to believe that an offence within the competence of the EPPO is being or has been committed. The same requirement shall be fulfilled when an application of the procedural coercion measure is needed and the Commission's Proposal does require a review of that requirement in many instances of undertaking coercive actions and measures. Nonetheless, the Commission's Proposal does not deem the adoption of a decision on investigation initiation as criminal prosecution commencement but instead prefers an indictment before a national court acting as a prosecutor in trial (Article 30). However, actions and measures undertaken by the EPPO during an investigation actually serve to direct the suspicion to a certain person. Therefore, such practice can be said to be criminal prosecution, which constitutes the core of the fundamental duty of the EPPO after all, so it is not fair to restrain the right of suspects to opt for the judicial review of unlawful criminal prosecution at the moment when they are notified of the legal and factual grounds on which the suspicion is based.

E. The EPPO is a prosecuting body. When it comes to making a decision as to whether there are reasonable grounds for criminal procedure initiation or not, this office works autonomously and does not depend on other bodies or institutions of the EU. Yet, as an EPPO, this office is a strictly hierarchical body with a number of prosecutors subordinated to the EPPO. Those lower rank public prosecutors do not often work on their own, and such circumstances may sometimes lead to arbitrary acts, so it is necessary to provide citizens with the right of access to a third party personally uninterested in the outcome of the case. Such a third party should also be objective and impartial and should have prerogatives of autonomous and independent power. As these requirements can only be met by the judiciary, such review should be logically entrusted to a court.[130]

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129. Only exceptionally, if the delivery of such a notice could jeopardise the interests of ongoing investigation, would it be justified to restrain this right and only for a short period of time during which such danger exists.

130. Nowak rightly points out: 'It seems clear that a prosecutor may only be controlled by a judge who enjoys independence towards both the parties to the proceedings and to the executive power and who is not a prosecuting party to the proceedings' (Nowak, 'Judicial Control of the Prosecutor's Activities', p. 61).

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