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„The European Union and Economic Criminal Law – the European anti-fraud mechanisms"

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"On my honour as a student of the Diplomatische Akademie Wien, I submit this work in good faith and pledge that I have neither given nor received unauthorised assistance on it."

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ABSTRACT

This thesis concerns the intersection of European Union law and criminal economic law, that is, the anti-fraud institutions and instruments of the Union to combat fraud that is detrimental to its financial interests. In order to reach that goal, the financial provisions concerning the European Union, as established by the Treaty on the Functioning of the European Union, are analysed. Budgetary provisions, revenue and expenditure of the Union, are scrutinised and the central topic of the financial interests of the Union is assessed. The competence of the Union to protect its financial interests and the mandate to combat fraud are also the object of analysis of this thesis, alongside the topic of the judicial cooperation of the European Union for criminal matters. A plurality of European institutions and bodies has some competences regarding anti-fraud measures, however, only the European institutions and bodies exclusively competent to combatting fraud are the object of study. The legal and institutional framework, scope of competences, and practice of the European Court of Auditors - ECA, the European Anti-Fraud Office - OLAF, and the European Public Prosecutor's Office - EPPO, are analysed and explored. Finally, the topic of the coexistence and possible conflict of two competing jurisdictions, the European legal order and the domestic legal order of the Member States, is also investigated.

Keywords: European Union law, economic criminal law, anti-fraud mechanisms, ECA, OLAF, EPPO.

ABSTRAKT

Die vorliegende Arbeit befasst sich mit der Schnittstelle zwischen dem Recht der Europäischen Union und dem Wirtschaftsstrafrecht, d. h. mit den Institutionen und Instrumenten der Union zur Bekämpfung von Betrug zum Nachteil der finanziellen Interessen der Union. Zu diesem Zweck, werden die Finanzvorschriften der Europäischen Union, wie sie im Vertrag über die Arbeitsweise der Europäischen Union festgelegt sind, analysiert. Die Bestimmungen, betreffend den Haushalt, die Einnahmen und Ausgaben der Union, sowie das Thema der finanziellen Interessen der Union werden dahingehend untersucht. Die Zuständigkeit der Union für den Schutz ihrer finanziellen Interessen und das Mandat zur Betrugsbekämpfung sind ebenso Gegenstand der Analyse dieser Arbeit, wie auch das Thema der justiziellen Zusammenarbeit der Europäischen Union in Strafsachen. Eine Vielzahl von europäischen Organen und Einrichtungen verfügt über gewisse Kompetenzen in Bezug auf Betrugsbekämpfungsmaßnahmen, wobei nur die ausschließlich für die Betrugsbekämpfung zuständigen europäischen Organe und Einrichtungen Gegenstand dieser Untersuchung sein werden. Der rechtliche und institutionelle Rahmen, der Zuständigkeitsbereich und die Praxis des Europäischen Rechnungshofs (EuRH), des Europäischen Amtes für Betrugsbekämpfung (OLAF) und der Europäischen Staatsanwaltschaft (EPPO), werden analysiert und erforscht. Schließlich wird auch das Thema der Koexistenz und des möglichen Konflikts zwischen zwei konkurrierenden Rechtsordnungen, der europäischen Rechtsordnung und der nationalen Rechtsordnung der Mitgliedstaaten, untersucht.

Stichworte: Recht der Europäischen Union, Wirtschaftsstrafrecht, Betrugsbekämpfungmechanismen, EuRH, OLAF, EPPO.

TABLE OF CONTENTS

Introduction

This thesis aims to analyse the anti-fraud mechanisms of the European Union, *i.e.* the institutional and legal measures taken by the Union to defend itself against fraud.

Since the inception of the process of European integration, the Union has been acquiring an ever-growing list of attributions and responsibilities: from funding fisheries and agricultural programmes to international humanitarian aid.

Following that trend, the budget of the Union contains colossal financial resources, both in the revenue and expenditure sides. Those resources attract activities of financial criminality: misappropriation, corruption, fraud, evasion, *etc*.

This thesis questions what are the actions taken by the European Union to shield itself against fraud: (i) what legal measures were taken; (ii) what sort of institutions or bodies were created; (iii) what effect do they have.

To fulfil that aim, the first chapter will explore the financial provisions of the Union, as established by the Treaty on the Functioning of the European Union. Budgetary provisions will be analysed and the central topic of the financial interests of the Union will be assessed.

That will lead to the topic of the protection of the aforementioned financial interests of the Union. The thesis will investigate what is the legal framework to protect said interests. That will lead to the legal mandate of combatting fraud established by the Treaty on the Functioning of the European Union.

Finally, the first chapter will investigate what means the Union has for cooperating judicially in criminal matters. The narrow limits of this thesis do not allow it to explore the juridical nature of the European Union: suffice it to state that it is a *sui generis* supra-national entity with no criminal jurisdiction.

Then, the second chapter will explore the institutions and bodies of the European Union that were tasked with combatting fraud.

Many institutions and bodies of the Union have some anti-fraud competences. That chapter, however, will focus only on institutions whose central role is combatting fraud, that is: (i) the European Court of Auditors; (ii) the European Anti-Fraud Office - OLAF; (iii) and the European Public Prosecutor's Office - EPPO.

Due to its novelty and institutional complexity, the thesis will concentrate more attention on the last of the institutions *supra*, that is: the EPPO. The EPPO is a supra-national prosecution office that operates, as an indivisible office, at a central and a decentralised levels. It is a body of the Union that prosecutes criminal offences before national courts.

The implications of those overlapping and (eventually) conflicting jurisdictions - *i.e.* the legal order of the European Union and the domestic legal orders of the Member States - will play a central role in the investigations of this thesis.

Political considerations are also taken into account: (i) the political discussions and interests that created the institutional framework of institutions in a certain way; and (ii) the political consequences of their actions.

In order to elaborate this thesis, bibliographical, legal and jurisprudential research was made, encompassing: (i) the analysis of European legal texts - both primary and secondary legislation; (ii) the study of books and articles on the topic; and (iii) examination of pertinent case law.

1. THE EUROPEAN UNION AND FINANCIAL CRIMINALITY

Aiming to introduce the topic of the anti-fraud mechanisms of the Union, this preliminary chapter dwells on the topic of the financial provisions of the Union: dealing with the annual budget of the European Union and introducing the concept of the Union's own resources.

Which, in turn, will lead to the theme of the Union's financial interests and the necessity of protecting them.

At last, the chapter will close with the subject of the judicial cooperation of the European Union on criminal matters.

1.1 The Financial Provisions of the European Union

The Title II of the Part Six "Institutional and Financial Provisions" of the Treaty on the Functioning of the European Union - TFEU - disciplines the financial provisions of the European Union. "The EU has financial autonomy"[1].

As the holder of a legal personality that is completely different from the legal personality of the Member States, the EU has its own revenues and expenditures that ought to appear on its budget.

1.1.1 The Union's annual budget

A budget is a financial plan that contains the estimated income and expenditure of a given person (legal or natural, private or governmental) for a given period of time.

According to Harrop, "[t]he Community's Budget derives from the positive law in the financial provisions of the treaties plus a significant amount of soft law which has been significantly consolidated recently from the interinstitutional agreements"[2].

Pursuant to article 310(1), TFEU: "[a]ll items of revenue and expenditure of the Union shall be included in estimates to be drawn up for each financial year and shall be shown in the budget".

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[1] MASSIMO, Fabio. *Customs Law of the European Union*. Wolters Kluwer, Fourth Edition, 2012, § 1.07, p. 17.

[2] HARROP, Jeffrey. Chapter 3: *The development of EU budgetary measures and the rise of structural funding*. In BAIMBRIDGE, Mark. WHYMAN, *Philip. Fiscal Federalism and European Economic Integration*. Taylor & Francis Group, 2003, p. 69.

According to Citi, "[t]he general budget of the European Union (EU) establishes on a yearly basis how the fiscal resources controlled by the EU are allocated to a range of policies and programmes that are directly financed and generally managed by the European Commission"[3].

The financial year referred to in the excerpt *supra* runs from 1 January to 31 December[4]. The Union's budget aims to be in "balance"[5], to be kept in "discipline"[6] and to be implemented in compliance "with the principle of sound financial management"[7].

The European Parliament and the Council are the European institutions charged with the task of elaborating the budget[8]: they are, therefore, known as the "budgetary authorities"[9].

Considering the budgetary role of the European Parliament, Schütze makes an interesting comparison with the traditional role of national parliaments. It is worth reproducing the following excerpt:

> National parliaments have historically been involved in the budgetary process because they were seen as legitimating the *raising* of revenue. In the words of the American colonists: "No taxation without representation" In the European Union, this picture is somewhat inverted. For, since Union revenue is fixed by the Council and the Member States, the European Parliament's budgetary powers have not focused on the *income* side but on the *expenditure* side. Its powers have consequently been described as the "reverse of those traditionally exercised by parliaments"[10].

Concerning the status of budgetary authority of the European Parliament, the following excerpt explains its origins:

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[3] CITI, Manuele. *European Union budget politics: Explaining stability and change in spending allocations*.European Union Politics 2015, Vol. 16(2), p. 262.
[4] *V.* Article 313, TFEU.
[5] *V.* Article 310(1), subparagraph 3, TFEU.
[6] *V.* Article 310(4), TFEU.
[7] *V.* Article 310(5), TFEU.
[8] *V.* Article 310(1), TFEU.
[9] "The Lisbon Treaty has introduced a new procedure for the adoption of the budget, which has given the European Parliament a final say over all expenditure. Consequently, the distinction between compulsory and non-compulsory expenditure is now only of historical interest". In: LENAERTS, Koen. VAN NUFFEL, PIET. *EU Constitutional Law*. Oxford University Press, 2022, p. 485.
[10] SCHÜTZE, Robert. *European Union Law*. Cambridge University Press, Second Edition, 2018, p 168.

> The first Budgetary Treaty granted to the European Parliament its first decision-making powers in the budgetary procedure. It conferred[11] on the President of the European Parliament the powers to declare that the budget was finally adopted and it provided that the discharge in respect of the implementation of the budget would be given by a joint decision of the European Parliament and the Council[12].

Chapter 2 of the Title II of the Part Six of the TFEU establishes that the Union shall also have a multiannual financial framework (MFF), also known as long-term budget. Pursuant to Article 312, TFEU, the MFF aims "to ensure that Union expenditure develops in an orderly manner and within the limits of its own resources"

The MFF creates "a stable framework, with overall spending limits to (i) align spending with the EU's political priorities (ii) increase predictability of EU finances for co-financers and beneficiaries (iii) ensure budgetary discipline (iv) make it easier to adopt the annual EU budget"[13].

The MFF establishes ceilings, *i.e.* limits, for the Union's expenditure: (i) total commitment in a given financial year; (ii) total payments in a given financial year; and (iii) total commitments[14] and payments in each of the headwinds, *i.e.* area of the Union's expenditure.

The MFF is supposed to "be established for a period of at least five years"[15], but currently it covers a timeframe of seven years[16].

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[11] First Budgetary Treaty/Treaty of Luxemburg, 22 April 1970. V. Article 1(7): "Lorsque la procédure prévue au présent article est achevée, le président de l'Assemblée constate que le budget administratif est définitivement arrêté".

[12] INGHELRAM, J. F.H. Chapter 9: *Budget and Finances*, pp. 314/315 in KUIJPER, Pieter Jan. AMTENBRINK, Fabian. CURTIN, Deirdre. DE WITTE, Bruno. MCDONNEL, Alison. VAN DEN BOGAERT, Stefaan (Edited by). *The Law of The European Union*. Wolters Kluwer, Fifth Edition, 2018.

[13] Information taken from the official website of the European Council, consulted on 13 May 2024: https://www.consilium.europa.eu/en/policies/eu-long-term-budget/#what

[14] "Total commitments correspond to the maximum amount of legal obligations – such as contracts or grants – that the EU can enter into in a given year. These amounts are not necessarily paid out in the same year but may be spent over subsequent financial years.Total payments are the actual amounts spent in a given year. They arise from legal commitments made in the same year or in previous ones" information taken from the official website of the European Council, consulted on 13 May 2024: https://www.consilium.europa.eu/en/policies/eu-long-term-budget/#what

[15] Article 312(1), subparagraph 2, TFEU.

[16] The MFF in force now covers the years 2021-2027.

1.2 The Union's own resources

The first chapter of the Title II, Part Six of the TFEU is dedicated to the Union's own resources. Pursuant to Article 311, first subparagraph: "[t]he Union shall provide itself with the means necessary to attain its objectives and carry through its policies".

In 1970, a Council Decision[17] replaced contributions from Member States as the source of financing of the EU by the Union's own resources. Since then, "the EU is financed by "own resources". This implies that those resources are attributed to the EU at source and cannot therefore be entered in the budget of a Member State"[18].

The second subparagraph of the same article establishes the following: "[w]ithout prejudice to other revenue, the budget shall be financed wholly from own resources". Said article also tasked the Council to adopt a decision, in accordance with a special legislative procedure[19], "laying down the provisions relating to the system of own resources of the Union"[20], after consultation with the European Parliament.

The Council adopted[21] a decision containing the general provisions on the system of own resources of the European Union. The Council Decision divides the Union's own resources into four categories: (i) traditional own resources; (ii) a value added tax (VAT) based own resources; (iii) a plastic packing based own resource; and (iv) a gross national income (GNI) based own resource.

Pursuant to the Council Decision *supra*, revenue originated from one of the four sources *infra* constitutes the own resources of the European Union:

> [a] **traditional** own resources consisting of levies, premiums, additional or compensatory amounts, additional amounts or factors, Common Customs Tariff duties and other duties established or to be established by the institutions of the Union in respect of trade with third countries, customs duties on products under the expired Treaty establishing the European Coal and Steel Community, as well as contributions and other duties provided for within the framework of the common organisation of the markets in sugar;
> [b] the application of a uniform call rate of 0,30 % for all Member States to the total amount of **VAT** receipts collected in respect of all taxable supplies divided

[17] COUNCIL DECISION (70/243 ECSC, EEC, Euratom) of 21 April 1970. *V.* Article 1.
[18] INGHELRAM, J. F.H. Chapter 9: *Budget and Finances*, p. 325 in *op. cit*.
[19] V. Article 289(2), TFEU.
[20] Article 311, third subparagraph, TFEU.
[21] COUNCIL DECISION (EU, Euratom) 2020/2053 of 14 December 2020. The adoption a a new MFF coincides with the adoption of a new own resources decision: MFF 2021-2017 triggered the adoption of COUNCIL DECISION (EU, Euratom) 2020/2053 of 14 December 2020; the previous MFF 2014-2020 produced the Council Decision 2014/335/EU, Euratom of 26 May 2014.

> by the weighted average VAT rate calculated for the relevant calendar year as stipulated in Council Regulation (EEC, Euratom) No 1553/89 (4). For each Member State the VAT base to be taken into account for this purpose shall not exceed 50 % of GNI;
> [c] the application of a uniform call rate to the weight of **plastic** packaging waste generated in each Member State that is not recycled. The uniform call rate shall be EUR 0,80 per kilogram. An annual lump sum reduction for certain Member States as defined in the third subparagraph of paragraph 2 shall apply;
> [d] the application of a uniform call rate, to be determined pursuant to the budgetary procedure in the light of the total of all other revenue, to the sum of **GNI** of all the Member States.[22][mine emphasis]

Despite the fact that those sources of revenue constitute the Union's own resources, "[i]t does not necessarily mean that the EU is entitled to collect those resources or that it may decide to raise taxes"[23].

According to Inghelram, the European resources are "to a large extent paid to beneficiaries under a system of shared management and on the basis of a large variety of - usually complex - rules and conditions. Such a system of indirect financing increases the risk of irregularities and fraud to the detriment of the EU budget"[24].

The Union's resources are a target for fraud and financial criminality. Thus, it ought to be protected to decrease the risk of misconduct: "[i]n the market for crime, where all rational agents act to optimise behaviour, opportunities are given by the interaction between a likely offender, a suitable target and the absence of a capable guardian"[25].

To tackle the reality described in the paragraph *supra*, Article 325, TFEU creates a mandate for the European Union to combat fraud. Due to the centrality and relevance of the topic, said article shall be here reproduced in its entirety:

> 1. The Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States, and in all the Union's institutions, bodies, offices and agencies.
> 2. Member States shall take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests.
> 3. Without prejudice to other provisions of the Treaties, the Member States shall coordinate their action aimed at protecting the financial interests of the Union

[22] Article 2(1), COUNCIL DECISION (EU, Euratom) 2020/2053 of 14 December 2020.
[23] INGHELRAM, J. F.H. Chapter 9: *Budget and Finances*, p. 325 in *op. cit*.
[24] *Ibidem*, p. 342 in *ibidem*.
[25] MANCANO, Leandro. *The European Union and Deprivation of Liberty: A Legislative and Judicial Analysis from the Perspective of the Individual*. Oxford,: Hart Publishing, 2019, p. 64.

> against fraud. To this end they shall organise, together with the Commission, close and regular cooperation between the competent authorities.
> 4. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union with a view to affording effective and equivalent protection in the Member States and in all the Union's institutions, bodies, offices and agencies.
> 5. The Commission, in cooperation with Member States, shall each year submit to the European Parliament and to the Council a report on the measures taken for the implementation of this Article.

The article *supra* aims to protect the financial interests of the European Union. The Union's financial interests are defined in the PIF[26] Directive as "[a]ll revenues, expenditures and assets covered by, acquired through, or due to: (i) the European Union budget; (ii) the budgets of the institutions, bodies, offices and agencies established under the Treaties, and budgets managed and monitored by them"[27].

The financial interests of the European Union are the object of protection of Article 325, TFEU. Such interests ought to be protected against "fraud and any other illegal activities"[28].

What would be, however, a proper definition of fraud? "In its very first Annual Report the European Court of Auditors defined fraud in the context of the then Community as a deliberate misappropriation of money or goods inevitably breaching the law and rules"[29].

The Council Resolution of 06 December 1994 provides a definition of what fraud means in the context of the European Union:

> [...], a definition of fraud should be drawn up. It should refer, subject to conditions and terms to be defined more closely, any intentional acts or omissions, including at least incorrect statements and concealment of facts in violation of duties of disclosure, resulting in damage to the budget of the Communities or to budgets managed by or on behalf of them, and involving, on the one hand, misappropriation, wrongful retention and misapplication of funds, and, on the other hand, the wrongful diminution of revenues[30].

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[26] The acronym PFF stands for *Protection des Intérêts Financiers*.
[27] DIRECTIVE (EU) 2017/1371 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law.
[28] Article 325(1), TFEU.
[29] XANTHAKI, Helen. *What is EU fraud? Can OLAF really combat it?* Journal of Financial Crime, Vol. 17 No. 1, 2010, p. 133.
[30] COUNCIL RESOLUTION (94/C 355/02) of 06 December 1994 on the legal protection of the financial interests of the Communities.

1.2.1 The PIF Convention and the PIF Regulation of 1995

In 1995, the Member States signed a convention - known as the PIF Convention - that brings a more detailed definition of fraud affecting the Union’s financial interests:

> Article 1(1) For the purposes of this Convention, fraud affecting the European Communities’ financial interests shall consist of:
> (a) in respect of expenditure, any intentional act or omission relating to:
> - the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds from the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities,
> - non-disclosure of information in violation of a specific obligation, with the same effect,
> - the misapplication of such funds for purposes other than those for which they were originally granted;
> (b)in respect of revenue, any intentional act or omission relating to:
> - the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the general budget of the European Communities or budgets managed by , or on behalf of, the European Communities,
> - non-disclosure of information in violation of a specific obligation, with the same effect,
> - misapplication of a legally obtained benefit, with the same effect[31].

As specified by Sanchéz, it “was the first legal instrument imposing criminal law obligations on the member states for the protection of the [Union’s] budget. Specifically, the Convention required the member states to take measures to punish fraudulent activities through criminal law sanctions”[32].

From that same year, *i.e.* 1995, a Council Regulation - known as the PIF Regulation - brings a definition of irregularity vis-à-vis the financial interests of the European Union that is convergent to the definitions *supra*:

> 'Irregularity' shall mean any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure[33].

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[31] CONVENTION Drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities’ financial interests.

[32] SÁNCHEZ, Demelsa Benito. Chapter 16: *Protecting EU financial interests through criminal law The shortcomings of the PIF Directive and repercussions for the functioning of the EPPO.* In: STEPHENSON, Paul. SÁNCHEZ-BARRUECO, María-Luisa. ADEN, Hartmut (Edited by). *Financial Accountability in the European Union - Institutions, Policy, and Practice.* Routledge, 1st Edition, 2020, p. 270.

[33] Article 1(2), COUNCIL REGULATION (EC, EURATOM) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests.

The PIF Regulation establishes that even irregularities that have "no specific financial impact may be seriously prejudicial to the financial interests of the EU and thus constitute an ´irregularity`"[34][35]. Inghelram[36] provides as examples of such irregularities jeopardising potential revenue of the Union and the disobedience to the rules concerning public procurement.

Moreover, the PIF Regulation, in its Article 3, creates a limitation period of four years. Said article also establishes provisions to be applied in case of continuous and repeated irregularities, as well as the acts that are able to trigger an interruption of the limitation period.

1.2.2 The PIF Directive

Another legal instrument governing the protection of the financial interests of the European Union is the PIF Directive[37]. "The aim of the PIF Directive is to strengthen the protection of the financial interests of the Union and to counter fraud and other illegal activities affecting them"[38].

The PIF Directive brings a list of what shall be regarded as fraud affecting the financial interests of the European Union:

> Article 3(2): For the purposes of this Directive, the following shall be regarded as fraud affecting the Union's financial interests: (a) in respect of non-procurement-related expenditure, any act or omission relating to: (i) the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds or assets from the Union budget or budgets managed by the Union, or on its behalf; (ii) non-disclosure of information in violation of a specific obligation, with the same effect; or (iii) the misapplication of such funds or assets for purposes other than those for which they were originally granted; (b) in respect of

[34] INGHELRAM, J. F.H. Chapter 9: *Budget and Finances*, p. 345 in *op.cit*.

[35] V. Case C-199/03, Ireland v Commission, 2005. It is worth reproducing paragraph 31 of the Court's ruling: Furthermore, as the Advocate General observed in paragraph 36 of his Opinion, even irregularities which do not have a specific financial impact may be seriously prejudicial to the financial interests of the Union and to compliance with Community law and for that reason justify the application of financial corrections on the part of the Commission.

[36] *V.* footnote 34. To support the argument for the two exemples, the author mentions Case C-465/10 (paragraph 46: Indeed, it should be noted that even irregularities having no specific financial impact may be seriously prejudicial to the financial interests of the European Union.) and Case C-669/11 (paragraph 37: Par conséquent, la violation par un opérateur, ayant obtenu par adjudication des lots d'alcools, de l'obligation d'exporter ces lots en dehors de l'Union dans le délai exigé est susceptible de porter atteinte au budget de l'Union en privant ce dernier d'une recette potentielle.).

[37] DIRECTIVE (EU) 2017/1371 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law.

[38] MAESA, Constanza Di Francesco. *Directive (EU) 2017/1371 on the Fight Against Fraud to the Union's Financial Interests by Means of Criminal Law: A Missed Goal?*. European Papers. Vol. 3, 2018, p. 1456.

> procurement-related expenditure, at least when committed in order to make an unlawful gain for the perpetrator or another by causing a loss to the Union's financial interests, any act or omission relating to: (i) the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds or assets from the Union budget or budgets managed by the Union, or on its behalf; (ii) non-disclosure of information in violation of a specific obligation, with the same effect; or (iii) the misapplication of such funds or assets for purposes other than those for which they were originally granted, which damages the Union's financial interests; (c) in respect of revenue other than revenue arising from VAT own resources referred to in point (d), any act or omission relating to: (i) the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the Union budget or budgets managed by the Union, or on its behalf; (ii) non-disclosure of information in violation of a specific obligation, with the same effect; or (iii) misapplication of a legally obtained benefit, with the same effect; (d) in respect of revenue arising from VAT own resources, any act or omission committed in cross-border fraudulent schemes in relation to: (i) the use or presentation of false, incorrect or incomplete VAT-related statements or documents, which has as an effect the diminution of the resources of the Union budget; (ii) non-disclosure of VAT-related information in violation of a specific obligation, with the same effect; or (iii) the presentation of correct VAT-related statements for the purposes of fraudulently disguising the non-payment or wrongful creation of rights to VAT refunds.

Fraud detrimental to the financial interest of the European Union ought to be regarded and treated, by the Member State, as the fraud to the detriment of their own domestic treasury. In the same sense, the “Commission v Greece” case can be highlighted in the European jurisdiction[39].

Pursuant to Article 83(2) of the TFEU[40], the PIF directive seeks to harmonise how some criminal offences are treated by the Member States. It “sets common standards for Member States’ criminal laws. These common standards seek to protect the EU’s financial

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[39] Case 68/88, Commission v Greece, Judgment of the Court, 21 September 1989. It is worth reproducing the paragraphs 25 and 26 of the Court’s ruling: [§ 25] For that purpose, whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive. [§ 26] For that purpose, whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.

[40] Article 83(2), TFEU: If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76.

interests by harmonising the definitions, sanctions, jurisdiction rules, and limitation periods of certain criminal offences affecting those interests"[41].

In fact, the PIF Directive institutes a criminalising *mandamus* to the Member States[42], *i.e.* it warrants or orders to criminalise fraudulent conducts detrimental to the financial interests of the European Union. The provisions in the directive have to be transposed by the Member States into their legal orders[43].

Article 4 of the PIF Directive ordains three other criminalising *mandamuses* to the Member States[44]: (i) money laundering[45]; (ii) passive and active corruption[46]; and (iii) misappropriation[47].

In the context of the protection of the financial interest of the European Union, the criminal offences listed in the paragraph *supra* can be regarded as connected crimes, *i.e.* one offence is connected to the other, either to to allow its fulfilment or concealment, or the ensure impunity or an advantage of any sort.

Another criminalising *mandamus* can be found in Article 5 of the PIF Directive: (i) paragraph 1 ordains that the incitement, aiding and abetting of the conducts described in Articles 3 and 4 shall be treated as criminal offences by the Member States; (ii) paragraph 2 institutes that the attempt to commit the conducts described in Articles 3 and 4(3) shall be deemed as criminal offences by the Member States.

It is important to highlight that the conducts described in Article 4, §§ 1 and 2, *i.e.* the offences of money laundering and corruption (both in the passive and active forms), are not compatible with the attempted form: hence their omission from Article 5(2).

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[41] VAN BALLEGOOIJ, Wouter. *Protecting the EU's Financial Interests through Criminal Law The Implementation of the "PIF Directive"*. EUCRIM. The European Criminal Law Association's Forum. 2021/3, p. 178.
[42] PIF Directive, Article 3(1): Member States shall take the necessary measures to ensure that fraud affecting the Union's financial interests constitutes a criminal offence when committed intentionally.
[43] "La directive constitue l'instrument le plus original au sein de l'ordre juridique de l'Union. Elle est symptomatique de la nécessaire collaboration entre les autorités nationales et celles de l'Union dans un processus d'intégration normative", BOUTAYEB, Chahira. *Droit Institutionnel de l'Union Européenne - Institutions*, *Ordre Juridique*, *Contentieux*. LGDJ, 5ª édition, 2018, p. 526.
[44] The directive uses the expression "Member States shall take the necessary measures to ensure that [...] constitutes criminal offences".
[45] PIF Directive, Article 4(1).
[46] PIF Directive, Article 4(2).
[47] PIF Directive, Article 4(3).

Article 6 of the PIF Directive concerns the liability of legal persons: "[...] Member States shall take the necessary measures to ensure that legal persons can be held liable for any of the criminal offences referred to in Articles 3, 4 and 5 [...]".

The provision *supra* does not constitute a criminalising *mandamus*: whereas Member States are required to take measures to ensure the liability of legal persons, it does not specify that the liability in question shall be criminal[48].

That is a salutary provision, because it takes into account that different legal traditions tend to treat the issue of the criminal liability of legal persons differently[49]. Some legal orders do not accept the idea of a legal person being a defendant in a criminal prosecution[50] - *societas delinquere non potest*.

Article 7 of the PIF Directive concerns the sanctions with regards to natural persons. It imposes to Member States the adoption of the sanctions to the offences described in Articles 3, 4 and 5 that ought to be "effective, proportionate and dissuasive"[51][52].

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[48] That interpretation is corroborated by the reasoning provided by the Commission in its proposal: "Liability of legal persons – this is a provision applicable to all offences mentioned above, which requires Member States to ensure liability of legal persons, while excluding that such liability is alternative to that of natural persons", in Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the fight against fraud to the Union's financial interests by means of criminal law /* COM/2012/0363 final - 2012/0193 (COD).

[49] This provision of the PIF Directive converges with the United Nations Convention against Transnational Organized Crime: Article 10. Liability of Legal Persons. [1] Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in serious crimes involving an organized criminal group and for the offences established in accordance with articles 5, 6, 8 and 23 of this Convention. [2] Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative. [3] Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences. [4] Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

[50] V. *inter alia*: MARKUNTSOV, Sergey. WASSMER, Martin. *The Problem of Imposing Criminal Liability on Legal Persons in Germany and Russia*. Russian Law Journal Volume VI (2018) Issue 3, p. 126: "The German and Russian legal systems do not provide for the criminal liability of legal persons". As inexhaustible examples, the French legal system allows the criminal liability of legal persons (v. Article 121-2, Code Pénal); the Brazilian legal system, on an intermediate position, allows the criminal liability of legal persons only on some environmental crimes.

[51] Article 7(1), PIF Directive.

[52] The principles of effectiveness, proportion and dissuasion of the punishment can be traced back to the Enlightenment. In the immortal lesson of Beccaria, the concept that the punishment should be proportionate, effective and dissuasive is already present. BECCARIA, Cesare. *On Crimes and Punishments and Other Writings*. University of Toronto Press, 2008, p. 49: "One of the greatest checks on crimes is not the cruelty of punishments, but the inevitability of punishment, [...]. The certainty of a punishment, even if it is moderate, will always make a stronger impression than the fear of another, more terrible punishment, but that carries with it the hope of impunity [...]".

It also ordains to Member States the institution of the sanction of imprisonment to the conducts described in Articles 3 and 5. The Commission argued that "[e]conomic crime – including fraud – is typically an area where criminal sanctions can have a particularly deterrent effect, as potential perpetrators can be expected to make a certain calculation of risks before deciding to engage in such criminal activities"[53].

An aggravating circumstance[54] is created by Article 8 of the PIF Directive: when the infractions described in Articles 3, 4 and 5 are committed within a criminal organisation, Member States shall consider that an aggravating circumstance of the crime.

Article 9 of the PIF Directive disciplines the sanctions regarding the legal persons. It establishes the sanction of fine (whether criminal or non-criminal in nature) as the sanction *par excellence*. Analogous to what is predicted concerning natural persons - Article 7, the sanctions concerning legal persons shall be "effective, proportionate and dissuasive".

It also provides an illustrative list of other sanctions: (i) "exclusion from entitlement to public benefits or aid"; (ii) "temporary or permanent exclusion from public tender procedures"; (iii) "temporary or permanent disqualification from the practice of commercial activities"; (iv) "placing under judicial supervision"; (v) "judicial winding-up"; (vi) "temporary or permanent closure of establishments which have been used for committing the criminal offence".

Among the measures deemed the most efficient against fraud and financial criminality, there are the freezing and confiscation of assets linked to criminal offences, either to enable it or the product of it. Article 10 of the PIF Directive determines that Member States shall legislate in order to permit the use of such measures.

The article mentioned *supra* also makes a reference to the DIRECTIVE 2014/42/EU[55] OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 3 April

[53] Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the fight against fraud to the Union's financial interests by means of criminal law /* COM/2012/0363 final - 2012/0193 (COD).
[54] Aggravating circumstances can be defined as "the elements related either to the offence or to the accused, which have the effect of increasing the penalty". CASSESE, Antonio. *The Oxford Companion to International Criminal Justice*. Oxford University Press, 2009, p. 235.
[55] That directive defines freezing [Article 2(5)] as the "temporary prohibition of the transfer, destruction, conversion, disposal or movement of property or temporarily assuming custody or control of property"; confiscation [Article 2(4)] as the "final deprivation of property ordered by a court in relation to a criminal

2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.

Considering the cross-border nature of the criminal offences concerned, Article 11 of the PIF Directive seeks to establish the territoriality of the criminal law: each Member State shall set its jurisdiction on the conducts described in Articles 3, 4 and 5 when (i) "the criminal offence is committed in whole or in part within its territory"[56]; or (ii) "the offender is one of its nationals"[57].

Article 12 of the PIF Directive regulates the issue of the limitation period for the criminal offences dealt by such directive. Member States are expected to set a limitation period long enough to enable "the investigation, prosecution, trial and judicial decision of criminal offences referred to in Articles 3, 4 and 5 for a sufficient period of time after the commission of those criminal offences, in order for those criminal offences to be tackled effectively"[58].

The recovery of the assets detrimental by the offence is laid down by Article 13 of the PIF Directive. The punishment of the perpetrators does not exclude the recovery of the following: (i) "at Union level of sums unduly paid in the context of the commission of the criminal offences referred to in point (a), (b) or (c) of Article 3(2), or in Article 4 or 5"[59]; and (ii) "at national level, of any VAT not paid in the context of the commission of the criminal offences referred in point (d) of Article 3(2), or in Article 4 or 5"[60].

According to the Commission, Article 13 "clarifies that this Directive does not affect the obligation of Member States to ensure recovery of sums irregularly paid as a consequence of the offences included in this Directive, also irrespective of the criminal prescription provision included in Article 12"[61].

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offence"; and instrumentalities [Article 2(3)] as "any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences".

[56] Article 11(1) (a), PIF Directive.

[57] Article 11(1) (b), PIF Directive.

[58] Article 12(1), *in fine*, PIF Directive.

[59] Article 13(1), PIF Directive.

[60] Article 13(2), PIF Directive.

[61] Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the fight against fraud to the Union's financial interests by means of criminal law /* COM/2012/0363 final - 2012/0193 (COD).

The interaction of the PIF Directive with other applicable European legal acts is disciplined by Article 14. It stresses the compatibility of the PIF Directive with the PIF Regulation[62], underlining the different and separate criminal and administrative spheres.

As justified by the Commission, Article 14 "is a provision which clarifies the interaction between administrative and criminal sanctions regimes"[63]. The regimes concerned are independent.

The Title IV - Final Provisions - of the PIF Directive contains Articles 15 to 20. Article 15 lays out the cooperation between Member States and European institutions and offices (Commission, i.e. OLAF; Eurojust; European Public Prosecutor's Office; Court of Auditors *etc*) in the fight against the offences referred to in the Directive.

Concerning Article 15, the Commission provides the following grounds for its adoption:

> [T]his is a provision which closely mirrors the provision on cooperation between Member States and the Commission, as included in the Second protocol to the PIF Convention. The inclusion of this provision is necessary due to the repeal of the Convention and its Protocols by Article 16[64].

Articles 17 and 18 regulate the transposition of the directive into the domestic legal order of the Member States and the report that shall be made about the progress of this processus in each Member State.

Article 19 of the PIF Directive establishes a *vacatio legis* period of twenty days. And, lastly, Article 20 defines the addresses of the PIF Directive: "[t]his Directive is addressed to the Member States in accordance with the Treaties".

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[62] Article 14, PIF Directive, *in limine*: "The application of administrative measures, penalties and fines as laid down in Union law, in particular those within the meaning of Articles 4 and 5 of Regulation (EC, Euratom) No 2988/95 [...]".
[63] Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the fight against fraud to the Union's financial interests by means of criminal law /* COM/2012/0363 final - 2012/0193 (COD).
[64] *Idem*.

1.3 Judicial cooperation in criminal matters

Chapter 4 of Title V (*i.e.* area of freedom, security and justice) of the TFEU disciplines de judicial cooperation in criminal matters in the Union. Chapter 4 contains Articles 82 to 86.

The European Union has no criminal jurisdiction, *i.e.* it does not institute crimes nor punishments, it does not trial them. An "European criminal code" does not exist; neither does an "European criminal procedural code". The competence concerning criminal law of the Union is established and framed by the aforementioned Chapter 4 - Judicial cooperation in criminal matters.

Pursuant to Article 82(1), TFEU: "Judicial cooperation in criminal matters in the Union [...] shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83".

The approximation of the criminal domestic laws can be done through European directives. The areas that can be harmonised are disciplined in Paragraph 2:

> To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.
> They shall concern:
> (a) mutual admissibility of evidence between Member States;
> (b) the rights of individuals in criminal procedure;
> (c) the rights of victims of crime;
> (d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.
> Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals[65].

Also disciplining the adoption of directives in the criminal law field is Article 83, TFEU. It states that directives might "establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a

[65] Article 82(2), TFEU.

cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis”.[66]

The second subparagraph lists the aforementioned areas of crimes: “terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime”[67].

Article 84, TFEU authorises the European Parliament and the Council to “establish measures to promote and support the action of Member States in the field of crime prevention, excluding any harmonisation of the laws and regulations of the Member States”.

From what was mentioned *supra*, it can be apprehended that the competence of the Union, concerning criminal matters, is a very limited one. Criminal law is deeply intertwined with the idea of national sovereignty.

The European Union is, as a consequence, restricted to issuing directives seeking to harmonise and set common minimum rules in some areas. The actual criminalisation of conducts remains a competence of the Member States: The EU can issue a directive containing a criminalising *mandamus*, though; the transposition of such directive rests with the domestic legislation.

As points out Mancano:

> There are structural features of the EU legal order, and of this area of law more specifically, that affect the legal development. First, EU criminal law is an area where conflicts—or at least inconsistencies—are more prone to arising, because of its importance to national sovereignty. Unsurprisingly, Articles 82 and 83 of the Treaty on the Functioning of the European Union (TFEU) limit approximation to minimum rules and, in most cases, only via directives[68].

[66] Article 83(1), *in fine*, TFEU.
[67] Article 83(1), second subparagraph, TFEU.
[68] MANCANO, Leandro. *The Systemic and the Particular in European Law - Judicial cooperation in criminal matters*. German Law Journal (2023), 24, p. 964.

2. EUROPEAN INSTITUTIONS AND ORGANS COMBATTING FRAUD

There are multiple European institutions, bodies, offices and agencies tasked with combatting fraud, *e.g.* the European Parliament, who is one of the budgetary authorities. The Commission as well: one should not forget that the European Anti-Fraud Office (OLAF) is an ancillary - yet independent - organ of the Commision.

This chapter, however, will analyse only institutions and organs exclusively dedicated to combatting fraud. Bearing that in mind, the following institutions and bodies shall be *infra* analysed: (i) the European Court of Auditors, *v.* section 2.1.; (ii) the European Anti-Fraud Office (OLAF), *v.* section 2.2; and (iii) the European Public Prosecutor's Office (EPPO), *v.* section 2.3.

Other bodies of the Union with a competence that touches the combat of fraud, but is broader than that, *i.e.* the European Union Agency for Criminal Justice Cooperation (Eurojust) and the European Union Agency for Law Enforcement Cooperation (Europol), will not be analysed.

2.1 The Court of Auditors

The European Court of Auditors (ECA) is one of the European institutions: Article 13(1), TEU. Its legal framework is established in Articles 285 to 287, TFEU. Another important legal instrument framing the action of the ECA is the Financial Regulation[69].

The legal foundation of the Court of Auditors was laid down by the second Budgetary Treaty of 1975 - or the Treaty of Brussels[70]. The ECA gained its status of an European institution (at the time, a Community institution) due to the endorsement of the Maastricht Treaty[71].

It is composed by one national of each Member State, for a renewable term that lasts six years[72]. The members of the ECA are independent from their national

[69] REGULATION (EU, Euratom) 2018/1046 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 18 July 2018 on the financial rules applicable to the general budget of the Union.
[70] Second Budgetary Treaty/Treaty of Brussels, 22 July 1975.
[71] Maastricht Treaty, 7 February 1992: Title II, Article G, provisions 6 and 59.
[72] Articles 285(2) and 286(2), TFEU.

governments[73]. The Court of Justice of the European Union is competent to deprive a member of the Court of Auditors from office[74].

The ECA structure is the following: (i) the Presidency; (ii) the Secretariat General; (iii) Audit Chambers - Chamber I Sustainable use of natural resources; Chamber II Investment for cohesion, growth and inclusion; Chamber III External action, security and justice; Chamber IV Regulation of markets and competitive economy; Chamber V Financing and Administering the Union; and (iv) four Committees - Audit Quality Control; Administrative; Ethics; and Internal Audit.

The Court of Auditors is the supreme audit institution of the European Union. "Seeking to ensure sound public management, auditors assume a key role in supervising and alerting on fraud risks, seeking to justify their activity by scrutinizing matters important to their stakeholders and thus legitimize their existence and relevance"[75].

About the independence, methodology and discretion on selecting issues to audit of the ECA, the following excerpt is comprehensive:

> The ECA is a fully independent EU institution with a broad and global mandate, encompassing financial, compliance, and performance audit. The Treaty leaves the ECA to determine and implement its own duties. It thus enjoys a discretionary power in deciding audit priorities, applying standards and methodologies as appropriate to the EU context, and allocating its resources accordingly[76].

Despite its name, the ECA is not a court of law. It has no jurisdictional function nor a binding decisionary power. It assists the European Parliament and the Council "in exercising their powers of control over the implementation of the budget"[77].

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[73] Articles 285(2) and 286(3), TFEU. In prohibiting other activities, Article 286(4), TFEU also aims to assure the independence of the members of the Court of Auditors.
[74] Article 286(6), TFEU.
[75] HANCU-BUDUI, Andreea. ZORIO-GRIMA, Ana. BLANCO-VEGA, Jose. *The quest for legitimacy: The European Court of Auditors' work on fraud*. Financial Accountability & Management, Volume 40, Issue 2, May 2024, p. 156.
[76] CIPRIANI, Gabriele. *Improving the Accountability of the EU Budget's multi-level implementation: Strengthening the contribution of the European Court of Auditors*. German Law Journal (2021), 22, 2021,p. 471.
[77] Article 287(4), TFEU.

The Court of Auditors is competent to verify the soundness of all revenue and expenditure of the Union[78]. That aim is twofold: improving financial management and assuring the transparency of public funds[79].

The ECA is competent to conduct both the analysis of records - *i.e.* documents - and *in loco* diligences on the premises of any body, office or agency[80]: Article 287(3), TFEU. This auditing competence includes any natural or legal persons who received funds from the budget of the Union. The same disposition also authorises the cooperation between the ECA and national audit institutions.

According to Craig and de Búrca, it "scrutinizes EU finances and ensures sound financial management. The Court examines the revenue and expenditure of the Union and of EU bodies, offices, and agencies, except where this is precluded by the relevant constituent instrument"[81].

Regarding the scrutiny on the accounts of European public expenditure and revenue, Schütze differentiates two levels of depth: formal review and substantial review. The European political choice fell on the latter type:

> [...]a *substantial* review will additionally examine the "soundness" of public of public spending decisions, that is: whether the financial priorities of the Union guarantee "value for money". Substantive review is more intrusive, as it involves questioning the underlying political choices behind the budget. [...] The Court of Auditors must thus review whether the revenue and expenditure of the Union was "lawful and regular", "and examine whether the financial management has been *sound"*. The soundness of the Union's finances is thereby determined "by reference to the principles of economy, efficiency and effectiveness"[82].

The Court of Auditors produces an annual report after each financial year is closed[83]. Such report is published in the Official Journal of the European Union and is also forwarded to other European institutions; "and, since the Commission is primarily charged

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[78] Article 287(1), TFEU.
[79] Statement of the ECA's mission in the official website of the institution, consulted in 05 May 2024: https://www.eca.europa.eu/en/legal-framework
[80] BOUTAYEB, Chahira. *Op. cit*, p. 436: "Elle dispose d'un pouvoir de contrôle sur pièce et sur place auprès des institutions de l'Union, mais aussi dans les locaux de tout organisme gérant des recettes ou des dépenses au nom de l'Union, et dans les États membres, notamment dans les locaux de toute personne physique ou morale bénéficiant de fonds communautaires".
[81] CRAIG, Paul. DE BÚRCA, Gráinne. *EU LAW - Texts, Cases, and Materials.*Oxford University Press, Seventh Edition, 2020, p. 97.
[82] SCHÜTZE, Robert. *European Union Law*. Cambridge University Press, Second Edition, 2018, p. 222.
[83] Article 287(4), TFEU.

with implementation of the Union budget, the reports will be primarily addressed to this Union Institution"[84].

The annual report is a statement of assurance, "about whether the EU's accounts are reliable, and whether the underlying transactions were legal and regular"[85]. Apart from the annual report, the ECA may issue special reports containing observations on specific topics.

The quotidian operations of the Court of Auditors are mainly regulated by its Rules of Procedure[86]. Pursuant to the TFEU, such rules were drawn by the ECA itself and were required to be approved by the Council[87].

The Court of Auditors might be requested at any time by other European institutions to "submit observations, particularly in the form of special reports, on specific questions and deliver opinions"[88].

The Court of Auditors has active legitimacy (*i.e. locus standi*) to bring annulment actions before the Court of Justice of the European Union for the defence of its own prerogatives: Article 263, TFEU.

2.2 European Anti-Fraud Office (OLAF)

The European Anti-Fraud Office (OLAF[89]) was created by the Decision 1999/352/EC, ECSC, Euratom[90] of the Commission, pursuant to Article 325, TFEU. The OLAF is an investigative organ that enjoys independence from the Commission.

The decision *supra* was later amended by: (i) Commission Decision 2013/478/EU of 27 September 2013; (ii) Commission Decision (EU) 2015/512 of 25 March 2015; and (iii) Commission Decision 2015/2418 of 18 December 2015.

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[84] SCHÜTZE, Robert. *Op. cit*, p. 222.
[85] Statement of the ECA's mission in the official website of the institution, consulted in 05 May 2024: https://www.eca.europa.eu/en/legal-framework
[86] Rules of Procedure of the Court of Auditors of the European Union. The document can be accessed in: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010Q0423(01)
[87] Article 287(4), TFEU.
[88] Article 287(4), TFEU.
[89] OLAF is the acronym in French: *Office Européen de Lutte Antifraude*.
[90] 28 April 1999.

Alongside the decisions referred to *supra*, the legal framework of OLAF is also constituted by: (i) Regulation (EC) nº 1073/1999[91]; (ii) Council Regulation nº 1074/1999[92] - which has the same content of the previous regulation; and (iii) an Interinstitutional Agreement[93] between the European Parliament, the Council and the Commission.

In addition to the legal framework, the OLAF produced and published a manual: the "OLAF Manual - Operational Procedures". Despite being an *interna corporis* instrument, the OLAF has an argumentative burden to justify possible deviations from its announced proceedings. In that direction, the following excerpt by Inghelram:

> It appears possible to qualify the OLAF Manual as an internal measure adopted by an EU administration. In this respect, the ECJ has ruled that although such measures may not be regarded as rules of law which the administration is always bound to observe, they nevertheless form rules of practice from which the administration may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment. Such measures constitute a general act, and the officials and other staff concerned may invoke their illegality in support of an action against the individual measures taken on the basis of these measures[94].

The mandate of the OLAF is to ensure the righteousness of European funds. Therefore, what falls into the OLAF interests is: centralised spending, foreign aid, agricultural funds, customs, market place and, to a lesser extent, counterfeit objects and tobacco (these last two categories have a customs/fiscal impact, *i.e.* affect the European revenue).

In order to pursue its mandate[95], the OLAF (i) "carryi[es] out independent investigations into fraud and corruption involving EU funds, so as to ensure that all EU taxpayers' money reaches projects that can create jobs and growth in Europe"; (ii) "contribut[es] to strengthening citizens' trust in the EU Institutions by investigating serious misconduct by EU staff and members of the EU Institutions"; and (iii) "develop[s] a sound EU anti-fraud policy".

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[91] Of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-fraud Office (OLAF), O. J. 1999, L 136/1.
[92] Of 25 May 1999 concerning investigations conducted by the European Anti-fraud Office (OLAF), O. J. 1999, L 136/8.
[93] O.J. 1999, L 136/15.
[94] INGHELRAM, J.F.H. *Legal and Institutional Aspects of the European Anti-Fraud Office (OLAF) - An analysis with a look forward to a European Public Prosecutor's Office*. Europa Law Publishing, Groningen, 2011, pp. 58/59.
[95] The information in this paragraph was collected in the official website of OLAF, accessed on 11 May 2024. https://anti-fraud.ec.europa.eu/about-us/what-we-do_en

2.2.1 The investigative competences of OLAF

The OLAF has a mandate to investigate fraud, corruption and other misconducts and offences that have an impact in the financial interest of the European Union: revenues, expenditures and also the (mis)conduct of members of the EU institutions and staff.

That mission is explicitly stated in the documents constituents of its legal framework:

> The Office shall exercise the Commission's powers to carry out external administrative investigations for the purpose of strengthening the fight against fraud, corruption and any other illegal activity adversely affecting the Community's financial interests, as well as any other act or activity by operators in breach of Community provisions[96].
>
> In order to step up the fight against fraud, corruption and any other illegal activity affecting the financial interests of the European Community, the European Anti-Fraud Office established by Commission Decision 1999/352/EC, ECSC, Euratom (hereinafter 'the Office') shall exercise the powers of investigation conferred on the Commission by the Community rules and Regulations and agreements in force in those areas[97].

The Commission Decision that established OLAF unambiguously assured its independence in the investigative function[98].

The investigations conducted by OLAF have an administrative nature[99], *i.e.* non-criminal. The OLAF Regulation differentiate two types of investigation: (i) external investigation[100]; and (ii) internal investigation[101].

Pursuant to Article 3 of the OLAF Regulation, external investigation is the investigation conducted by OLAF, through means of on-the-spot inspections and checks, in Member States and third countries, in accordance with cooperation agreements in force.

The legal framework of the on-the-spot inspections and checks is set by the Council Regulation 2185/96[102]. Inghelram compares the frame of the cooperation between

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[96] Article 2(1), COMMISSION DECISION 1999/352/EC, ECSC, Euratom of 28 April 1999.
[97] Article 1(1), REGULATION (EC) No 1073/1999 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 May 1999.
[98] *V.* Article 3, COMMISSION DECISION 1999/352/EC, ECSC, Euratom of 28 April 1999.
[99] *V.* Article 2, REGULATION (EC) No 1073/1999 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 May 1999.
[100] Article 3, *idem*.
[101] Article 4, *idem*.
[102] *V.* Article 4, COUNCIL REGULATION (EURATOM, EC) No 2185/96 of 11 November 1996.

OLAF and Member States for the on-the-spot inspections and checks with the regulation providing for the cooperation between the Court of Auditors and Member States:

> Although the task of auditing differs in nature from the tasks and controls to be carried out by OLAF, it is interesting to note that the cooperation defined by this provision resembles, to a certain extent, the cooperation between the ECA and national authorities when audits are carried out in the Member States[103].

Article 4 establishes that internal investigations are those carried out by OLAF within institutions, bodies, offices and agencies of the European Union. Paragraph 2 of that article establishes the powers of investigation that OLAF possesses when conducting internal investigations.

The OLAF has ample and far-reaching powers of investigation, when it comes to internal investigations. Those being[104]: (i) "right of immediate and unannounced access to any information held by the institutions, bodies, offices and agencies, and to their premises"; (ii) " inspect the accounts of the institutions, bodies, offices and agencies"; and (iii) "take a copy of and obtain extracts from any document or the contents of any data medium held by the institutions, bodies, offices and agencies and, if necessary, assume custody of such documents or data to ensure that there is no danger of their disappearing".

OLAF is also able[105] to (iv) " request oral information from members of the institutions and bodies, from managers of offices and agencies and from the staff of the institutions, bodies, offices and agencies".

Inghelram asserts that "in exercising these competences, OLAF is not entitled to use physical force against EU officials or agents. [...] In order to enforce its powers of

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[103] INGHELRAM, J.F.H. *Op. cit.*, 2011, p. 79. About the provisions concerning the cooperation between the Court of Auditors and national authorities of the Member States, the author continues in pages 79/80: "According to Article 287(3), first subparagraph, TFEU [...], such audits are carried out in liaison with national audit bodies or, if these do not have the necessary powers, with the competent national departments. These bodies and departments shall inform the ECA whether they intend to take part in the audit. In practice, this means the ECA notifies the national audit body of an audit in the Member State. The latter informs the former whether it intends to take part in the audit. It is, however, not obliged to do so, which confirms the autonomous nature of the ECA's audit rights in the Member States".

[104] V. Article 4(2), REGULATION (EC) No 1073/1999 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 May 1999.

[105] The OLAF Regulation also creates a duty to cooperate with OLAF and a duty to supply information. *V.* Article 4(6) (a). Also, *v.* Article 1, Interinstitutional Agreement of 25 May 1999.

investigation, OLAF can count on the assistance of the security office of the EU institution or body involved"[106].

2.2.1.1 The opening of investigations

The rules for OLAF to open an investigation are established in Article 5 of the OLAF Regulation. This article also differentiates the proceedings for opening an external investigation and an internal one.

Pursuant to this article, an (i) external investigation can be initiated by the Director of the OLAF acting *ex officio* or following a request by a Member State concerned; and an (ii) internal investigation can be triggered by a decision of the Director of OLAF, again acting *ex officio*, or following a request by the institution, body, office or agency within which the investigation ought to be conducted.

2.2.1.2 The proceedings of the investigations

Articles 6 to 10 of the OLAF Regulation discipline how the OLAF should conduct an investigation, procedures, issues concerning confidentiality and data protection, the reports of the investigation, and the forwarding of the information assembled during an investigation. This section will briefly analyse those formal proceedings.

Article 6 stipulates that the investigations conducted by the OLAF shall be controlled by its director[107]. It also privileges the written form of commands and authorisations for the performance of the investigative function[108].

Investigations by the OLAF do not have a deadline for conclusion, however them should not last longer than necessary[109]: proportionality and complexity of the case are the limiting factors.

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[106] INGHELRAM, J.F.H. *Op. cit.*, 2011, p. 100. The author ponders on the enforceability of the powers of investigation of OLAF in p. 101: "Contrary to the right of access to information and to premises, the duty to cooperate with OLAF and the duty to supply information do not appear to be directly enforceable. However, a failure to comply with them, as with any staff obligation, would make the EU official or servant liable to disciplinary action under Article 86 of the Staff Regulations". In that sense, v. Article 86(2), REGULATION No 31 (EEC), 11 (EAEC), OJ 45, 14.6.1962: "Where the Appointing Authority or OLAF becomes aware of evidence of failure within the meaning of paragraph 1, they may launch administrative investigations to verify whether such failure has occurred".

[107] Article 6(1).

[108] Article 6(2) and (3).

[109] Article 6(5).

Article 7 of the OLAF Regulation creates a duty to inform the OLAF: European institutions - *i.e.* institutions, bodies, offices and agencies - have an obligation to forward swiftly to the OLAF "any information relating to possible cases of fraud or corruption or any other illegal activity"[110].

In paragraph 2, the response to an request for information or document made by the OLAF is disciplined. Naturally, a distinction is made between Member States, on one side, and the European institutions, offices, bodies and agencies, on the other: for the former, national law and relevant provisions also apply.

Article 8 of the OLAF Regulation aims to ensure that the nature of secrecy of the investigations is maintained: it concerns the confidentiality in which information and documents shall be kept and also the protection of the data[111].

Article 9 of the OLAF Regulation devises the investigation report and the follow-up of the investigations. Concerning the report, paragraph 1 establishes that when an investigation is concluded, the OLAF must produce a "a report, under the authority of the Director, specifying the facts established, the financial loss, if any, and the findings of the investigation, including the recommendations of the Director of the Office on the action that should be taken"[112].

Taking into account that the report of an external investigation might be used by the Member State concerned as evidence for the persecution of the perpetrators of the offence, attention ought to be made to the procedural requirements of the Member State concerned[113].

In those cases, the report will "be sent to the competent authorities of the Member States in question in accordance with the rules relating to external investigations"[114]. When received by the Member State concerned, the report "shall be subject to the same

[110] Article 6(1), *in fine*.
[111] Article 8(3) expressly refers to the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.
[112] Article 9(1), *in fine*.
[113] Article 9(2): "[...] Reports drawn up on that basis shall constitute admissible evidence in administrative or judicial proceedings of the Member State in which their use proves necessary, in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors.[...]".
[114] Article 9(3), *in fine*.

evaluation rules as those applicable to administrative reports drawn up by national administrative inspectors and shall be of identical value to such reports"[115].

When the report is the conclusion of an internal investigation, on the other hand, it shall be sent to the European institution, office, body or agency concerned. Considering that the report is sent to an actor (*i.e.* European institution, office, body or agency) that belongs to the same legal order (*i.e.* the European one), the effects will be different from the ones created by sending the report to a Member States.

The concerned actor receiving the report (*i.e.* European institution, office, body or agency) "shall take such action, in particular disciplinary or legal, on the internal investigations, as the results of those investigations warrant, and shall report thereon to the Director of the Office, within a deadline laid down by him in the findings of his report"[116].

Finally, Article 10 of the OLAF Regulation frames the forwarding of information by the OLAF. It establishes that the OLAF "may at any time forward to the competent authorities of the Member States concerned information obtained in the course of external investigations"[117].

The Director of the OLAF "shall forward to the judicial authorities of the Member State concerned the information obtained by the Office during internal investigations into matters liable to result in criminal proceedings"[118]. He also will concomitantly inform the Member State concerned.

The OLAF may also " at any time forward to the institution, body, office or agency concerned the information obtained in the course of internal investigations"[119].

2.2.2 The European case law concerning the OLAF

The OLAF is not a sanctioning body, it is an investigative body. Yet, in pursuing its investigative mandate, the OLAF might affect fundamental rights and is bound by limits - *e.g.* due process.

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115 Article 9(2), *in fine*.
116 Article 9(4).
117 Article 10(1).
118 Article 10(2).
119 Article 10(3).

In a comprehensive study on how jurisprudential developments helped shaping the attributions of the OLAF, Groussot and Popov assess the equilibrium that the OLAF has to find between efficacy and fundamental rights: "OLAF is indeed in a delicate position and has to balance the effectiveness of its investigations and the so-called "culture of accountability[120]" [...] with fundamental rights of the individual, in particular the presumption of innocence"[121].

The possible clash between the investigative competences of the OLAF and fundamental rights was thoroughly studied by Inghelram. According to him, the fundamental rights that more directly might be affected by the functioning of the OLAF are: (i) the right to privacy; (ii) the rights of defence; and (iii) the right to an effective remedy. The following excerpt is worth reproducing:

> The OLAF-Regulation does not, however, contain specific rules on fundamental rights in the context of OLAF investigations [...] since OLAF is a part of the European Commission, the general rules on fundamental rights applicable in the EU context also apply to its investigations. [...] The most relevant source nowadays is the Charter of Fundamental Rights of the EU. [...] the fundamental rights which are of primary importance in the context of OLAF investigations, namely the right to privacy, the rights of the defence and the right to an effective remedy[122].

An analysis of the case law involving the OLAF in the European jurisdiction far exceeds the scope of this thesis. However, a (non-exhaustive) list of cases involving the OLAF to trigger the European jurisdiction can be found in its official website[123].

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[120] The European jurisdiction explicitly referred to the concept of "culture of accountability in the Case F-23/05, Giraudy v. Commission, paragraph 165: " That being said, it has to be recognised that a culture of accountability has grown up within the Community institutions, responding in particular to the concern of the public to be informed and assured that malfunctions and frauds are identified and, as appropriate, duly eliminated and punished. The consequence of that requirement is that officials and other servants who hold posts of responsibility within an administration such as the Commission must take into account the possible existence of a justified need to communicate a degree of information to the public".

[121] GROUSSOT, Xavier. POPOV, Ziva. *What's wrong with OLAF? Accountability, due process criminal justice in European anti-fraud policy*. Common Market Law Review. Volume 47, Issue 03,2010, p. 607.

[122] INGHELRAM, J.F.H. *Fundamental Rights, the European Anti-Fraud Office (OLAF) and a European Public Prosecutor's Office (EPPO): Some Selected Issues.* Critical Quarterly for Legislation and Law / Revue critique trimestrielle de jurisprudence et de législation, 2012-01, Vol.95 (1), p. 67/68.

[123] Consulted on 12 May 2024: https://anti-fraud.ec.europa.eu/about-us/legal-background/list-rulings-court-justice-eu-concerning-olaf_en

2.2.3 The non-investigative competences of the OLAF

Besides its investigative competences, the OLAF has also the task of assisting and coordinating the creation of a sound European anti-fraud policy. This task is set by Article 1(2) of the OLAF Regulation[124]:

> The Office shall provide the Member States with assistance from the Commission in organising close and regular cooperation between their competent authorities in order to coordinate their action aimed at protecting the financial interests of the Union against fraud. The Office shall contribute to the design and development of methods of preventing and combating fraud, corruption and any other illegal activity affecting the financial interests of the Union. The Office shall promote and coordinate, with and among the Member States, the sharing of operational experience and best procedural practices in the field of the protection of the financial interests of the Union, and shall support joint anti-fraud actions undertaken by Member States on a voluntary basis.

As specified by Inghelram, "[b]y virtue of this provision, OLAF in fact exercises for the Commission the coordinating task in the area of the protection of the EU's financial interests, which the latter has under Article 325(3)[125] TFEU"[126].

Pursuant to Article 12a(1) of the OLAF Regulation, Member States are required to "designate a service (the 'anti-fraud coordination service' [AFCOS]) to facilitate effective cooperation and exchange of information, including information of an operational nature, with the [OLAF]".

Each Member State has a degree of flexibility in the structuring of the AFCOS and in the placement on its internal administrative bureaucracy - *e.g.* countries might place it in the ministry of finances, or ministry of interior, or ministry of justice *etc*.

The AFCOS have two main functions: (i) guarantee the cooperation between the Member State concerned and the OLAF; and (ii) coordinate, within the Member State concerned, "legislative, administrative and investigative obligations and activities related to the protection of the EU's financial interests as appropriate"[127].

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[124] REGULATION (EU/ EURATOM) 883/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 September 2013.

[125] Article 325(3), TFEU: "Without prejudice to other provisions of the Treaties, the Member States shall coordinate their action aimed at protecting the financial interests of the Union against fraud. To this end they shall organise, together with the Commission, close and regular cooperation between the competent authorities".

[126] INGHELRAM, J.F.H. *Op. cit.*, 2011, p. 116.

[127] Information taken from the official website of the OLAF, accessed on 21 May 2024. https://anti-fraud.ec.europa.eu/investigations/anti-fraud-coordination-service-afcos_en

2.2.4 The OLAF in action

Annually, the OLAF publishes a report describing its activities in the preceding year: investigations, statistics, areas of investigation, figures about the sums recovered, main trends *etc*.

All the information that will be presented *infra* in this subsection was taken from the OLAF Report 2022[128], the most recent annual report available.

In the year of 2022, the OLAF concluded 256 investigations and made 275 recommendations. The latter can be divided into (i) 153 financial recommendations; (ii) 61 administrative recommendations; (iii) 44 judicial recommendations; and (iv) 17 disciplinary recommendations.

In that year, the OLAF recommended for recovery the amount of € 426,8 millions and recommended to be prevented from being unduly spent the amount of € 197,9 millions.

In the same period, 192 investigations were opened. The OLAF investigations can be divided into the following main areas: (i) own resources - 28 investigations; (ii) indirect management - 16; (iii) illicit trade - 2; (iv) cohesion fund - 5; (v) European social fund - 6; (vi) European agricultural guarantees and rural development funds - 17; (vii) European regional development fund - 42; (viii) direct management - 44; (ix) internal matters - 29; and (x) other - 3.

The OLAF has developed a strong activity in preventing the smuggling of cigarettes and tobacco into the European Union. For the year 2022, the figures are as follows: seizures of over 531 millions illicit cigarettes, which can be translated into the prevention of an estimated amount of € 153 millions in lost revenue for the Union.

The OLAF also has a competence to work on cases targeting counterfeit goods: from food and drinks to toys and luxury products[129]. Just as an example, more than 421 thousand bottles of counterfeit wine were seized in 2022.

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[128] Available online (date of access: 21 May 2024) in: https://anti-fraud.ec.europa.eu/document/download/f15610c4-8601-4ac5-9d3e-f921c2c9395c_en?filename=or-2022-short_en_0.pdf

[129] There has been some criticism about OLAF focusing too much on counterfeit luxury goods, thus becoming an "agent" of up-scale commercial giants. V., *inter alia* (accessed on 22 May 2024): https://euranetplus-inside.eu/olafs-fight-against-counterfeit-is-questioned/

2.3. The European Public Prosecutor's Office (EPPO)

The European Public Prosecutor's Office (EPPO) was instituted by the Council Regulation 2017/1939 of 12 October 2017 (henceforth, the "EPPO Regulation")[130]. It is a supra-national independent[131] prosecution's office.

The PIF Directive - *v. supra* 1.2.2 - establishes what are the criminal offences able to trigger the action of the EPPO, *i.e.* the crimes that are considered to affect the financial interest of the European Union.

Among the constellation of institutions and bodies of the European Union, the EPPO has a legal personality of its own[132].

2.3.1 Genesis of the EPPO

The inception of the EPPO can be traced back to 1995: in that year, a group of experts, headed by Professor Mireille Delmas-Marty[133], in criminal law was formed to "develop guiding principles in relation to the criminal law protection of the EU's financial interests within the framework of a single European legal area"[134].

In 1997, the group of experts delivered the report[135] "Corpus Juris: introducing penal provisions for the purpose of the financial interests of the European Union". The report contains "a core of rules of uniform substantial law dealing with the means of fighting crimes against the Community budget"[136].

[130] COUNCIL REGULATION (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO').
[131] *V.* Article 6(1), EPPO Regulation.
[132] Article 1(2), EPPO Regulation: "The EPPO shall have legal personality".
[133] "Un savant capable d'anticiper les temps, de faire face aux défis posés dans le domaine pénal par les processus généraux d'européanisation et de globalisation, de tenter de résoudre ces défis avec une approche syncrétique dans laquelle les sciences pénales ont été rejointes par les connaissances les plus diverses, de la sociologie à la philosophie, de la géopolitique aux mathématiques" in BERNARDI, Alessandro. *Mireille Delmas-Marty et l'harmonisation des systèmes pénaux*. Revue de Science Criminelle et de Droit Pénal Comparé. 2022/4, p. 745.
[134] Information taken from the official website of the EPPO, accessed on 26 May 2024: https://www.eppo.europa.eu/en/about/background
[135] The report "[...] ouvraient la perspective audacieuse d'un espace judiciaire pénal commun. L'espace envisagé se fondait essentiellement sur le principe novateur de territorialité unique européenne ainsi que sur la création d'une autorité commune compétente pour la phase précédant le jugement, à savoir le Ministère public européen", in ANGELIS, Francesco di. *L'espace judiciaire pénal européen : une vision se concrétise*. Revue du Droit de l'Union Européenne 2/2011, p. 187.
[136] DONÀ, Gabriele. *Towards a European Judicial Area? A Corpus Juris Introducing Penal Provisions for the Purpose of the Protection of the Financial Interests of the European Union*. European Journal of Crime, Criminal Law and Criminal Justice, Vol. 6/3, 1998, p. 283.

According to the EPPO, "[w]hereas the first 17 Articles are dedicated to substantive criminal law issues, Articles 18 to 35 contain principles of and rules on criminal procedure, including the proposal for the creation of a European Public Prosecutor"[137].

Two other theoretical developments followed the report produced by the group of experts:

> 2000: The Corpus Juris 2000 ('Florence proposal') is a follow-up to the 1997 project, with the aim of analysing the feasibility of the Corpus Juris in relation to the legislations of the Member States. This revised version maintains the original structure, composed of 35 articles.
> 2003: The study 'Penal and Administrative Sanctions, Settlement, Whistleblowing and Corpus Juris in the Candidate Countries' is coordinated by the Academy of European Law (ERA), with Professor Christine Van den Wyngaert as scientific coordinator. It scrutinises the potential reception of the Corpus Juris in the legal systems of the Central and Eastern European candidate countries[138].

In 2001, the Commission published a Green Paper[139] on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor. In that document, the Commission assessed that the measures combatting fraud detrimental to the Union - which has a cross-border nature - were not effective as it could be due to the fragmentation of efforts:

> The involvement of organised crime in fraud against the Community's financial interests and the transnational nature of such fraud imply cooperation with seventeen legal orders applying different rules of substance and procedure.[...] The shortcomings of the current arrangements lie above all in the fragmentation of the European criminal law-enforcement area[140].

[137] Information taken from the official website of the EPPO, accessed on 26 May 2024: https://www.eppo.europa.eu/en/about/background
[138] Information taken from the official website of the EPPO, accessed on 26 May 2024: https://www.eppo.europa.eu/en/about/background
[139] "Green papers are documents published by the European Commission to stimulate discussion on given topics at European Union (EU) level. They invite the relevant parties (bodies or individuals) to participate in a consultation process and debate on the basis of the proposals they put forward. Green papers may give rise to legislative developments that are then outlined in white papers". Information taken from the official website of the European Union, accessed on 26 May 2024: https://eur-lex.europa.eu/EN/legal-content/glossary/green-paper.html
[140] Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor of 11 December 2001. Paragraph 2.1.1, p. 12.

The formal legal disposition to allow the creation of the EPPO was an article introduced on the TFEU by the Treaty of Lisbon. Due to the centrality of it to the current section, it shall be reproduced:

> In order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust. The Council shall act unanimously after obtaining the consent of the European Parliament.
> In the absence of unanimity in the Council, a group of at least nine Member States may request that the draft regulation be referred to the European Council. In that case, the procedure in the Council shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council for adoption.
> Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft regulation concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply[141].

Article 86, TFEU authorises the establishment of the EPPO and also authorises that such establishment be achieved by means of enhanced cooperation. The enhanced cooperation is a way to circumnavigate[142] the lack of consensus among the Member States and allow a further integration in a topic that does not fall into the Unio's exclusive competence or into the common foreign and security policy[143].

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141 Article 86(1), TFEU.

142 "Sometimes it may happen that some Member States want the Union to go ahead in a given area while others do not. The latter may be able to block the adoption of any EU measure. Can the former then go ahead on their own and obtain the enactment of Union Measures that apply only to them? The answer is that, in certain circumstances, they can. The EU term used to describe this is ´enhanced co-operation`", in HARTLEY, T. C. *The Foundations of European Union Law - An introduction to the constitutional and administrative law of the European Union*. Oxford University Press, Eighth Edition, 2014, p. 43. "Enhanced cooperation was introduced in 1997 by the Treaty of Amsterdam that came into force in May 1999. It constitutes a flexible mechanism to accommodate diversity when certain Member States are unwilling or unable to participate in the Union's policy developments. [...] Enhanced cooperation may be characterized as the child of the crisis of the constitutional foundations of the Community", in KONSTADINIDES, Theodore. *Division of Powers in European Union Law - The delimitation of internal competence between the EU and the Member States*. Wolters Kluwer, Kluwer Law International, 2009, p. 250.

143 Article 329(1), TFEU: "Member States which wish to establish enhanced cooperation between themselves in one of the areas covered by the Treaties, with the exception of fields of exclusive competence and the common foreign and security policy, shall address a request to the Commission, specifying the scope and objectives of the enhanced cooperation proposed. The Commission may submit a proposal to the Council to that effect. In the event of the Commission not submitting a proposal, it shall inform the Member States concerned of the reasons for not doing so. Authorisation to proceed with the enhanced cooperation referred to in the first subparagraph shall be granted by the Council, on a proposal from the Commission and after obtaining the consent of the European Parliament".

The EPPO has currently (May 2024) 23 participating Member States, out of the potential 27[144].

2.3.2 Structure of the EPPO

The EPPO is a *sui generis* supra-national prosecution institution. Pursuant to Article 8(1) of the EPPO Regulation[145], the EPPO is an indivisible body of the European Union, due to operate as a single prosecution office with a decentralised structure.

Despite its indivisible nature, the EPPO is structured at a central level - European Union - and at a decentralised level, *i.e.* before the domestic jurisdiction of the Member States[146].

At the central level, the EPPO has the following organs[147]: (i) the College of the EPPO; (ii) the Permanent Chambers; (iii) the European Chief Prosecutor; (iv) the Deputy European Chief Prosecutors; (v) the European Prosecutors; (vi) and the Administrative Director[148].

At the decentralised sphere[149], the EPPO comprises the European Delegated Prosecutors, whose competence is exercised in the Member States.

2.3.2.1 The central level of the EPPO

The European Chief Prosecutor (ECP) has the attributions of "organis[ing] the work of the EPPO, direct[ing] its activities, and tak[ing] decisions in accordance"[150] with the EPPO Regulation and the rules of procedure of the EPPO.

[144] European Union Member States participating in the EPPO, in alphabetical order: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czechia, Estonia, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia and Spain.
[145] *V.* Article 8(1), EPPO Regulation.
[146] *V.* Article 8(2), EPPO Regulation.
[147] *V.* Article 8(3), EPPO Regulation.
[148] Due to the non-investigative and non-prosecutorial nature of the office of the Administrative Director, it will not be covered by this thesis. "The Administrative Director (Articles 17 and 18) has no immediate role to play in the investigative and prosecutorial operations of the EPPO, as he/she is mainly in charge of human resources (see Recital 114) as well as the general administration and the budget of the EPPO", in BURCHARD, Christoph. Chapter III: *STATUS, STRUCTURE AND ORGANISATION OF THE EPPO,* p. 46, in HERRNFELD, Hans-Holger. BRODOWSKI, Dominik. BURCHARD, Christoph. *European Public Prosecutor's Office - Article-by-Article Commentary*. Nomos. 2021.
[149] *V.* Article 8(4), EPPO Regulation.
[150] Article 11(1), EPPO Regulation.

The ECP is also competent to represent the EPPO in its relations with other institutions of the European Union, Member States and third parties[151]. The EPPO Regulation authorises[152] the ECP to delegate its representing tasks to the Deputy European Chief Prosecutors.

It is important to highlight the importance of internal independence within a prosecution office: prosecutors need to run investigations and prosecutions according to an established set of competencies, not based on the orders of superiors. Pursuant to this general principle, "he/she [*i.e.* the European Chief Prosecutor] must not instruct European Prosecutors or European Delegated Prosecutors on how to run their investigations and prosecutions"[153].

The EPPO Regulation establishes that there will be two Deputy European Chief Prosecutors (DECP). They have two main functions[154]: (i) assistance to the ECP; and (ii) replacement of the ECP.

Pursuant to Article 9 of the EPPO Regulation, the College of the EPPO is composed of the European Chief Prosecutor and one European Prosecutor for each Member State[155]. The European Chief Prosecutor is the chair of the College of the EPPO[156].

The College of the EPPO, in compliance with Article 9(2), EPPO Regulation, has the responsibility of generally overseeing the activities of the EPPO[157]. In Recital 23 of the EPPO Regulation, the expression "general oversight" is defined as "as referring to the general administration of the activities of the EPPO, in which instructions are only given on issues which have a horizontal importance for the EPPO".

The College of the EPPO, according to Burchard, "is the principal actor for strategic affairs. It is responsible for the general oversight of the EPPO"[158]. Yet another

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151 *V.* Article 11(3), in *limine*, EPPO Regulation.
152 *V.* Article 11(3), in fine, EPPO Regulation.
153 BURCHARD, Christoph. Chapter III: *STATUS, STRUCTURE AND ORGANISATION OF THE EPPO,* p. 88, in *op. cit*.
154 *V.* Article 11(2), EPPO Regulation.
155 *V.* Article 9(1), *in limine*, EPPO Regulation.
156 *V.* Article 9(1), in fine, EPPO Regulation.
157 *V.* Article 9(2), *in limine*, EPPO Regulation.
158 BURCHARD, Christoph. Chapter III: *STATUS, STRUCTURE AND ORGANISATION OF THE EPPO,* p. 46, in *op. cit*.

important competence of the College is the approval of the internal rules of procedure of the EPPO[159]. The College function aims to "ensure coherence, consistency and efficiency in the prosecution policy"[160].

At the central level, the EPPO is structured into Permanent Chambers. Pursuant to Article 10(2) of the EPPO Regulation, said chambers have the competence to "monitor and direct the investigations and prosecutions conducted by the European Delegated Prosecutors [...]".

The amount of Permanent Chambers will depend on the workload and development of the EPPO: the EPPO Regulation does not determine an exact number. It shall be determined by the internal rules of procedure[161]. Currently, there are 15 Permanent Chambers.

Chairing each Permanent Chamber is either the European Chief Prosecutor or one of the Deputy European Chief Prosecutors, *v.* Article 10(1), EPPO Regulation.

It falls into the competence of the Permanent Chambers the decisions regarding a case being brought into judgement[162] or being dismissed[163], the referral of a case to national authorities[164], the reopening of investigations[165], allocation[166] and reallocation[167] of cases, instructing European Delegated Prosecutors on the initiation[168] of investigations or on the right of evocation[169], *etc*.

In short, the Permanent Chambers:

> form, as a rule [...], the top operative actors of the EPPO. They are to monitor and direct the investigations, to ensure the coordination of investigations and prosecutions in cross-border cases, and to guarantee the implementation of decisions taken by the College[170].

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[159] V. Article 9(4), EPPO Regulation.
[160] Information taken from the official website of the EPPO, accessed on 27 May 2024: https://www.eppo.europa.eu/en/about/structure-and-characteristics
[161] *V.* Article 10(1), EPPO Regulation.
[162] Article 10(3) (a), EPPO Regulation.
[163] Article 10(3) (b), EPPO Regulation.
[164] Article 10(3) (d), EPPO Regulation.
[165] Article 10(3) (e), EPPO Regulation.
[166] Article 10(4) (d), EPPO Regulation.
[167] Article 10(4) (e), EPPO Regulation.
[168] Article 10(4) (a), EPPO Regulation.
[169] Article 10(4) (b), EPPO Regulation.
[170] BURCHARD, Christoph. Chapter III: *STATUS, STRUCTURE AND ORGANISATION OF THE EPPO,* p. 46, in *op. cit*.

At the central level of the EPPO, there is still the role of the European Prosecutors. They "serve, as a rule [...] as the operative and supervisory links between the competent Permanent Chamber and the European Delegated Prosecutor"[171]. There is one European Prosecutor for each participating Member State.

The European Prosecutors"[...] supervise the investigations and prosecutions for which the European Delegated Prosecutors handling the case in their Member State of origin are responsible"[172]. They act as some sort of bridge between the central and decentralised levels of the EPPO: "liaisons and information channels between the Permanent Chambers and the European Delegated Prosecutors in their respective Member States of origin"[173].

When domestic law of one of the participating Member States deems necessary to have internal review of certain acts, *i.e.* the review *interna corporis* of acts of the prosecution institution, the European Prosecutor shall have the reviewing authority[174].

2.3.2.2 The decentralised level of the EPPO

The decentralised level of the EPPO is composed of the European Delegated Prosecutors (EDP). Pursuant to Article 13(1), *caput*, of the EPPO Regulation, the EDPs:

> act on behalf of the EPPO in their respective Member States and shall have the same powers as national prosecutors in respect of investigations, prosecutions and bringing cases to judgment, in addition and subject to the specific powers and status conferred on them.

Article 13(1), in its second subparagraph, lists the responsibilities that fall into the EDPs sphere of competences. The EDPs are "responsible for bringing a case to judgment, in particular have the power to present trial pleas, participate in taking evidence and exercise the available remedies in accordance with national law"[175].

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171 *Ibidem*.
172 Article 12(1), EPPO Regulation.
173 Article 12(5), *in limine*, EPPO Regulation.
174 *V.* Article 12(4), EPPO Regulation.
175 Article 13(1), subparagraph 3, EPPO Regulation.

According to Burchard, the EDPs "are to conduct the bulk of the operative work, be it by investigating, prosecuting or bringing a case to judgment in their respective Member State, and/or by participating in the actual trial before a national court in their respective Member States"[176].

The operations of the EPPO - *i.e.* investigations and prosecutions - are mainly conducted, vis-à-vis the participating Member States, by the European Delegated Prosecutors.

The EPPO Regulation establishes that there must be at least two European Delegated Prosecutors per participating Member State[177]. An interesting feature of the role of EDP is that, despite being a member of the EPPO office, the EDP is also a member of the domestic prosecution office or a member of the judiciary of his country: the EDP can be considered the intersection of the European and domestic legal orders - double-hatting of the role[178].

That *sui generis* nature of the position is described in Recitals 32 and 33 of the EPPO Regulation:

> (32) The European Delegated Prosecutors should be an integral part of the EPPO and as such, when investigating and prosecuting offences within the competence of the EPPO, they should act exclusively on behalf and in the name of the EPPO on the territory of their respective Member State. This should entail granting them under this Regulation a functionally and legally independent status which is different from any status under national law.
> (33) Notwithstanding their special status under this Regulation, the European Delegated Prosecutors should, during their term of office, also be members of the prosecution service of their Member State, namely a prosecutor or member of the judiciary, and should be granted by their Member State at least the same powers as national prosecutors.

In performing his competences on behalf of the EPPO, the EDP shall have the same prerogatives and powers as the domestic prosecutors of his country[179]. Moreover, the

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[176] BURCHARD, Christoph. Chapter III: *STATUS, STRUCTURE AND ORGANISATION OF THE EPPO,* p. 47, in *op. cit*.
[177] *V.* Article 13(2), *in limine*, EPPO Regulation.
[178] Pajcic ponders the advantages and disadvantages of the double-hatted structure of the EDPs: "The main advantage of this "double hat" approach is anchoring the European office into the national systems and thereby ensuring a certain proximity to the field work of investigations. When it comes to disadvantages, the "double hat" status raises concerns regarding the independence of EDPs and therefore of the EPPO in general"; in PAJCIC, Matko. *How independent is the European Public Prosecutor's Office "de facto"?* Hrvatski ljetopis za kaznene znanosti i praksu, 2020-01, Vol.27 (1), p. 97.
[179] *V.* Article 13(1), EPPO Regulation.

EDP might carry on concomitantly his duties as a domestic prosecutor in his home jurisdiction, provided that it is compatible with his European functions[180].

The functional and territorial competences of the EDPs within each participating Member State, as well as the number of EDPs, is decided by the European Chief Prosecutor in agreement with the relevant domestic authorities of the given jurisdiction[181].

2.3.3 The competence of the EPPO

Article 22 of the EPPO Regulation establishes the material competence of the EPPO. According to Brodowski, "Article 22 sets out the material circumstances under which the EPPO is competent to investigate and prosecute criminal offences"[182]. Due to its relevance, said article will be reproduced *infra*:

> (1) The EPPO shall be competent in respect of the criminal offences affecting the financial interests of the Union that are provided for in Directive (EU) 2017/1371, as implemented by national law, irrespective of whether the same criminal conduct could be classified as another type of offence under national law. As regards offences referred to in point (d) of Article 3(2) of Directive (EU) 2017/1371, as implemented by national law, the EPPO shall only be competent when the intentional acts or omissions defined in that provision are connected with the territory of two or more Member States and involve a total damage of at least EUR 10 million.
> (2) The EPPO shall also be competent for offences regarding participation in a criminal organisation as defined in Framework Decision 2008/841/JHA, as implemented in national law, if the focus of the criminal activity of such a criminal organisation is to commit any of the offences referred to in paragraph 1.
> (3) The EPPO shall also be competent for any other criminal offence that is inextricably linked to criminal conduct that falls within the scope of paragraph 1 of this Article. The competence with regard to such criminal offences may only be exercised in conformity with Article 25(3).
> (4) In any case, the EPPO shall not be competent for criminal offences in respect of national direct taxes including offences inextricably linked thereto. The structure and functioning of the tax administration of the Member States shall not be affected by this Regulation.

Pursuant to Article 22(1), the EPPO is competent to investigate and prosecute criminal offences detrimental to the financial interests of the Union, as established by the PIF Directive: *v. supra*, sub-section 1.2.2.

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180 *V.* Article 13(3), EPPO Regulation.
181 *V.* Article 13(2), *in fine*, EPPO Regulation.
182 BRODOWSKI, Dominik. Chapter IV: *COMPETENCE AND EXERCISE OF COMPETENCE OF THE EPPO*, p.145 in *op. cit*.

Paragraph 1, *in fine*, sets a monetary threshold to trigger the competence of the EPPO: the fraud related to cross-border VAT irregularities must cause a damage of at least € 10 millions.

It is also important to emphasise that the PIF Directive does not create a single criminal offence (the European Union is not competent to institute crimes). The PIF Directive "establish[es] minimum rules concerning the definition of criminal offences and sanctions"[183]

The material competence of the EPPO depends on the transposition of the standards set by the PIF Directive into domestic jurisdictions: "The EPPO shall be competent [...] as implemented by national law, irrespective of whether the same criminal conduct could be classified as another type of offence under national law"[184].

Pursuant to paragraph 2, the EPPO is competent to investigate and prosecute criminal offences concerning engagement to criminal organisations, as defined by the COUNCIL FRAMEWORK DECISION 2008/841/JHA of 24 October 2008 on the fight against organised crime. That Decision defines the expression "criminal organisation" as:

> [...] a structured association, established over a period of time, of more than two persons acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit[185].

Paragraph 3 establishes the competence of the EPPO over criminal offences "inextricably linked" to the offences described in paragraph 1, *i.e.* crimes detrimental to the financial interests of the Union as laid out in the PIF Directive. This paragraph concerns the concept of connected crimes, *i.e.* criminal offences that are perpetrated to allow the commitment of another crime, or to ensure its impunity.

Paragraph 4 constitutes a negative clause of competence: it protects the autonomy of the tax systems of the participating Member States and their financial interests, in opposition to the financial interests of the Union.

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183 Article 83(1), TFEU. *V.* also Article 83(2), TFEU.
184 Article 22(1), EPPO Regulation.
185 Article 1(1), COUNCIL FRAMEWORK DECISION 2008/841/JHA of 24 October 2008 on the fight against organised crime.

As specified by Brodowski, "[a]s a generic protection of the Member States interests', paragraph 4 sentence 1 stipulates that the EPPO is not ´competent for criminal offences in respect of national direct taxes`"[186].

The author, them, clarifies the the object of paragraph 4: "[d]irect taxes are taxes which have to be paid by the person bearing the burden of the tax, in contrast to indirect taxes such as the VAT as well as tariffs or custom duties which burden the buyer but which have to be paid by the seller"[187].

The material competence of the EPPO, as established by Article 22 of the EPPO Regulation, can be summarised as follows[188]: (i) "cross-border VAT fraud involving damages of at least EUR 10.000.000"; (ii) "other type of fraud affecting the EU's financial interests"; (iii) "corruption that damages, or is likely to damage, the EU's financial interests"; (iv) misappropriation of EU funds or assets by a public official"; and (v) "money laundering and organised crime, as well as other offences inextricably linked to one of the previous categories".

Article 23 of the EPPO Regulation establishes the territorial and personal competence of the office. The EPPO is competent when the criminal offences listed in Article 22:

> (a) were committed in whole or in part within the territory of one or several Member States;
> (b) were committed by a national of a Member State, provided that a Member State has jurisdiction for such offences when committed outside its territory, or
> (c) were committed outside the territories referred to in point (a) by a person who was subject to the Staff Regulations or to the Conditions of Employment, at the time of the offence, provided that a Member State has jurisdiction for such offences when committed outside its territory.

Article 23 provides a list of alternative factors to trigger the competence of the EPPO: the criteria is not cumulative. According to Herrnfeld, Article 23 of the EPPO Regulation could have gone further, extending the territorial competence of the EPPO:

> The provision of Article 23 falls a bit short of what would have been possible to do. While the EPPO certainly should be able to exercise its competence in the

[186] BRODOWSKI, Dominik. Chapter IV: *COMPETENCE AND EXERCISE OF COMPETENCE OF THE EPPO*, p.169 in *op. cit*.
[187] *Ibidem*, pp. 169/170.
[188] This simplified catalogue of the material competence of the EPPO was taken from its official website, accessed on 28 May 2024: https://www.eppo.europa.eu/en/about/mission-and-tasks

> situations described in Article 23, this provision has been modelled on the minimum catalogue of jurisdiction provided for in Article 11(1) and (2) of the PIF-Directive.[...] The provision of Article 23 falls a bit short of what would have been possible to do. While the EPPO certainly should be able to exercise its competence in the situations described in Article 23, this provision has been modelled on the minimum catalogue of jurisdiction provided for in Article 11(1) and (2) of the PIF-Directive[189].

Article 25 of the EPPO Regulation disciplines the exercise of the competence of the EPPO. It states that the office "shall exercise its competence either by initiating an investigation under Article 26 or by deciding to use its right of evocation under Article 27"[190].

Considering the nature of the competence of the EPPO, its relation to the competence to prosecute crimes of the participating Member States, and the political reasoning for the decisions taken, Mitsilegas offers a valuable and comprehensive lesson:

> Perhaps unsurprisingly given the strength of Member States' concerns over the impact of the EPPO on domestic criminal justice systems and state sovereignty in the administration of criminal justice, exclusivity did not survive negotiations. The Regulation has replaced the exclusive competence of the EPPO with a system of shared (or to some extent 'priority') competence of the EPPO, backed up by a right to evocation. The EPPO will exercise its competence either by initiating an investigation or by deciding to use its right of evocation. Under the latter, if the EPPO becomes aware of the fact that an investigation in respect of an offence falling within its mandate is already undertaken by national authorities, it will consult with the latter authorities and will thereafter decide whether to open its own investigation and request the competent authorities to transfer the proceedings to it. Where the EPPO exercises its right of evocation, the competent authorities of the Member States must transfer the file to the EPPO and refrain from carrying out further acts of investigation in respect of the same offence – in this manner priority competence essentially becomes exclusive. However, in cases of disagreement between the EPPO and the national prosecution authorities over the question of whether the criminal conduct falls within the material scope of the EPPO competence, it is not the EPPO, but the national authorities competent to decide on the attribution of competences concerning prosecution at national level which will decide who is to be competent for the investigation of the case[191].

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[189] HERRNFELD, Hans-Holger. Chapter IV: *COMPETENCE AND EXERCISE OF COMPETENCE OF THE EPPO*, p. 177 in *op cit*.
[190] Article 26(1), *in limine*, EPPO Regulation.
[191] MITSILEGAS, Valsamis. *European prosecution between cooperation and integration: The European Public Prosecutor's Office and the rule of law*. Maastricht Journal of European and Comparative Law 2021, Vol. 28(2), p. 249.

Article 25, paragraph 2, establishes the conditions that allow[192] the EPPO to exercise its competence "[w]here a criminal offence that falls within the scope of Article 22 caused or is likely to cause damage to the Union's financial interests of less than EUR 10 000"[193].

Article 25, paragraph 3, institutes two situations to exclude the exercise of the competence of the EPPO, *i.e.* negative competence. Pursuant to that provision, when some conditions are met, the EPPO shall refrain from exercising its competence and refer the case to the competent authorities of the Member State concerned.

The hypothesis that trigger the referral of the case to the domestic authorities of the interested Member States are the following: (i) "the maximum sanction provided for by national law for an offence falling within the scope of Article 22(1) is equal to or less severe than the maximum sanction for an inextricably linked offence as referred to in Article 22(3) unless the latter offence has been instrumental to commit the offence falling within the scope of Article 22(1)"[194]; or (ii) "there is a reason to assume that the damage caused or likely to be caused, to the Union's financial interests by an offence as referred to in Article 22 does not exceed the damage caused, or likely to be caused to another victim"[195].

The provision of Article 25, paragraph 4, brings an exception to the hypothesis of Article 25(3) (b): if the consent of the national authorities concerned is granted, the EPPO may exercise its competence, if it is better placed to do so (vis-à-vis the participating Member State)[196].

Pursuant to the paragraph 5 of Article 25, the EPPO has a duty to inform the national authorities concerned of its exercise or refrain from doing so of its competence:

[192] Article 25(2) of the EPPO Regulation uses the expression "[...] the EPPO may only exercise its competence if [...]".
[193] The conditions laid down by the provision in Article 25(2) of the EPPO Regulation to allow the EPPO to exercise its competence for criminal offences whose damage or potential damage is inferior to ten thousand euros are: "(a) the case has repercussions at Union level which require an investigation to be conducted by the EPPO; and (b) officials or other servants of the Union, or members of the institutions of the Union could be suspected of having committed the offence".
[194] Article 25(3) (a), EPPO Regulation.
[195] Article 25(3) (b), EPPO Regulation.
[196] *V.* Article 25(4), EPPO Regulation.

"The EPPO shall inform the competent national authorities without undue delay of any decision to exercise or to refrain from exercising its competence"[197].

If the EPPO and the domestic concerned authorities cannot reach an agreement on the competence concerning criminal organisations[198], inextricably linked offences[199], criminal offences whose damage if below the threshold of ten thousand euros[200], and/or the hypothesis of Article 25(3), Article 22(6) attributes precedence to the latter, i.e. the prosecution authority of the Member State concerned[201].

2.3.4 Investigations under EPPO

Article 24 of the EPPO Regulation sets the layout governing the reporting, registration and verification of information. In other words, the possible channels through which the EPPO might become aware of potential offences falling into its competence - *i.e. notitia criminis*.

Article 26 of the EPPO Regulation disciplines the initiation of investigations and the allocation of competences within the EPPO. Pursuant to paragraph 1, a European Delegated Prosecutor of the Member State concerned will initiate an investigation when there are "reasonable grounds" to believe on the commitment of a criminal offence[202] that falls into the competence of the EPPO[203].

Paragraph 3 of Article 26 concerns the possibility of inaction of the EDP. In that case, the Permanent Chamber to which the investigation has been allocated will issue an instruction for the EDP initiate an investigation[204].

Paragraph 4 sets the rules determining the territorial competence of the different EDPs. The general rule, as stated *in limine*: "A case shall as a rule be initiated and handled by a [EDP] from the Member State where the focus of the criminal activity is or, if several

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[197] Article 25(5), EPPO Regulation.
[198] *V.* Article 22(2), EPPO Regulation.
[199] *V.* Article 22(3), EPPO Regulation.
[200] *V.* Article 25(2), EPPO Regulation.
[201] *V.* Article 25(6), EPPO Regulation.
[202] *I.e.*, minimum evidentiary ballast.
[203] It is possible to note how deferential this provision is to the domestic legal orders involved, leaving the details and formalities of the initiation of an investigation to the domestic legal-prosecution system concerned. *V.* Article 26(1), EPPO Regulation.
[204] *V.* Article 26(3), EPPO Regulation.

connected offences within the competences of the EPPO have been committed, the Member State where the bulk of the offences has been committed"[205].

That, however, does not constitute an absolute rule to determine the *forum* of the investigation. Paragraph 4 also establishes the standards concerning the hypothesis determining a different *locus* for the initiation of the investigation, as follows:

> A European Delegated Prosecutor of a different Member State that has jurisdiction for the case may only initiate or be instructed by the competent Permanent Chamber to initiate an investigation where a deviation from the rule set out in the previous sentence is duly justified, taking into account the following criteria, in order of priority: (a) the place of the suspect's or accused person's habitual residence; (b) the nationality of the suspect or accused person; (c) the place where the main financial damage has occurred[206].

As stated *supra*, the European Union has not a criminal code: it does not institute crimes nor establishes the punishments of criminal offences - that is done by the Member States. The PIF Directive sets a minimum standard of criminalisation and determines that certain conducts shall be criminalised by the Member States, *i.e.* criminalising *mandamus*; leaving, however, the details of the criminalising process to the Member States.

Therefore, different participating Member States may have varying degrees of prosecutorial severity to different criminal offences. As a consequence, the procedural position of a defendant may vary greatly in different jurisdictions.

The territorial definition of the competence of the EPPO to initiate investigations (and eventually to prosecute individuals) concerning cases in which more than one participating Member State has jurisdiction (and considering the cross-border nature of the offences concerned, that might happen very often) has the potential to be a source of doctrinal discussions and it will certainly be the object of judicial review.

Concerning the reallocation of a case to a different domestic jurisdiction, and the merge or split of cases, there is paragraph 5. Due to the repercussions that such a topic might acquire (*v. supra*), it will be reproduced *ipsis litteris*:

> Until a decision to prosecute under Article 36 is taken, the competent Permanent Chamber may, in a case concerning the jurisdiction of more than one Member

[205] Article 26(4), *in limine*, EPPO Regulation.
[206] Article 26(4), *in fine*, EPPO Regulation.

> State and after consultation with the European Prosecutors and/or European Delegated Prosecutors concerned, decide to:
> (a) reallocate the case to a European Delegated Prosecutor in another Member State;
> (b) merge or split cases and, for each case choose the European Delegated Prosecutor handling it,
> if such decisions are in the general interest of justice and in accordance with the criteria for the choice of the handling European Delegated Prosecutor in accordance with paragraph 4 of this Article[207].

The provision *supra* emphasises the crucial role that the Permanent Chambers - organs from the central level of the EPPO - are able to play in setting standards and developing the action of the EPPO.

Paragraph 6 also concerns the Permanent Chamber: "Whenever the Permanent Chamber is taking a decision to reallocate, merge or split a case, it shall take due account of the current state of the investigations"[208]. Pursuant to this provision, the decision of reallocating, merging or splitting a case must have a pragmatic substratum, that is: the best interest of the investigation.

The EPPO activity of investigation takes place within the jurisdiction of participating Member States, hence the caution of the EPPO Regulation in being deferential to their legal orders.

One example of such deference can be found in paragraph 7: it institutes a duty to the EPPO of informing the domestic authorities concerned about the initiation of investigations[209].

2.3.4.1 The right of evocation of the EPPO

Article 27 of the EPPO Regulation disciplines the right of evocation of the EPPO. That right appears in Recital 13 of the EPPO Regulation: "This Regulation provides for a system of shared competence between the EPPO and national authorities in combating crimes affecting the financial interests of the Union, based on the right of evocation of the EPPO".

[207] Article 26(5), EPPO Regulation.
[208] Article 6(6), EPPO Regulation.
[209] *V.* Article 6(7), EPPO Regulation

According to Herrnfeld, "Article 27 is a mere procedural provision in respect of the EPPO's "right of evocation". Interestingly, neither Article 27 nor any other provision of the EPPO Regulation specifically does clarify under which condition the EPPO may or should exercise that right"[210].

The right of evocation consists in a prerogative of the EPPO in transferring an investigation that falls into its scope of competence from the domestic authority to the European office, *i.e.* the EPPO.

Paragraph 1 states the following:

> Upon receiving all relevant information in accordance with Article 24(2), the EPPO shall take its decision on whether to exercise its right of evocation as soon as possible, but no later than 5 days after receiving the information from the national authorities and shall inform the national authorities of that decision. The European Chief Prosecutor may in a specific case take a reasoned decision to prolong the time limit by a maximum period of 5 days, and shall inform the national authorities accordingly.

The right of evoking an investigation from the competent national authorities concerned constitutes a priority competence[211] to the EPPO. The issue is as complex as it is relevant. Mitsilegas ponders as following:

> Where the EPPO exercises its right of evocation, the competent authorities of the Member States must transfer the file to the EPPO and refrain from carrying out further acts of investigation in respect of the same offence - in this manner priority competence essentially becomes exclusive. However, in cases of disagreement between the EPPO and the national prosecution authorities over the question of whether the criminal conduct falls within the material scope of the EPPO competence, it is not the EPPO, but the national authorities competent to decide on the attribution of competences concerning prosecution at national level which will decide who is to be competent for the investigation of the case[212].

The division of investigative and prosecutorial competences between the EPPO and the participating Member States is not as clearly defined as it could be[213]. Competence

[210] HERRNFELD, Hans-Holger. Chapter V: *RULES OF PROCEDURE*, p. 235 in *op. cit*.
[211] "In terms of division of competences between the EPPO and the national judicial authorities, once the EPPO has decided to exercise its right of evocation, the national authorities may no longer exercise their own competence in respect of the same criminal conduct". HERRNFELD, Hans-Holger. Chapter V: *RULES OF PROCEDURE*, p. 242, *op. cit*.
[212] MITSILEGAS, Valsamis. *Op. cit.*, p. 249.
[213] "A number of legal experts have previously pointed out inaccuracies and difficulties of interpretation of Art. 24 of Regulation 2017/1939, which regulates the exercise of the EPPO's material competence. The premise of the Regulation is that in the event of the EPPO deciding to exercise its competence, the

conflicts between the European and the domestic jurisdictions concerned (and also between different domestic jurisdictions) might arise.

As Herrnfeld points out:

> The fact that – on the one hand – the EPPO is supposed to have a "priority competence" and may exercise a "right of evocation" (Article 27), but – on the other hand – in case of disagreement it is a national judicial authority that decides on the attribution of competence, may give rise to disturbances in the course of conducting an efficient investigation[214].

The same author ponders about the effects that the exercise of the right of evocation by the EPPO has on the participating Member State in charge of the investigations (until that point) and on the possible effects to other Member States (it is important not to forget that many of the criminal offences dealt by the EPPO will have a cross-border nature). He presents the considerations that follow:

> In terms of division of competences between the EPPO and the national judicial authorities, once the EPPO has decided to exercise its right of evocation, the national authorities may no longer exercise their own competence in respect of the same criminal conduct (Article 25(1)), i.e. the same set of facts[...]. As in the case of an initiation of an investigation in accordance with Article 26 [...], the competence of the EPPO becomes in effect an exclusive competence. [...] also a decision by the EPPO in accordance with Article 27(1) has a certain erga omnes effect in respect of all (participating) Member States[215].

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authorities of the Member States may no longer exercise their own competence in respect of the same criminal conduct. Consequently, the EPPO's competence has priority. However, a seemingly unambiguous legal situation is complicated by several exceptions stipulated by the Union legislator with regard to the exercise of competence in Art. 25 of Regulation 2017/1939, turning the issue into a Gordian knot", in MARTON, Balázs. *The Conflict of Competence between the European Public Prosecutor's Office and Spanish Prosecutors – Lessons Learned.* The European Criminal Law Associations' Forum, 2002/4, p.287.

214 HERRNFELD, Hans-Holger. Chapter IV: *COMPETENCE AND EXERCISE OF COMPETENCE OF THE EPPO*, p. 211, *op. cit*.

215 HERRNFELD, Hans-Holger. Chapter V: *RULES OF PROCEDURE*, p. 243, *op. Cit*. Assessing specifically the right of evocation, p. 245: The rules on the EPPO's right of evocation are a consequence of the introduction of the principle of "shared competences" and serve to establish a "priority competence" for the EPPO in relation to "national claims of competence". . It would have been possible to consider certain alternatives when it comes to the details of the concept of evocation, such as e.g. to prescribe certain conditions for the EPPO's right to exercise competence along the lines of the principle of complementarity [...]. On the other hand, it would have been – at least theoretically – possible to follow the legality principle in Article 27 as well, and to require the EPPO to exercise the right of evocation when it has received information in accordance with Article 24(2) and determines that the conditions for exercising its competence are met. The final text of Article 27 strikes an appropriate compromise, allowing for flexibility in the EPPO's decisions on exercising the right of evocation. It should be considered to provide for some further criteria in the EPPO's internal rules of procedure with a view to establishing a common policy in this respect. Such a policy should nevertheless retain sufficient flexibility for the EDPs to take into account the state of the proceedings in the respective national investigations as well as the availability of resources necessary to conduct efficient investigations in due time".

The arrangements for the competences of the EPPO can be understood as a compromise between the European institutions (pushing for a system where the EPPO would have an exclusive competence for the criminal offences concerned) and the unwillingness of the participating Member States in advancing too much the integration process[216].

As remarks Mitsilegas, "yet the compromise reached in the final text of the Regulation raises serious questions of legal certainty and foreseeability for the individual under investigation on whether the exercise of competence lies with the EPPO or with Member States"[217]. The author then considers the possible effects of the legal uncertainty brought by the division of competence:

> The combination of these provisions aims to strike a balance between the centralized model of exclusivity put forward by the Commission and Member States' preference for a less integrated, more interactive and co-operative model – yet the compromise reached in the final text of the Regulation raises serious questions of legal certainty and foreseeability for the individual under investigation on whether the exercise of competence lies with the EPPO or with Member States[218].

Enough was written about the political conditions framing the right of evocation of the EPPO and also about possible juridical consequences of the division of competences between the EPPO and the domestic authorities of the participating Member States.

Article 27(4) establishes that a consultation of the national authorities concerned can happen before the EPPO decides to evoke a case[219]. Paragraph 5 disciplines the consequences of the right of evocation taking place[220]: (i) the domestic authorities concerned shall transfer the files of the investigation to the EPPO; and (ii) they shall refrain from carrying out new investigations about the same offences.

The European Delegated Prosecutor is the actor with active legitimacy in deciding whether or not to exercise the right of evocation[221]. Concerning the right of evocation,

[216] MITSILEGAS, Valsamis. *Op. cit.*, p. 249: "Perhaps unsurprisingly given the strength of Member States' concerns over the impact of the EPPO on domestic criminal justice systems and state sovereignty in the administration of criminal justice, exclusivity did not survive negotiations. The Regulation has replaced the exclusive competence of the EPPO with a system of shared (or to some extent 'priority') competence of the EPPO, backed up by a right to evocation".
[217] *Ibidem*.
[218] *Ibidem*.
[219] *V.* Article 27(4), EPPO Regulation.
[220] *V.* Article 27(5), EPPO Regulation.
[221] *V.* Article 27(6), first sub-paragraph, EPPO Regulation.

paragraph 6 utilises the terms "may be exercised", denoting that the use of the right of evocation is not mandatory. The optional nature of the right of evocation is also emphasised in Article 27(1) of the EPPO Regulation.

If the EDP concerned decides to refrain from evoking a case, there is a duty to inform that to the competent Permanent Chamber, so it can review the decision, i.e. exercising or refraining the evocation[222].

Article 27(7) of the EPPO Regulation sets the consequences of the EPPO refrain from evoking a case[223]: (i) the EPPO has to inform the competent domestic authorities - there will be nothing preventing them from carrying out their investigative diligences[224]; and (ii) the domestic authorities concerned have to inform the EPPO of any new relevant facts.

The EPPO might reconsider its decision of refraining from evoking a case:

> The EPPO may, however, subsequently have reason to reconsider its previous decision. That could be the case e.g., where the investigations reveal that the damage incurred by the EU is considerably higher than originally assumed [...]. Thus, the competent national authorities are obliged to inform the EPPO of "any new facts which could give the EPPO reasons to reconsider its decision not to exercise competence"[225].

Paragraph 8 of Article 27, EPPO Regulation is related to the evocation of cases concerning offences whose damage - actual or potential - does not exceed the amount of one hundred thousand euros[226]. That monetary threshold "is not only important in view of the subsidiarity principle, it should, in particular, also be welcomed as it allows the EPPO to concentrate its efforts and resources on more serious cases"[227].

Article 27(9) of the EPPO Regulation aims to ensure coherence in the application of paragraph 8, *i.e.* the EDP refraining from evoking cases involving offences whose damage is inferior to that *quantum*: "[...] a European Delegated Prosecutor shall inform the

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222 *V.* Article 27(6), second sub-paragraph, EPPO Regulation.
223 *V.* Article 27(7), EPPO Regulation.
224 "When the EPPO has informed the national authorities accordingly, the "stand-still" obligations under paragraph 2 of Article 27 no longer apply, and the national authorities may continue the investigations and decide to prosecute or dismiss the case as appropriate" in HERRNFELD, Hans-Holger. Chapter V: *RULES OF PROCEDURE*, p. 244, *op. cit*.
225 HERRNFELD, Hans-Holger. Chapter V: *RULES OF PROCEDURE*, p. 245, *op cit*.
226 *V.* Article 27(8), EPPO Regulation.
227 HERRNFELD, Hans-Holger. Chapter IV: *COMPETENCE AND EXERCISE OF COMPETENCE OF THE EPPO*, p. 211, *op. cit*.

competent Permanent Chamber of each decision taken in accordance with paragraph 8 and each Permanent Chamber shall report annually to the College on the application of the guidelines".

2.3.4.2 The conduction of the investigation

Article 28 of the EPPO Regulation sets the framework for conducting the investigations[228]. The organ most directly concerned with the conduction of the investigation is the European Delegated Prosecutor[229].

It does not mean, however, that the central level of the EPPO has not a role assigned in the conduction of investigations: the investigations are monitored and directed by the Permanent Chambers[230], while the task of supervising the investigations is assigned to the European Prosecutor[231].

Pursuant to paragraph 3 of the Article 28, the European Prosecutor concerned may propose to the competent Permanent Chamber the reallocation of a given case to another EDP[232]. The causes that might trigger that action are the following[233]: (i) the EDP inability to investigate or prosecute; and (ii) failure to comply with instructions of one the actors *supra*, *i.e.* the competent Permanent Chamber and/or the European Prosecutor.

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[228] "Article 28 presumably will give rise to different interpretations especially of its provisions on the relation between the EDPs and the national authorities and their respective roles and responsibilities in the investigations conducted by the EDPs "on behalf of the EPPO in their respective Member States". The provisions of paragraph 3, allowing the Permanent Chamber to reallocate the case to another EDP of the same Member State, i.a. where the handling EDP "fails to follow the instructions" and paragraph 4, allowing the European Prosecutor to personally assume the responsibility for handling the investigations in a particular case are the result of a compromise struck between different positions voiced during the negotiations. It remains to be seen how these provisions will be applied in practice. While paragraph 3 presumably was necessary to include in the Regulation as such cases may arise in practice and at least the situation described in point (a) of paragraph 3 would require the availability of a possible solution (supra → mn. 19), paragraph 4 is less convincing. Its application in practice may raise different legal issues (supra → mn. 21) and would lead to a situation where the level of supervision – the "normal" role of central supervision of the investigations by the European Prosecutors (cf. Article 12) – is effectively lost and the Permanent Chamber, when taking its decisions in accordance with Article 10(4) will – for lack of own knowledge of the law of the respective Member State – need to do so (merely) based on the reports to be submitted by the "handling European Prosecutor" in HERRNFELD, Hans-Holger. Chapter V: *RULES OF PROCEDURE*, pp. 260/261, *op. cit*.

[229] *V.* Article 28(1), EPPO Regulation.

[230] *V.* Article 10(2), EPPO Regulation.

[231] *V.* Article 12(1), EPPO Regulation.

[232] *V.* Article 28(3), EPPO Regulation.

[233] *Idem.*.

Paragraph 4 authorises the European Prosecutor to take the decision of conducting the investigation personally. That provision emphasises the exceptional nature of the measure. Due to its importance, the caput of the Article 28(4) shall be reproduced:

> In exceptional cases, after having obtained the approval of the competent Permanent Chamber, the supervising European Prosecutor may take a reasoned decision to conduct the investigation personally, either by undertaking personally the investigation measures and other measures or by instructing the competent authorities in his/her Member State, where this appears to be indispensable in the interest of the efficiency to the investigation or prosecution by reasons of one or more of the following criteria: [...]

The conditions imposed by that provision are the following[234]: (i) “the seriousness of the offence, in particular in view of its possible repercussions at Union level”; (ii) “when the investigation concerns officials or other servants of the Union or members of the institutions of the Union”; and/or (iii) “in the event of failure of the reallocation mechanism provided for in paragraph 3”.

As stressed in the *caput* of paragraph 4, those criteria are not cumulative. Paragraph 4 has another two sub-paragraphs that emphasise the exceptionality of the measure and the consequences to the national authorities concerned and to the EDP[235].

2.3.4.3 Rules on investigation measures and other measures

Article 30 of the EPPO Regulation disciplines the investigative tools that the EDP shall possess. Since the EPPO Regulation is not a criminal procedural code, it lists a few investigative measures that the participating Member States must make available to the EDPs.

Paragraph 1 takes into account the *quantum* of the punishment of the offences. Pursuant to Article 30(1), when a criminal offence is punishable by a maximum penalty that is superior to four years of imprisonment, the domestic jurisdiction must ensure that

[234] *V.* Article 28(4), EPPO Regulation.

[235] Article 28(4), in fine, EPPO Regulation: “In such exceptional circumstances Member States shall ensure that the European Prosecutor is entitled to order or request investigative measures and other measures and that he/she has all the powers, responsibilities and obligations of a European Delegated Prosecutor in accordance with this Regulation and national law. The competent national authorities and the European Delegated Prosecutors concerned by the case shall be informed without undue delay of the decision taken under this paragraph”.

the EDP - within the investigation concerned - will be able to request or order the following measures[236]:

> (a) **search** any premises, land, means of transport, private home, clothes and any other personal property or computer system, and take any **conservatory measures** necessary to preserve their integrity or to avoid the loss or contamination of evidence;
> (b) obtain the production of any **relevant object or document** either in its original form or in some other specified form;
> (c) obtain the production of **stored computer data**, encrypted or decrypted, either in their original form or in some other specified form, including banking account data and traffic data with the exception of data specifically retained in accordance with national law pursuant to the second sentence of Article 15(1) of Directive 2002/58/EC of the European Parliament and of the Council;
> (d) **freeze instrumentalities or proceeds of crime**, including assets, that are expected to be subject to confiscation by the trial court, where there is reason to believe that the owner, possessor or controller of those instrumentalities or proceeds will seek to frustrate the judgement ordering confiscation.
> (e) **intercept electronic communications** to and from the suspect or accused person, over any electronic communication means that the suspect or accused person is using;
> (f) **track and trace an object** by technical means, including controlled deliveries of goods[237]. [mine emphasis]

The extent of powers of a prosecution office, naturally, varies from one jurisdiction to another, hence the expression used in Article 30(1), *caput*: “request or order”. Some jurisdictions might allow a prosecutor to order a measure, while others might make it the object of a jurisdictional reserve, *i.e.* only a judge can order it - judicial authorisation.

Paragraphs 2 and 3 recognise that each participating Member State has its own prosecutorial system: the former estates that the investigative measures “may be subject to conditions in accordance with the applicable national law”[238]; the latter, “may be subject to further conditions, including limitations, provided for in the applicable national law”[239].

Paragraph 4 emphasises the parity of prerogatives that the EDP is supposed to have vis-à-vis its homologous domestic authorities. Article 30(4), EPPO Regulation: they are “entitled to request or to order any other measures in their Member State that are available to prosecutors under national law in similar national cases, in addition to the measures referred to in paragraph 1”.

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[236] *V.* Article 30(1), *caput*, EPPO Regulation. The investigative measures shall be reproduced in the main body of the text.
[237] Article 30(1), EPPO Regulation.
[238] *V.* Article 30(2), EPPO Regulation.
[239] *V.* Article 30(3), EPPO Regulation.

Paragraph 5 disciplines the conditions on which the investigative measures should be ordered or requested[240] - when there are “reasonable grounds”. It is a procedural guarantee that aims to safeguard the rights of the defendants.

2.3.4.4 Cross-border investigations

Article 31 of the EPPO Regulation sets the framework of cross-border investigations. It aims to organise how the cooperation of different European Delegated Prosecutors, acting before different domestic jurisdictions, should take place.

Taking into account the predominantly transnational nature of the criminal offences that fall into the competence of the EPPO, the provision of Article 31 acquires central relevance.

Investigations in a given case are assigned to an EDP, the decentralised office of the EPPO, who is acting with powers delegated by the European Union before the domestic jurisdiction of a participating Member State.

The EDP has to defend the interest of the Union as a task - and he does so in the capacity of an European official. Yet, the EDP exercises its delegated mandate before the domestic jurisdiction of a participating Member State.

It is reasonable to assume, however, that quite often the defence of the financial interests of the Union (the *ratio* that triggered the creation of the EPPO) will surpass any single national jurisdiction.

Hence the importance of establishing clearly the mechanisms of cooperation between the different European Delegated Prosecutors. Hence the importance of Article 31, EPPO Regulation, on cross-border investigations.

Article 31(1), EPPO Regulations states that:

> The European Delegated Prosecutors shall act in close cooperation by assisting and regularly consulting each other in cross-border cases. Where a measure needs to be undertaken in a Member State other than the Member State of the handling European Delegated Prosecutor, the latter European Delegated Prosecutor shall decide on the adoption of the necessary measure and assign it to a European Delegated Prosecutor located in the Member State where the measure needs to be carried out.

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[240] *V.* Article 30(5), EPPO Regulation.

From the provision *supra* and within the cooperation among EDPs, there are two capacities in which the EDPs might act in a cross-border investigation: (i) the handling European Delegated Prosecutor, *i. e*. the EDP that assigns an investigative measure to be performed in a different domestic jurisdiction; and (ii) the assisting European Delegated Prosecutor, *i.e*. the EDP who receives the assignment to perform an investigative measure from an EDP acting in a different participating Member State.

Paragraph 2 regulates the assignment of investigative measures to different jurisdictions:

> The handling European Delegated Prosecutor may assign any measures, which are available to him/her in accordance with Article 30. The justification and adoption of such measures shall be governed by the law of the Member States' of the handling European Delegated Prosecutor. Where the handling European Delegated Prosecutor assigns an investigation measure to one or several European Delegated Prosecutors from another Member State, he/she shall at the same time inform his supervising European Prosecutor.

Some investigative measures require judicial authorisation. From that premise, three possible scenarios arise: a given investigative measure requires judicial authorisation (i) in the domestic jurisdiction of both the handling and assisting EDP; (ii) only in the domestic jurisdiction of the handling EDP, but not in the assisting's; and (iii) only in the domestic jurisdiction of the assisting EDP, but not in the handling´s. Paragraph 3 deals with the these possibilities[241].

Pursuant to paragraph 4, "[t]he assisting European Delegated Prosecutor shall undertake the assigned measure, or instruct the competent national authority to do so".

Paragraph 5 states the the assisting EDP "shall inform his supervising European Prosecutor and consult with the handling European Delegated Prosecutor in order to resolve the matter bilaterally", when he considers that one of the following happened: (i) "the assignment is incomplete or contains a manifest relevant error"[242]; (ii) "the measure cannot be undertaken within the time limit set out in the assignment for justified and objective reasons"[243]; (iii) " an alternative but less intrusive measure would achieve the same results as the measure assigned"[244]; or (iv) "the assigned measure does not exist or

[241] *V.* Article 31(3), EPPO Regulation.
[242] Article 31(5) (a), EPPO Regulation.
[243] Article 31(5) (b), EPPO Regulation.
[244] Article 31(5) (c), EPPO Regulation.

would not be available in a similar domestic case under the law of his/her Member State"[245].

Pursuant to paragraph 7, inability to solve any matter between EDPs or the inaction concerning the undertaking of assigned investigative measures shall be referred to the competent Permanent Chamber[246]. The role to be performed by the Permanent Chamber is the object of paragraph 8[247].

Article 32, EPPO Regulation frames the enforcement of the assigned measures. It seeks to harmonise the legal systems of the domestic jurisdictions involved and the European Union. The provision follows:

> The assigned measures shall be carried out in accordance with this Regulation and the law of the Member State of the assisting European Delegated Prosecutor. Formalities and procedures expressly indicated by the handling European Delegated Prosecutor shall be complied with unless such formalities and procedures are contrary to the fundamental principles of law of the Member State of the assisting European Delegated Prosecutor[248].

According to Burchard, Article 32 "regulates how (pursuant to which law and which formalities and procedures) cross-border investigative measures are to be enforced by the assisting [EDP] [...] in Member States other than the one where the handling [EDP] is located"[249].

2.3.5 Rules on prosecution

Article 34 of the EPPO Regulation sets the frame concerning the referral and transfers of proceedings to national authorities.

There are three hypothesis in which the EPPO shall refer a case to the domestic competent authorities: (i) the investigation concludes that it is not dealing with offences that fall into the competence of the EPPO[250]; (ii) the conditions[251] allowing the EPPO to exercise its competence are no longer present[252]; and (iii) the competent Permanent

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245 Article 31(5) (d), EPPO Regulation.
246 *V.* Article 31(7), EPPO Regulation.
247 *V.* Article 31(8), EPPO Regulation.
248 Article 32, EPPO Regulation.
249 BURCHARD, Christoph. Chapter V: *RULES OF PROCEDURE*, p. 301, *op. cit.*
250 *V.* Article 34(1), EPPO Regulation.
251 *V.* Article 25(2) and (3), EPPO Regulation.
252 *V.* Article 34(2), EPPO Regulation.

Chamber might understand that it is not in the interests of the EPPO to investigate and prosecute offences whose damage - actual or potential - is inferior to one hundred thousand euros[253].

Article 34(4) establishes the proceeding to refer a case to the competent domestic authorities.

Article 34 of the EPPO Regulation distinguishes between mandatory and facultative referrals. The case of paragraph 1 is an example of the former, *i.e.* mandatory referral: investigations demonstrated that the offences in fact do not fall within the sphere of competence of the EPPO - lack of competence to investigate and prosecute.

Paragraph 2 deals with referrals triggered by the EPPO refraining from exercising its competence. The cases in which the EPPO might refrain are (i) the damaged caused or likely to be caused to the financial interests of the Union are inferior to ten thousand euros[254]; and (ii) on the hypothesis described on Article 25(3) of the EPPO Regulation.

The referral of a case based on the Article 34(2) is not triggered because there is a lack of competence of the EPPO, *i.e.* the EPPO could exercise its competence. In the situations described in this provision, the decision not to exercise its competence is based on considerations of opportunity and convenience.

The same applies to the scenario described in paragraph 3. If a criminal offence has caused or is likely to cause a damage inferior to one hundred thousand euros to the financial interests of the Union, “[...] the College considers that, with reference to the degree of seriousness of the offence or the complexity of the proceedings in the individual case, there is no need to investigate or to prosecute a case at Union level and that it would be in the interest of the efficiency of investigation or prosecution [...]”[255], the case can be referred to the competent national authorities.

That provision states that the EPPO shall take a consequentialist decision, a judgement of convenience and opportunity of pursuing in the exercise of its competence.

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[253] *V.* Article 34(3), EPPO Regulation.
[254] V. Article 25(2), EPPO Regulation.
[255] Article 34(3), EPPO Regulation.

In the case of paragraph 1, the EPPO lacks competence - mandatory referral. In the cases of paragraph 2 and 3, the EPPO decides not to exercise its competence for the reasons discussed *supra* - facultative referral.

Paragraph 5 disciplines the legal consequences of the competent domestic authorities not accepting the referral of a case by the EPPO:

> Where the competent national authorities do not accept to take over the case in accordance with paragraph 2 and 3 within a timeframe of maximum 30 days, the EPPO shall remain competent to prosecute or dismiss the case, in accordance with the rules laid down in this Regulation[256].

The provision supra expressively distinguishes the mandatory referrals (Article 34(1)) and the facultative referrals (Article 34(2) and (3)). In the case of paragraphs 2 and 3, the EPPO "shall remain competent". In the case of paragraph 1, the competence never existed.

Herrnfeld assesses Article 34 of the EPPO Regulation in the following way:

> Article 34 contains complex rules on a referral of the case in a number of different scenarios that may arise in practice. The different paragraphs properly differentiate between obligatory and optional referrals as well as the legal consequences in case the competent national authority(ies) decide(s) not to request a transfer of the file. [...] The fact that where the EPPO considers a referral of the case, there may be more than one Member State whose authorities would be competent to take over the EPPO's investigation, may lead to conflicts over the exercise of jurisdiction and may raise concerns over possible "forum shopping" by the EPPO. The EPPO Regulation should, however, not be expected to resolve the question which Member State's authorities in such a situation should be competent to continue the EPPO's investigation. Such issues of concurrent competence of two or more Member States may be an issue that should be addressed by way of an EU legal instrument on the basis of Article 82(1)(b) TFEU[257].

Lastly, paragraphs 7 and 8 establish the procedure for transferring files and determining which informations concerning the investigation should be forwarded to the competent national authorities. It also states that the EPPO shall "refrain from taking further investigative or prosecutorial measures and close the case"[258].

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[256] Article 34(5), EPPO Regulation.
[257] HERRNFELD, Hans-Holger. Chapter V: *RULES OF PROCEDURE*, pp. 320/321, *op. cit*.
[258] Article 34(7), EPPO Regulation.

2.3.5.1 The termination of investigations

The EPPO is a prosecution office. A prosecution office is the *dominus litis* of the penal action (or criminal prosecution) and has two main competences: (i) investigative; and (ii) prosecutorial. The investigative competence aims to form the *opinio delicti*. Once formed, it triggers the prosecutorial competence, authorising the *persecutio criminis in judicio*.

In a convergent sense, the excerpt by Novokmet is worth reproducing:

> 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. On the other hand, the investigative function implies taking actions and measures focused on collecting evidence for the prosecution, 7 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.)[259].

Article 35 of the EPPO Regulation disciplines the termination of investigations. Pursuant to that provision, once the EPPO concludes one investigation, the following options arise: (i) prosecute itself before a national court; (ii) refer the case to the competent domestic authorities; (iii) dismiss the case; or (iv) adopt a simplified prosecution procedure.

After concluding the investigation, the EPPO either has the *opinio delicti* formed or has it not formed. In the first case, the EPPO may adopt options (i), (ii) and (iv), *supra*. In the second case, *i.e.* the *opinio delicti* is not formed, option (iii) is due - the dismissal of the case.

For purposes of clarity, Article 35(1) of the EPPO Regulation will be reproduced *infra*:

> When the handling European Delegated Prosecutor considers the investigation to be completed, he/she shall submit a report to the supervising European Prosecutor, containing a summary of the case and a draft decision whether to prosecute before a national court or to consider a referral of the case, dismissal or simplified prosecution procedure in accordance with Article 34, 39 or 40. The supervising European Prosecutor shall forward those documents to the competent Permanent Chamber accompanied, if he/she considers it to be

[259] NOVOKMET, Ante. *The European public prosecutor's office and the judicial review of criminal prosecution*. New Journal of European Criminal Law 2017, Vol. 8(3), p. 377.

> necessary, by his/her own assessment. When the Permanent Chamber, in accordance with Article 10(3), takes the decision as proposed by the European Delegated Prosecutor, he/she shall pursue the matter accordingly.

Pursuant to paragraph 2, the competent Permanent Chamber might disagree with the report submitted by the EDP. In that occurrence, the Permanent Chamber is able to review the case in order to take a final decision or further instruct the EDP[260].

Pursuant to paragraph 3, the report produced by the EDP shall be able to act as the legal instrument required to seize the criminal jurisdiction of the national court concerned[261], *i.e.* starting the *persecutio criminis in judicio*.

2.3.5.2 Prosecution before national courts

Article 36 of the EPPO Regulation sets the rules governing the procedures to bring a case before national courts.

Pursuant to paragraph 1, the EDP has the duty to "submit a draft decision proposing to bring a case to judgment, the Permanent Chamber shall, following the procedures set out in Article 35, decide on this draft within 21 days".

Article 36(1), *in fine*, EPPO Regulation, however, establishes that "[t]he Permanent Chamber cannot decide to dismiss the case if a draft decision proposes bringing a case to judgment".

Paragraph 7 establishes another occasion where the competent Permanent Chamber can "monitor and supervise"[262] the prosecution conducted by the EDP: the decision to lodge an appeal.

The provisions of Article 36(1) and (7) do not seem to be the most productive in terms of the effectiveness of the prosecutorial work. They also seem to be ineffective, because it allows the EDP to act if urgency so requires.

Paragraph 2 states that, if the deadline stipulated in paragraph 1, *i.e.* 21 days, elapses *in albis*, "the decision proposed by the European Delegated Prosecutor shall be deemed to be accepted".

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[260] *V.* Article 35(2), EPPO Regulation.
[261] *V.* Article 35(3), EPPO Regulation.
[262] Article 10(2), EPPO Regulation.

Paragraph 3 contains a rule regarding which jurisdiction will be chosen to prosecute a case involving multiple participating Member States:

> Where more than one Member State has jurisdiction over the case, the Permanent Chamber shall in principle decide to bring the case to prosecution in the Member State of the handling European Delegated Prosecutor. However, the Permanent Chamber may, taking into account the report provided in accordance with Article 35(1), decide to bring the case to prosecution in a different Member State, if there are sufficiently justified grounds to do so, taking into account the criteria set out in Article 26(4) and (5), and instruct a European Delegated Prosecutor of that Member State accordingly[263].

Also regarding the selection of the *forum*, there is paragraph 4. It authorises the EDP to propose to group different cases, originating from investigations in different participating Member States, concerning the same defendants. The competent Permanent Chamber decides, on the proposal of the handling EDP, to unite different cases against the same person or person, if it is useful for the prosecution[264].

After the establishment of which jurisdiction[265] the case shall be prosecuted, domestic criminal procedural law shall determine the competence[266] to trial the prosecution: "Once a decision on the Member State in which the prosecution shall be brought has been taken, the competent national court within that Member State shall be determined on the basis of national law"[267].

Article 37, EPPO Regulations concerns the topic of evidence. If one thinks on the importance of evidence within the domain of criminal procedural law, Article 37 falls short

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[263] Article 36(3), EPPO Regulation.
[264] V. Article 36(4), EPPO Regulation.
[265] The term jurisdiction can be understood as a power, as a function and as an activity. "À jurisdição costuma ser atribuída uma tríplice conceituação, dizendo-se habitualmente que ela é ao mesmo tempo um poder, uma função e uma atividade. Na realidade ela não é um poder, mas o próprio poder estatal, que é uno, enquanto exercido com os objetivos do sistema processual - assim como a legislação é o poder estatal quando exercido para criar normas, e a administração para governar. Como função a jurisdição caracteriza-se pelos escopos que mediante seu exercício o Estado-juiz busca realizar - notadamente o escopo social de pacificar pessoas, eliminando litígios. A atividade jurisdicional constitui-se dos atos que o juiz realiza no processo, segundo as regras do procedimento". DINAMARCO, Cândido Rangel. *Instituições de Direito Processual Civil*. Vol. I, 8ª Edição, Malheiros Editores, 2016, p. 440.
[266] Competence can be defined as an internal organisation of the jurisdiction. "[...] competência é justamente o critério de distribuir entre os vários órgãos judiciários as atribuições relativas ao desempenho da jurisdição". THEODORO JUNIOR, Humberto. *Curso de Direito Processual Civil*. 35ª Edição. Editora Forense, 2000, p. 147. "[...] a competência significa idéia da legitimidade do exercício de um determinado poder, num determinado momento e sob determinadas circunstâncias". ARRUDA ALVIM, Eduardo. *Curso de Direito Processual Civil.* Editora Revista dos Tribunais, 1999, p. 90.
[267] Article 36(5), EPPO Regulation.

of major developments. Especially if one is aware of the cross-border nature of the cases that the EPPO is more likely to prosecute.

Article 37, basically, aims to regulate the admission of evidence - produced in a different jurisdiction - in the jurisdiction of the participating Member States. It also deals with the assessment of evidence, which is intrinsic to the domestic criminal procedural law concerned.

Article 37(1), EPPO Regulation: "[e]vidence presented by the prosecutors of the EPPO or the defendant to a court shall not be denied admission on the mere ground that the evidence was gathered in another Member State or in accordance with the law of another Member State".

Burchard assessment of the provisions brought by Article 37 includes comments on its relation to European constitutional law, *i.e.* primary law. The topic of evidence in criminal procedural law is deeply intertwined with the theme of fundamental rights and basic human rights. Due to its comprehensive nature, his remarks will be reproduced *supra ipsis litteris*:

> Article 37(2) is about the free assessment of evidence. [...] The assessment of evidence, in this respect, relates to evaluating if a certain piece of evidence (in a literal reading: of all evidence, not only evidence that was gathered in another Member State participating in the EPPO or in accordance with its laws, although the systematic context of paragraph 2 suggests a focus on foreign evidence) has any probative value, and if yes, which probative value. The power to assess evidence is detailed in applicable laws of national criminal procedure and needs to be interpreted in light of national constitutional principles and international law, especially the ECHR, which includes human rights standards about the assessment of evidence (especially illegally obtained evidence). Although the Regulation does not wish to affect the powers of the court to assess evidence in an EPPO proceeding, the Regulation cannot limit the impact of European Constitutional Law (EU Primary Law), which may in the future affect national standards about the assessment of evidence before a court becoming active in an EPPO proceeding, as the latter leads to applicability of Union law and the Charter [...]. It is because of this procedural link that a court assessing evidence in an EPPO procedure effectively implements Union Law (Article 51 of the Charter) (and not because the procedure relates to a "European", i.e. a PIF crime). Prima facie, paragraph 2 solely deals with the powers of the trial court, and not any national court that becomes involved before trial (e.g. when a court decides, based on evidence gathered by the EPPO, including cross-border evidence, on pre-trial detention of an accused person). But given that the Regulation does not want to intervene in applicable national laws of criminal procedure, it seems reasonable to read paragraph 2 broadly so as to cover all national courts that become involved in EPPO proceedings.[...], it seems reasonable that paragraph 2 does not only pertain to evidence presented by the

> EPPO or the defendant, but to all actors that have the power to present evidence under national law[268].

2.3.5.3 Rules on alternatives to prosecution

Article 39, EPPO Regulation establishes the causes upon which a case shall be dismissed. The *caput* of the article states:

> Where prosecution has become impossible, pursuant to the law of the Member State of the handling European Delegated Prosecutor, the Permanent Chamber shall, based on a report provided by the European Delegated Prosecutor handling the case in accordance with Article 35(1), decide to dismiss the case against a person on account of any of the following grounds:[269]

The grounds that allow a case to be dismissed are the causes of exclusion of culpability, *i.e.* the culpability is excluded from the active agent of the criminal offence. In other words, a typical and illicit conduct took place, but the culpability cannot be attributed to the agent.

Article 39(1) lists the following causes to exclude the culpability: (i) "the death of the suspect or accused person or winding up of a suspect or accused legal person"[270]; (ii) " the insanity of the suspect or accused person"[271]; (iii) "amnesty granted to the suspect or accused person"[272]; (iv) " immunity granted to the suspect or accused person, unless it has been lifted"[273]; (v) "expiry of the national statutory limitation to prosecute"[274]; (vi) "the suspect's or accused person's case has already been finally disposed of in relation to the same acts"[275]; and (vii) "the lack of relevant evidence"[276].

It would be desirable to highlight that the last of the grounds to dismiss a case, *i.e.* Article 39(1) (g) "the lack of relevant evidence", is not a cause to exclude the culpability. Relevant evidence is a condition for the forming of the *opinio delicti*.

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268 BURCHARD, Christoph. Chapter V: *RULES OF PROCEDURE*, pp. 351/352, *op. cit.*
269 Article 39, *caput*, EPPO Regulation.
270 Article 39(1), (a), EPPO Regulation.
271 Article 39(1), (b), EPPO Regulation.
272 Article 39(1), (c), EPPO Regulation.
273 Article 39(1), (d), EPPO Regulation.
274 Article 39(1), (e), EPPO Regulation.
275 Article 39(1), (f), EPPO Regulation.
276 Article 39(1), (g), EPPO Regulation.

Without the minimum required evidentiary substratum, the penal action has no just cause to be prosecuted: therefore, as a natural and logical consequence, the case must be dismissed.

Paragraph 2 takes the caution of expressly stating that the decision taken accordingly to paragraph 1 does not preclude the subject matter[277] - blocking further action of the EPPO. The supervenience[278] of new relevant information allows the review of the decision *supra* mentioned.

Concerning the capacity of the EPPO to investigate and prosecute offences inextricably linked[279] to the criminal conducts constituting the competence *stricto sensu*[280] the EPPO, paragraph 3 states the following:

> Where the EPPO is competent in accordance with Article 22(3), it shall dismiss a case only after consultation with the national authorities of the Member State referred to in Article 25(6). If applicable, the Permanent Chamber shall refer the case to the competent national authorities in accordance with Article 34(6), (7) and (8).
> The same applies where the EPPO exercises a competence in respect of offences referred to in points (a) and (b) of Article 3(2) of Directive (EU) 2017/1371 and where the damage caused or likely to be caused to the Union's financial interests does not exceed the damage caused or likely to be caused to another victim[281].

The legal consequences of dismissing a case are listed in Article 39(4) of the EPPO Regulation: it establishes some duties of notification and information for the EPPO[282]. Even though a case might be dismissed (i.e. the EPPO did not form the *opinio delicti*), other institutions might exercise their competences.

[277] *V.* Article 39(2), EPPO Regulation.
[278] "Acontecimento jurídico que, em princípio, vem modificar ou alterar uma situação firmada em fato anterior, para que se possa tomar uma nova orientação ou para que se permita a adoção de medida que desfaça ato, ou medida anterior, ou que venha imprimir novo rumo à solução de uma contenda judicial"; definition taken from the official website of the Conselho Nacional do Ministério Público, accessed on 01 June 2024: https://www.cnmp.mp.br/portal/institucional/476-glossario/7792-superveniencia#:~:text=Acontecimento%20jur%C3%ADdico%20que%2C%20em%20princ%C3%ADpio,solu%C3%A7%C3%A3o%20de%20uma%20contenda%20judicial.
[279] V. Article 22(3), EPPO Regulation.
[280] Material competence *stricto sensu* of the EPPO: *v.* Article 22(1), EPPO Regulation.
[281] Article 39(3), EPPO Regulation.
[282] *V.* Article 39(4), EPPO Regulation.

2.3.6 Procedural Safeguards

Article 41, EPPO Regulation touches on the scope of the rights of suspects and accused persons. The topic of the substantive and procedural rights of a defendant in a criminal prosecution has the utmost importance: "[...] the due process rights of the accused are seen as internationally recognised 'general principles of law,' which are immanent to the very concept of democracy and as such deserve a special"[283].

In a convergent direction, the remarks by Bassiouni and de Zayas shall be reproduced: "Indispensable to a democratic system of government is an independent judiciary that guarantees a fair trial to all persons accused of offences"[284].

Article 41(1), EPPO Regulation: "The activities of the EPPO shall be carried out in full compliance with the rights of suspects and accused persons enshrined in the Charter, including the right to a fair trial and the rights of defence". That is a somewhat redundant provision[285].

Paragraph 2 provides a list of rights that shall constitute a minimum for every defendant in every prosecution conducted by the EPPO, regardless of the *forum*. For its value, it is worth transcribing it *ipsis litteris*:

> Any suspected or accused person in the criminal proceedings of the EPPO shall, at a minimum, have the procedural rights provided for in Union law, including directives concerning the rights of suspects and accused persons in criminal procedures, as implemented by national law, such as:
> (a) the right to interpretation and translation, as provided for in Directive 2010/64/EU;
> (b) the right to information and access to the case materials, as provided for in Directive 2012/13/EU;
> (c) the right of access to a lawyer and the right to communicate with and have third persons informed in the event of detention, as provided for in Directive 2013/48/EU;
> (d) the right to remain silent and the right to be presumed innocent as provided for in Directive (EU) 2016/343;
> (e) the right to legal aid as provided for in Directive (EU) 2016/1919[286].

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[283] KAMBER, Kresimir. *Substantive and Procedural Criminal Law Protection of Human Rights in the Law of the European Convention on Human Rights*. Human Rights Law Review, 2020, 20, pp. 75/76.
[284] BASSIOUNI, M. Cherif. ZAYAS, Alfred de (collaborator). *The Protection of Human Rights in the Administration of Criminal Justice - A Compendium of United Nations Norms and Standards.* International and Comparative Criminal Law Series Vol. 1. Transnational Publishers, 1994, p. 132.
[285] *V*. Article 6(1), TEU.
[286] Article 41(2), EPPO Regulation.

The paragraph *supra* assembles some procedural rights that were already disciplined at the European level by the directives referenced in it. Paragraph 2 is also, therefore, somewhat redundant.

Finally, paragraph 3 states that the defendants prosecuted by the EPPO "shall have all the procedural rights available to them under the applicable national law"[287]. Considering the structure and competence of the EPPO (*i.e.* prosecution by the EDP before domestic jurisdiction), this provision is self-evident and also redundant.

Article 42 disciplines the regime of judicial review to which the EPPO is subject. Article 42(1), EPPO Regulation: "procedural acts [...] 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".

The EPPO exercises procedural acts before the domestic jurisdiction of one of the participating Member States. It is, therefore, natural that they will be judicially reviewed by the competent authority according to domestic law.

Despite the fact that it prosecutes cases before national courts, the EPPO is a body of the European Union[288]. As such, it may trigger the jurisdiction of the European Union, *i.e.* the Court of Justice of the European Union. Article 42 disciplines the cases in which that may happen[289].

Paragraph 3 establishes that the decisions to dismiss a case by the EPPO are able to trigger the European jurisdiction, by means of an action for annulment, if the contestation is based in the law of the Union[290].

Paragraph 4 regulates the competent jurisdiction to settle issues concerning compensation for damages caused by the EPPO. Article 42(4), EPPO Regulation: "The

[287] *V.* Article 41(3), EPPO Regulation.
[288] Article 3(1), EPPO Regulation.
[289] Article 42(2), EPPO Regulation: "The Court of Justice shall have jurisdiction, in accordance with Article 267 TFEU, to give preliminary rulings concerning: (a) the validity of procedural acts of the EPPO, in so far as such a question of validity is raised before any court or tribunal of a Member State directly on the basis of Union law; (b) the interpretation or the validity of provisions of Union law, including this Regulation; (c) the interpretation of Articles 22 and 25 of this Regulation in relation to any conflict of competence between the EPPO and the competent national authorities".
[290] Article 42(3), EPPO Regulation: "By way of derogation from paragraph 1 of this Article, the decisions of the EPPO to dismiss a case, in so far as they are contested directly on the basis of Union law, shall be subject to review before the Court of Justice in accordance with the fourth paragraph of Article 263 TFEU".

Court of Justice shall have jurisdiction in accordance with Article 268 TFEU in any dispute relating to compensation for damage caused by the EPPO".

Pursuant to paragraph 7, the European judiciary is the competent *forum* to decide on the dismissal of the European Chief Prosecutor and of the European Prosecutors[291]. Lastly, paragraph 8 disciplines the judicial review of non-procedural acts of the EPPO[292].

On his commentary to the EPPO Regulation, Herrnfeld assesses Article 42 as follows:

> [...] the major "innovative" element of Article 42 is the rule set out in its paragraph 1, awarding the competence to undertake the judicial review of procedural acts of the EPPO to the national courts and limiting the CJEU's role in this respect to decisions, declaring – on request for a preliminary ruling in accordance with Article 267 TFEU – procedural acts as "invalid" on the ground that they do not comply with Union law. Council and European Parliament have considered such deviation from the competences of the CJEU as set out in Articles 263 and 265 TFEU to be possible and an appropriate solution to ensure an effective judicial control of the EPPO. It remains to be seen whether the CJEU will eventually find this solution to be in compliance with the Treaty rules and principles on the CJEU's competences to review the legality of Union acts.On different occasions, the ECJ has, with reference i.a. to Article 344 TFEU, considered it incompatible with Union law if an international agreement were to "affect the allocation of powers fixed by the Treaties", as this would affect "the autonomy of the EU legal system, observance of which is ensured by the Court".The question thus may arise whether Article 86(3) TFEU is a sufficient and sound bases for the choice made by the Union legislator in case of the EPPO Regulation[293].

2.3.7 The EPPO in action

Annually, the EPPO publishes a report describing its activities in the preceding year. All the information that will be presented *infra* in this subsection was taken from the EPPO Report of 2023[294], the most recent one available.

In 2023, the EPPO opened 1371 investigations, amounting to an estimated damage of 11,5 billion euros. All active investigations totalled 1927 cases.

There were 139 indictments and a total of 448 persons indicted. Cases dismissed: 166. Cases referred to national authorities: 127.

[291] *V.* Article 42(7), EPPO Regulation.
[292] *V.* Article 42(8), EPPO Regulation.
[293] HERRNFELD, Hans-Holger. Chapter VI: *PROCEDURAL SAFEGUARDS*, pp. 437/438, *op. cit*.
[294] Available in: https://www.eppo.europa.eu/sites/default/files/2024-02/EPPO_Annual_Report_2023.pdf

Concerning the *notitia criminis*, out of a total of 4187, they were received from: (i) EU institutions, bodies, offices and agencies - 108; (ii) national authorities - 1562; (iii) private parties 2494; and (iv) *ex officio* - 23.

When it comes to the judicial activity of the EPPO, the following figures should be highlighted: (i) ongoing cases in the trial phase - 155; (ii) first court decisions - 67; (iii) appeals against first court decisions - 9; (iv) ongoing cases in the appellate phase - 10; (v) final court decisions - 54; (vi) extraordinary legal remedies against court decisions - 0; (vii) convictions - 48; and (viii) acquittals -5.

The cases dealt by the EPPO can be split into the following types of offences: (i) non-procurement expenditure fraud - 1486; (ii) procurement expenditure fraud - 379; (iii) PIF crime-focused criminal organisation - 209; (iv) non-VAT revenue fraud - 405; (v) VAT revenue fraud - 873; (vi) corruption - 131; (vii) misappropriation; (viii) money laundering - 226; and (ix) inextricably linked offence - 599.

The cases involving fraud related to active funding are: (i) agricultural and rural development programmes - 319; (ii) maritime and fisheries programmes - 30; (iii) international cooperation programmes - 17; (iv) regional and urban development programmes - 313; (v) education and culture related programmes - 17; (vi) research and innovation programmes - 25; (vii) employment, social cohesion, inclusion and values programmes - 101; (viii) climate and environment programmes - 5; (ix) recovery and resilience programmes - 233; (x) mobility and transport, energy and digitalisation programmes - 8; (xi) asylum, migration and integration programmes - 7; (xii) industry, entrepreneurship and SME programmes - 7; (xiii) security and defence programmes - 4; and (xiv) other programmes or doubt cases - 263.

2.3.8 The political implications of the EPPO

As already stated, the European Union has no criminal jurisdiction: it does not institute crimes nor attributes punishments to criminal offences; there is no “European criminal code”, nor an “European criminal procedural code”.

The Union can advance its agenda concerning criminal law by coordinating the judicial cooperation in criminal matters or issuing directives establishing minimum common standards.

The creation of the EPPO was a very significant advancement in the process of European integration. It did not change anything that was stated in the preceding two paragraphs, but now the Union is competent to prosecute criminal offences.

The European prosecution of criminal offences takes place before the national courts of participating Member States and the officials that exercise the prosecutorial competence, *i.e.* the European Delegated Prosecutors, act in the capacity by delegation from the Union.

This new development might trigger a conflict of two competing jurisdictions: the European Union and the domestic jurisdiction of participating Member States.

Within a legal system, when a conflict of competence arises, internal mechanisms are enough to solve it: at some point, either a supreme court or a constitutional court has the competence to pronounce the "last word" in any matter.

When it comes to the relation between the European legal order and the legal system of the Member States, however, there is no clear procedure to solve an eventual conflict of competence.

In a convergent understanding:

> In any type of large structure, in which the norms of multiple systems are supposed to coexist, sooner or later the question of their mutual hierarchy arises. What is striking with respect to the EU is the fact that even today questions of hierarchy, sovereignty, and the ultimate word remain unresolved. Both the Union and the Member States have different views on why and to what extent EU law is allowed to prevail over national law[295].

When a juridical system has no clear way of solving an issue, the issue is not a legal or juridical problem, it becomes a political problem.

Bearing that in mind, the prosecutorial competence of the European Union, exercised by the EPPO, might be the source of political turbulence between the Union and its constituent Member States.

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[295] BOBEK, Michal. Chapter 6: *The effects of EU law in the national legal systems*. In: BARNARD, Catherine. PEERS, Steve (Edited by). *European Union Law*. Oxford University Press, Fourth Edition, 2023, p. 177.

Also, adding another layer of complexity, it should be highlighted that all participating Member States to the EPPO are also members of the Council of Europe, an international organisation distinct from the European Union.

It means that the participating Member States to the EPPO are signatories to the European Convention on Human Rights, which means that they recognise the jurisdiction of the European Court of Human Rights as well.

Conclusion

As the integration process of the European Union progressed, so did its competences and attributions. The scope of the Union changed and increased in ambition. So did its budget: both from the perspective of the revenue and the expenditure.

The Union became more independent from the political will of its constituent Member States (more independent in the revenue side of the equation) and its competences were ever-growing (which was translated into a great capillary in its expenditure).

From the 1970s onwards, it is possible to notice a greater concern to preserve and safeguard the resources of the Union against fraud: both affecting its actual or potential revenue and the (mis)use of its expenditure.

From the adoption of the concept of the Union's own resources and the creation of the European Court of Auditors, it is possible to notice a growing concern in protecting the incomes and disbursements of the Union: the larger they were, the more fraudulent activity they enabled.

To a concrete problem, pragmatic and *ad hoc* answers: the PIF Convention and the PIF Regulation, both from 1995, and the creation of OLAF are good examples.

The most recent developments in the combat of the Union against fraud detrimental to its financial interests are the PIF Directive and the EPPO: both of them lean towards criminal law.

Criminal law has a *Janus*-like nature: it is both (i) the legitimate use of violence and (ii) the *ultima ratio* in the protection of juridical goods. It is both a form of oppression and a way of protecting fundamental rights and values held dear.

The Union places its financial interest so high in its axiological hierarchy that it decided that criminalising (through setting minimum common standards via a directive, *i.e.* the PIF Directive) was not enough.

The latest European body tasked with combatting fraud is the EPPO: a prosecution office. An European prosecution office exercising its duty before national courts of the participating Member States.

The creation of the EPPO constitutes a large step of the Union: not only in terms of combatting fraud, but also in terms of the European process of integration as a role. The prosecution of criminal offences lies just a few steps beneath the trial of criminal offences: *i.e.* establishing a criminal jurisdiction.

The possible implications of intersecting two distinct legal systems (the European legal order and the domestic jurisdiction of participating Member States), within the context of the criminal prosecution of offences, is still uncertain.

The EPPO started functioning on 01 June 2024: yesterday in institutional terms; a second ago, in terms of criminal jurisdiction - prosecuting, judging, appealing, *etc*: to form *res judicata* (a *conditio sine qua non* to assess the effectiveness of the EPPO) in a criminal procedure takes time.

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