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Abstract

This article critically examines the extent to which the European Public Prosecutor's Office can be claimed to constitute a prime example of supranational criminal law. The article observes that among policymakers and commentators, the Office appears to be a hallmark of the transformation of EU criminal law from an intergovernmental paradigm to a strong federal and supranational polity. The article discusses the scope, nature and limits to the powers of the European Public Prosecutor's Office, as well as its operating structure in light of Article 86 TFEU and the recently adopted EPPO Regulation. It departs from the basic assumption that the EPPO stands in the midst of supranationalism and intergovernmentalism. Whilst the EPPO is envisaged to be independent of the Member States, the Office's complicated, multifaceted and vertical structure means that Member States are able to direct, to some extent, its activities. The article argues, however, that a general assessment of the Office's operational and strategic direction (where its operational activities are managed and supervised by centralized 'European' prosecutors), and the type (direct criminal enforcement powers) of powers it has makes it distinctive as the most 'integrated' and 'supranational' EU agency.

Keywords

EPPO, EU criminal policy, supranationalism, intergovernmentalism, EU criminal law, European prosecution, EU competences, justification for EU action, transnational interests

1. Introduction

The European Public Prosecutor's Office (EPPO), which (at this stage of writing) will commence its operation in the very near future, appears to be an emblem for the transformation of EU criminal

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law from an intergovernmental paradigm to a strong supranational polity. The fashioning of such a body in this sensitive policy field has, however, been a slow and contested process.¹ The seeds for the EPPO were prefigured in the mid-1990s in the work of *Corpus Juris*. This project – which was an early step towards a ‘federal’ approach to EU criminal law² – had suggested a scheme of measures to counter the non-enforcement of offences against the EU’s budget, including suggestions of a single set of offences applicable throughout the Union, a common set of procedural rules for the prosecution of such offences and the establishment of a European Public Prosecutor.³ The rationale for creating a European Public Prosecutor emerged from legitimate concerns over extensive ‘internal’⁴ mismanagement and misappropriation of EU funds.⁵ This, in conjunction with the strategic importance of protecting the EU budget, made a compelling case for establishing a centralized European prosecution authority.⁶

It is, however, conventional wisdom that the ambitious vision of the EPPO as an integrated prosecution agency must be singled out as an extremely sensitive issue in political terms.⁷ Member States have voiced fierce opposition towards the establishment of such an office, viewing the EPPO as a further encroachment on national sovereignty, and have expressed concerns over the far-reaching implications of such an office on the functioning of national criminal justice systems.⁸ More importantly, prior to Lisbon there was no treaty mandate to create such an office. Whilst such an office was suggested by the European Convention,⁹ the failure of the Constitutional Treaty meant that it was impossible to constitutionally defend the establishment of a supranational prosecutor with powers to develop a more ‘integrated’ EU criminal law.¹⁰

Nevertheless, the prospect of creating a European Public Prosecutor derived real impetus from the successful negotiation of the new Article 86 TFEU, which was enshrined in the Lisbon Treaty.

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1. Described as a ‘rocky’ road’ in V. Mitsilegas, *EU Criminal Law After Lisbon: Rights, Trust and the Transformation of Justice in Europe* (Hart Publishing, 2016) Chapter 4.
 2. C. Gómez-Jara Díez, ‘Models for a System of European Criminal Law: Unification vs. Harmonization’, 1 *New Journal of European Criminal Law* (2010), p. 385.
 3. M. Delmas Marty and J.A.E. Vervaele, *The Implementation of the Corpus Juris in the Member States – Penal Provisions for the Protection of European Finances* (Intersentia, 2001). See also Commission, Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, COM (2001) 715 final, for a preliminary discussion on the design of a European Public Prosecutor.
 4. C. Harding and J. Banach-Gutierrez ‘The Emergent EU Criminal Policy: Identifying the Species’, 37 *European Law Review* (2012) p. 758 for the use of ‘external’ and ‘internal’ threats when describing EU criminal policy.
 5. M. Wade, *EuroNEEDs – Evaluating the Need for and the Needs of a European Criminal Justice System – Preliminary Report* (Max Planck Institute for Foreign and International Criminal Law, 2011) for an extensive report analysing the need for a European Public Prosecutor.
 6. See Commission, Commission Staff Working Document, Impact Assessment, Accompanying the Proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office, SWD (2013) 274, p. 7; K. Ligeti and M. Simonato, ‘The European Public Prosecutor’s Office: Towards a Truly European Prosecution Service?’, 4 *New Journal of European Criminal Law* (2013), p. 7.
 7. A. Weyembergh and C. Brière, Towards a European Public Prosecutor, Policy paper for the European Parliament, LIBE Committee, 2016, p. 9.
 8. The yellow card issued by national parliaments against the EPPO Proposal is compelling evidence for this proposition: Commission, Communication from the Commission to the European Parliament, the Council and the National Parliaments on the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office with regard to the principle of subsidiarity, in accordance with Protocol No 2, COM (2013) 851 final.
 9. Draft Treaty Establishing a Constitution for Europe, [2004] OJ C 310/121, Articles 3–274.
 10. J. Monar, ‘Eurojust and the European Public Prosecutor Perspective: From Cooperation to Integration in EU Criminal Justice?’, 14 *Perspectives on European Politics and Society* (2013), p. 339.

This provision provides the Council with a competence to ‘establish a European Public Prosecutor’s Office (...) in order to combat crimes affecting the financial interests of the Union’ by a unanimous decision. The EPPO shall ‘be responsible for investigating, prosecuting, and bringing to judgment (...) the perpetrators of, and accomplices in, offences against the Union’s financial interests’. It shall also ‘exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences.’¹¹ Whilst Article 86 TFEU does not in itself establish the EPPO, it provides the legal basis for the Council Regulation which then created it.¹²

The EPPO represents a highly symbolic achievement in terms of its potential for a fundamental system change for the EU’s area of criminal justice. It departs markedly from the conventional view among Member States that intergovernmental cooperation should remain a dominating principle of governance in the AFSJ.¹³ By establishing the EPPO, a supranational body has effectively assumed such competences (for example powers to independently prosecute offences in domestic courts) as traditionally belong to the central government of a federal state.¹⁴

This article critically examines the extent to which the EPPO can be said to constitute a prime example of supranational criminal law. The analysis is confined to providing a descriptive account of the current fashioning of the European Public Prosecutor along the supranational-intergovernmental axis rather than advancing a normative analysis for a more centralized prosecutor.¹⁵ The article assesses the design of the EPPO based on the general literature of EU integration. This literature is premised on the observation that institutional and legal factors largely condition political and economic integration processes.¹⁶ On this basis it has elaborated comprehensive legal criteria for assessing the depth of integration.¹⁷ One of the central ‘integration’ criteria underlined by Weiler and Dehousse (explored elsewhere in this special issue) is the mode and style of decision-making. If the Union institution (by means of qualified majority voting) can bind the Member States against their will, this strongly indicates that it is moving in the direction of

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11. See Article 86(1)–(2) TFEU; Final report of Working Group X ‘Freedom, Security and Justice, CONV 426/02, p. 19 for the thinking behind the provision.
 12. Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office, [2017] OJ L 283/1.
 13. For a small selection of recent literature: P. Asp (ed.), *The European Public Prosecutor’s Office—Legal and Criminal Policy Perspectives* (Jure, 2015); K. Ligeti, *Toward a Prosecutor for the European Union: Volume 1* (Hart Publishing, 2012); W. Geelhoed, L.H. Erkelens and A.W.H. Mei (eds.), *Shifting Perspectives on the European Public Prosecutor’s Office* (T.M.C. Asser Press, 2018).
 14. J.A.E. Vervaele, ‘The European Public Prosecutor’s Office (EPPO): Introductory Remarks’, p.11, in W. Geelhoed, L. Erkelens and A.W.H. Meij (eds.), *Shifting Perspectives on the European Public Prosecutor’s Office* (T.M.C. Asser Press, 2018) .
 15. E. Herlin-Karnell and C. Gomez Jara, ‘Prosecuting EU Financial Crimes: The European Public Prosecutor’s Office in Comparison to the US Federal Regime’, 19 *German Law Journal* (2018) p. 1191.
 16. L. Lindberg, *The Political Dynamics of European Economic Integration* (Stanford University Press, 1963); E. Haas, *The Uniting of Europe: Political, Social, and Economical Forces, 1950–1957*, (University of Notre Dame Press, 1958) for seminal works on the forces of EU integration.
 17. K. Lenaerts, ‘Constitutionalism and the Many Faces of Federalism’, 38 *American Journal of Comparative Law* (1990), p. 208, 256; W. Sandholtz and A. Stone Sweet, *European Integration and Supranational Governance* (Oxford University Press, 2004); R. Dehousse and J. Weiler, ‘The Legal Dimension’, in W. Wallace (ed.), *The Dynamics of European Integration* (Pinter, 1990). Weiler and Dehousse (ibid., p. 242), have additionally claimed that the effectiveness of the decisions taken by EU institutions (e.g. direct effect and supremacy), the territorial application of EU law as well as integration techniques used (binding uniform regulations and directives vis-à-vis soft law measures) are key criteria for analysing the intensity and depth of integration.

supranationalism.¹⁸ More importantly for this article, this literature postulates that the issue of formal delegation of powers to the EU institutions is of key importance for assessing the depth of integration. This requires an analysis of the type, nature and limits of the transference of legislative powers to the supranational EU institutions.¹⁹

On this basis, the first part of this article proceeds to comprehensively analyse the scope of the EPPO's powers, particularly in relation to national prosecutors. The analysis particularly centres on the question of exclusivity and the related issue of pre-emption as models for the exercise of the EPPO's powers. It also discusses in detail the type of enforcement powers enjoyed by the EPPO. The second part of the article subsequently discusses the operating structure and management of the EPPO as central integration criteria. This part attempts to ascertain the extent to which Member States have been capable of maintaining control of the operation of the EPPO. Particular attention is devoted to examining the independence of the EPPO and the potential for Member State involvement in its operations. Conceding that the Member States in theory (and perhaps in practice) retain some possibilities for exercising influence over the EPPO, it argues that the decentralized structure of the Office still leaves the supranational entities of the EPPO in charge of its direction and management.

2. The European Public Prosecutor's competencies under Article 86 TFEU and the EPPO Regulation

A. Substantive scope of competence

To appreciate the current transformation of EU criminal justice agencies we need to closely examine the existing powers of the EPPO. Article 86(1) TFEU currently limits the powers of the EPPO to prosecute crimes 'against the Union's financial interests'. It is beyond the scope of this article to consider this limitation in detail. It suffices to say here that the substantive jurisdiction of the EPPO, as derived from the PIF Directive and the 'inextricably linked offences', is potentially very broad.²⁰ The PIF offences cover a broad range of illegal behaviours, encompassing passive and active corruption, fraud, embezzlement, subsidy abuse and money laundering²¹ as well as 'offences regarding participation in a criminal organisation' if the focus of such an organization is to commit any of the PIF offences.²²

A more significant constitutional question is whether, and to what extent, the EPPO's mandate under Article 86 TFEU – as envisaged by the EPPO Regulation – contains a right to prosecute not only offences against the financial interests of the Union but also a competence to prosecute 'ancillary' offences.²³ The relevant provision in the EPPO Regulation prescribes that the 'EPPO shall also be competent for any other criminal offence that is *inextricably linked to*' one of the PIF offences.²⁴

18. R. Dehousse and J. Weiler, in W. Wallace (ed.), *The Dynamics of European Integration*.

19. P. Pescatore, *Law of Integration* (Springer, 1974, English translation), p. 32, 52.

20. Article 22 of Regulation (EU) 2017/1939.

21. 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, [2017] OJ 2017 L 198/29, Articles 3 and 4.

22. Articles 22(2) and 22(3) of Regulation (EU) 2017/1939.

23. See A. Nieto Martín and M. Muñoz de Morales Romero, 'The Office of the European Public Prosecutor and Related Offences: Deconstructing the Problem', in P. Asp (ed.), *The European Public Prosecutor's Office – Legal and Criminal Policy Perspectives* (Jure, 2015), p. 120.

24. Article 22(3) of Regulation (EU) 2017/1939.

The ‘ancillary’ competence was one of the primary concerns when the national parliaments issued the yellow card against the EPPO Proposal and has been subject to academic controversy.²⁵ It is apparent that Article 86 TFEU does not explicitly confer powers on the EPPO to prosecute ancillary offences.²⁶ The question is thus whether such competences can, by implication, be inferred on the basis of the doctrine of ‘implied powers’. The idea behind this would be that there is an implied competence to prosecute ancillary offences attached to the original power in Article 86 TFEU.²⁷ The argument would be that conferring powers on the EPPO to prosecute ancillary offences would be necessary to achieve the objective of effectively fighting crimes against the EU’s financial interests.²⁸

The Commission defended the scope of the Regulation on this basis, arguing that the principle of *ne bis in idem* requires an extension of competence beyond the PIF offences to prosecute other offences where these are inextricably linked to one of the PIF offences. Parallel prosecution of PIF offences and inextricably linked offences based on identical facts by both the EPPO and the national prosecution service would defeat the purpose of the EPPO Regulation. In the case of such parallel prosecutions, the *ne bis in idem* principle²⁹ would oblige the EPPO or the national prosecution service to close the proceedings once a final criminal conviction, prosecutorial case disposal (including plea bargains and other negotiated settlements with a national prosecutor) or a final acquittal had been delivered based on the same facts.³⁰ The Commission’s original proposal survived the negotiations, and the current provision in the Regulation offers a broad competence for intrinsically connected offences. A careful reading of the Regulation suggests that the EPPO is competent for ‘ancillary’ offences where offences are inextricably linked and the PIF offence is preponderant, in terms of the seriousness of the offence concerned (as reflected in the maximum sanctions that could be imposed). The EPPO is also competent where the inextricably linked offence is deemed to be instrumental in the committing of one of the PIF offences.³¹

The wide notion of ‘ancillary’ competence endorsed by the EPPO Regulation is, however, difficult to align with a principled reading of Article 86 TFEU based on the idea of ‘transnational interests’.³² It may be argued that the question of EU competence under Article 86 TFEU should be

25. COM (2013) 851 final; D. Fromage, ‘The Second Yellow Card on the EPPO Proposal: An Encouraging Development for Member State Parliaments?’, 35 *Yearbook of European Law* (2016), p. 5.

26. Article 5 TEU outlines the principle that the Union only ‘shall act within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein’.

27. Case C-176/03 *Commission v. Council*, EU:C:2005:542, para. 48; Case 22/70 *Commission v. Council (ERTA)*, EU:C:1971:32, para. 16, 28.

28. Article 325 TFEU.

29. Article 50 of the Charter of Fundamental Rights and Article 54 of the CISA

30. COM(2013)851 final, para. 2.6, 4; Case C-467/04 *Gasparini and Others*, EU:C:2006:610; European Court of Human Rights, judgment in *Sergey Zolotukhin v. Russia* (Grand Chamber) of 10.2.2009, para 82 (14939/03); Judgment of the Court of 9 September 2006.

31. Article 22(3), Article 25(3), and Recitals 54-56 of Regulation (EU) 2017/1939.

32. It is labelled by A. Somek (‘The Argument From Transnational Effects I: Representing Outsiders Through Freedom of Movement’, 16 *European Law Journal* (2010), p. 315) as ‘transnational effects’ and by M. Kumm (‘Constitutionalizing Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union’, 12 *European Law Journal* (2006), p. 503) as ‘collective action’ problems, whilst C. Joerges and J. Neyer (‘From Intergovernmental Bargaining to Deliberative Processes: The Constitutionalisation of Comitology’, 3 *European Law Journal* (1997), p. 273) term it ‘deliberative supranationalism’. ‘Transnational interests’ is used as a term to bridge these in many ways similar accounts, in order to broadly capture the normative basis for EU intervention in instances of cross-border problems arising from diverse national regulations. Initially the ideas advanced by these scholars may be traced to the

construed in light of normative criteria which would offer stronger justification for such a conferral of competence. The baseline premise for the idea of transnational interests is that nationally situated democratic processes are intrinsically predisposed to disregard ‘foreign’ or ‘transnational’ interests. Because democracies represent collective identities, they have very few mechanisms to ensure that transnational interests are taken into account within their decision-making processes. EU action based on transnational interests would correct the dysfunctional workings of national political processes by giving ‘virtual’ political rights to foreigners where they have a legitimate concern.³³

Transnational interests in this respect may refer to the interests of individuals moving within the EU to seek employment, live and reside, work, establish themselves or offer services.³⁴ One of the justifications for EU intervention on this basis is to address systemic anti-discrimination where the interests of such ‘free’ movers (individuals or firms) crossing the borders separating different legal systems are not sufficiently considered.³⁵ Another strong basis for EU intervention is to address transnational collective action problems arising from the fact that the regulatory choices of competing jurisdictions give rise to different economic costs or opportunities for firms.³⁶ These are choices with regard to which jurisdictions have an incentive to regulate strategically in order to capture a competitive advantage, thus raising concerns of structural bias.³⁷

However, the theory of transnational interests may also – as in the case of the EPPO’s competence – refer to common and strong EU interests, such as the protection of the EU budget. The financial interest of the EU is a genuine supranational interest, as the budget is central for the existence of the Union. The EPPO is, for this purpose, entrusted with the objective of protecting the common interests of the EU budget, which go beyond the territories of individual Member States.³⁸ The need to confer the EPPO with these competencies arises from the nature of the crimes in question, which by affecting the Union’s own financial interests inevitably have a Union dimension. This is because, as conceded by the opinions of several national parliaments,³⁹ the criminal justice authorities of Member States are systematically predisposed to deprioritize the protection of

theory of ‘virtual representation’ postulated by John Ely in *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980), chapter 6.

33. A. Somek, 16 *European Law Journal* (2010), p. 320, 335; C. Joerges and J. Neyer, 3 *European Law Journal* (1997), p. 293, 295; M. Maduro, ‘Reforming the Market or the State? Article 30 and the European Constitution: Economic Freedom and Political Rights’, 3 *European Law Journal* (1997), p. 75.
34. Articles 20 and 21 and Articles 30, 34, 35, 45, 49, 54, 56 TFEU.
35. A. Somek, 16 *European Law Journal* (2010), p. 335; M. Maduro, 3 *European Law Journal* (1997), p. 78.
36. Case C-376/98 *Council v. Germany (Tobacco Advertising)*, EU:C:2000:544, para. 106.
37. M. Kumm, 12 *European Law Journal* (2006), p. 514, 523; A. Somek, 16 *European Law Journal* (2010), p. 329, 334.
38. See A. Nieto Martín and M. Muñoz de Morales Romero in P. Asp (ed.), *The European Public Prosecutor’s Office – Legal and Criminal Policy Perspectives*, p. 132; M. Wade, *EuroNEEDs – Evaluating the need for and the needs of a European Criminal Justice System*.
39. Seimas of the Republic of Lithuania, Committee on European Affairs, Opinion on the European Commission Proposal for a Council Regulation on the Establishment of the European Public Prosecutor’s Office, 16 July 2014, No V-2014-4174 L; Joint Committee on Justice, Defence and Equality (Ireland), Reasoned Opinion of Joint Committee on Justice, Defence and Equality, COM(2013)534 Proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office, October 2013; Chamber of Deputies (Romania), Reasoned opinion finding the lack of conformity of the Proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office with the principle of subsidiarity, COM(2013)534 (courtesy translation); Dutch Senate of the States General, Reasoned opinion (breach of subsidiarity) on the proposal for a Council regulation on the establishment of the European Public Prosecutor’s Office (DOC(2013)534), 17 October 2013, 153768.01.

the Union's financial interests. Those distorted motivations and their loyalties to the state's criminal enforcement interests, which may conflict with their EU loyalties, make them incapable of effectively enforcing the prosecution of crimes against the EU's financial interests.⁴⁰ Thus, there is a compelling justification for the EPPO to have competencies to prosecute the PIF offences.

The degree of legitimacy for EU intervention in terms of inextricably linked offences is, however, substantially reduced. Unlike the situations where there are offences against the EU's financial interests, Member States have no competing interests in relation to ancillary offences. In fact, Member States may be well-placed to enforce such 'national' offences given their understanding of the local situation.⁴¹ Furthermore, there is a legitimate national economic interest in prosecuting the inextricably linked offences. VAT is a good example, but there may be a strong financial interest in the state prosecuting national subsidy abuse cases, especially if the offence concerns a co-financed subsidy.⁴²

The *ne bis in idem* argument must, however, be taken seriously. By not conferring powers on the EPPO to prosecute ancillary offences it is apparent that there may be instances where the EPPO would have to drop its pursuit of a specific investigation on the basis that a national prosecutor had already prosecuted those inextricably linked offences (for example forgery of documents in order to misappropriate EU funds) and those had ended in final discharge, a negotiated settlement or acquittal. However, it is argued that the EPPO would nonetheless be able to function effectively with the powers it has been conferred to prosecute the PIF offences. The offences in the PIF Directives, which constitute the basis for the EPPO's competences pursuant to the Regulation, are broadly defined, covering – to some extent – ancillary offences in the sense discussed here. The definition encompasses all actions (such as the use or presentation of false and incorrect statements or documents) which are intended to make an unlawful gain by causing a loss to the EU's financial interest, and covers procurement-related and non-procurement related expenditure.⁴³ In addition, all corruption offences committed by national officials that are likely to damage the Union's financial interest, as well as offences by national officials who are entrusted with the management of funds and who misappropriate or use funds contrary to their intended purpose and thus damage the Union's financial interest, fall within the remit of the EPPO's powers.⁴⁴

40. See J. Öberg, 'National Parliaments and Political Control of EU Competences – A Sufficient Safeguard of Federalism?' 24 *European Public Law* (2018) p. 695 for discussion. There is also empirical evidence that national investigators and prosecutors – even experienced ones – may not always be in a position or have the ability to appreciate the full extent of a case. This might mean that cases which are truly 'European' will not be handed over or picked up by the EPPO, with the consequence that they are not sufficiently investigated and prosecuted: M. Wade, *Euro NEEDS – Evaluating the need for and the needs of a European Criminal Justice*, p. 14, 144.

41. National parliaments made this point clearly in their reasoned opinions: Chamber of Deputies (Romania), Reasoned opinion; Dutch Senate of the States General, Reasoned opinion; Seimas of the Republic of Lithuania, Committee on European Affairs, Opinion; Senate of the Republic of Poland, Opinion of the European Union Affairs Committee of the Senate of the Republic of Poland on the proposal for a Council regulation on the establishment of the European Public Prosecutor's Office, COM (2013)534, adopted at the meeting of 9 October 2013 (courtesy translation); Statement by the Committee on Justice, Reasoned Opinion of Swedish Parliament – Subsidiarity check on the proposal on the establishment of the European Public Prosecutor's Office, 2013/14: JuU13.

42. A. Nieto Martín and M. Muñoz de Morales Romero in P. Asp (ed), *The European Public Prosecutor's Office – Legal and Criminal Policy Perspectives*, p. 135 outlines these legitimate interests when discussing ancillary competence.

43. See Article 3(2) of Directive (EU) 2017/1371.

44. See *ibid.*, Articles 4(2) and 4(3) of Directive (EU) 2017/1371 and Article 22(1) of Regulation (EU) 2017/1939.

Given the wide design of the EPPO's powers, it is difficult to understand the rationale for conferring an additional competence on the EPPO to prosecute 'inextricably linked offences'. The *ne bis in idem* concerns cannot change this observation. The *ne bis in idem* principle in EU law retains as a relevant criterion the identification of the material facts, understood in the sense of the existence of a set of concrete circumstances, which are inextricably linked together in time and space.⁴⁵ It is very difficult to envisage situations where the EPPO would be impeded – because of a previous proceeding for a similar national offence – in prosecuting a PIF offence.⁴⁶ In most instances where a national offence involved facts that would coincide with a PIF offence, the national prosecutors would be required to give priority to the exercise of the EPPO's powers by ceding to the EPPO the decision whether to initiate an investigation and bring proceedings in respect of that criminal conduct.⁴⁷ In this respect, national authorities must refrain from taking any decision that may have the effect of precluding the EPPO from exercising its right of evocation. Where the EPPO exercises this right, national authorities shall refrain from carrying out further acts of investigation in respect of the same offence.⁴⁸ This right may additionally be exercised at a very late stage, as long as the national investigation has not been finalized.⁴⁹

For all these reasons, it is difficult to find a compelling justification for the EPPO to be conferred with a competence to prosecute 'inextricably linked offences' in the final version of the Regulation.

B. Nature of the EPPO's powers

The nature of the EPPO's powers is another contentious question. Article 86 TFEU does not explicitly address this issue. It only states that the EPPO shall 'be responsible for investigating, prosecuting and bringing to judgment . . . the perpetrators of . . . offences against the Union's financial interests' and 'exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences'.

The Commission's original proposal of exclusive competence was the product of a highly innovative vision of a 'federal' and centralized prosecution authority at EU level.⁵⁰ By granting the EPPO exclusive competence, the Commission sent a strong signal to Member States that only the EPPO would be competent to investigate and prosecute the 'European Union' offences associated with fraud against the EU budget. This was perhaps the most far-reaching feature of the proposal, as the Commission was suggesting exclusivity in a field which, according to the general division of competences in the Treaties, fell under shared competence.⁵¹

The issue of 'exclusivity' was widely contested when the EPPO Proposal was subsequently brought to the Member States.⁵² Exclusive competence implies that the EPPO would have held a

45. Case C-436/04 *Van Esbroeck*, EU:C:2006:165 para 36

46. This is notwithstanding the broad reading of the *ne bis in idem* principle in the CISA convention advanced by the Court of Justice: Case C-467/04 *Gasparini and Others*, para. 23; Case C-436/04 *Van Esbroeck*, para. 30-40.

47. Articles 24 and 25(1) of Regulation (EU) 2017/1939 for the national authorities' obligations in this regard.

48. *Ibid.*, Article 27.

49. *Ibid.*, Article 27(7).

50. COM (2013) 534 final, Article 14.

51. Article 4(2) TFEU. See the discussion in V. Mitsilegas, *EU Criminal Law After Lisbon: Rights, Trust and the Transformation of Justice in Europe*, p. 104, 109, 122.

52. Illustrated by the fact that the national parliaments issued a 'yellow card' against the proposal on this basis: see COM (2013) 851 final. See the discussion in J. Öberg, *Limits to EU Powers: A Case Study of EU Regulatory Criminal Law* (Hart Publishing, 2017), p. 167.

monopoly on investigating and prosecuting those offences that fall within its substantive scope of competence, that is ‘PIF offences.’⁵³ If enacted, this would have meant that national authorities would have to surrender their competence in relation to such offences. This approach proved too sensitive in terms of national sovereignty, and subsequent negotiations in the Council shifted quickly to a more ‘cooperative’ design for the EPPO. The Greek presidency proposed a model of concurrent competence, which constituted the basis for the final design of the EPPO in the Regulation. This model provides that both the EPPO and national prosecution authorities are competent to enforce crimes against the EU budget, without an explicit priority for the EPPO.⁵⁴ As things stand, the current EPPO Regulation has opted for this model of concurrent competence, with a right of evocation for the EPPO.

Irrespective of the current design of the EPPO Regulation, it is opportune to discuss the extent to which ‘implied’ exclusive competence could be defended in constitutional terms, if at all.⁵⁵ The argument for ‘implied’ exclusive competence would be that ‘exclusivity’ would be indispensable for the EPPO effectively to fight crimes against the EU’s financial interests.⁵⁶ Implied exclusivity is a well-known but elusive concept in the field of EU external relations law.⁵⁷ In a line of case law that commenced with the seminal *ERTA* judgment, the Court of Justice has endorsed a broad test for finding EU exclusive competence to negotiate and conclude international agreements. In *Opinion 1/03* the Court held that exclusive competence was based on the ‘purpose of preserving the effectiveness of Community law and the proper functioning of the systems established by its rules’.⁵⁸ The basis for conferring exclusive competence to the Union is that Member State action would interfere with the realization of the objectives of EU legislation and the integrity of a coherent and uniform legal space in the Union.⁵⁹ The test for implied exclusivity is a wide one, encompassing a potential risk that the objectives of common EU rules would be frustrated. Given the ongoing development of EU secondary law and the requirement to consider the future state of EU law⁶⁰ it seems inevitable that this test – generally – will entail a finding of exclusive competence.⁶¹

For a number of reasons, but particularly because of the special nature of EU external relations law (where the need for uniformity is imperative at all stages of the negotiation of international agreements),⁶² it is questionable whether this broad reading of implied exclusive competence

53. See Article 22 of Regulation (EU) 2017/1939 for an outline of the EPPO’s substantive competence.

54. Council, From Presidency to the Council, Proposal for a Regulation on the establishment of the European Public Prosecutor’s Office, Draft Regulation, 5766/17, 31 January 2017, Articles 17 and 20. See V. Mitsilegas, *EU Criminal Law After Lisbon: Rights, Trust and the Transformation of Justice in Europe*, p. 103 for a discussion of the recent Council proposals.

55. The principle of conferral in Article 5(2) TEU does not impede the exercise of powers that, whilst not expressed by the Treaties, are ‘implied’ in the general legislative power: Case 22/70 *ERTA*, para. 16, 28.

56. Which is the key objective of Article 86 TFEU.

57. See *Opinion 1/76 Draft Agreement establishing a European laying-up fund for inland waterway vessels*, EU:C:1977:63; *Opinion 1/03 Competence of the Community to conclude the new Lugano Convention*, EU:C:2006:81, for examples of ‘implied’ exclusive competence.

58. *Opinion 1/03, Lugano Convention*, para. 126, 128, 131.

59. *Opinion 3/15, Marrakesh Treaty*, EU:C:2017:114, para. 124.

60. *Opinion 1/03, Lugano Convention*, para. 126, 128, 131.

61. M. Chamón, ‘Implied Exclusive Powers in the ECJ’s Post-Lisbon Jurisprudence: The Continued Development of the *ERTA* Doctrine’, 55 *Common Market Law Review* (2018), p. 1109, 1125, 1135, 1141.

62. See B. Van Vooren and R. Wessel, *EU External Relations Law: Text, Cases and Materials* (Cambridge University Press, 2014), chapters 4 and 6, exploring these justifications in the Court’s case law on EU external competence.

could be transposed to the field of EU criminal justice. In this area, particularly given the fact that this is an area where national sovereignty is affected in an especially significant manner by EU actions,⁶³ a more cautious approach to the question of exclusivity might be appropriate.

On the basis of the transnational interests theory discussed above, there is a tentative case for exclusivity. It is difficult to envisage how exclusive competence could be excluded from Article 86 TFEU if this is necessary. It is also evident that the effective pursuit of the tasks of the EPPO (that is, to effectively protect the Union's financial interests⁶⁴) under Article 86 TFEU might be jeopardized unless the EPPO was conferred with exclusive competence.⁶⁵ The EPPO's competence under Article 86 TFEU is confined to 'criminal offences affecting the financial interests of the Union'. Exclusivity would be based on the observation that Member States' concurrent exercise of competence could – because of their varying incentives in this area⁶⁶ – endanger the operation of the EPPO and thereby defeat the purpose of providing for an efficient and coherent prosecution of the PIF offences.⁶⁷ Member States' judicial authorities do not have the expertise, capacity or incentives to provide sufficient protection for the Union's financial interests. With exclusive competence, the EPPO would be able to more effectively direct and manage investigations, by having an overview of all the available information, and would thus be able to determine where the investigation could most successfully be pursued.⁶⁸ It is consequently the transnational dimension of the proposed action – the fact that it directly concerns the Union's financial interests – which provides a compelling justification for conferring exclusive competence on the EPPO.

C. Exercise of competence – if not exclusivity, pre-emption?

Whilst there may be a good case for exclusivity, the current EPPO Regulation, however, proceeds, as mentioned, from a model of concurrent competences between the EPPO and national prosecution authorities.⁶⁹ The EPPO does, however, have 'priority' in prosecuting the PIF offences where it decides to exercise competence and also a 'right of evocation' for investigations already started by national prosecution authorities. The key provision in the EPPO Regulation states that the 'EPPO shall exercise its competence either by initiating an investigation . . . or by deciding to use its right of evocation . . .'. If the EPPO decides to exercise its competence, the 'national authorities shall not exercise their own competence in respect of the same criminal conduct'.⁷⁰ The EPPO shall take its decision on whether to exercise its right of evocation no later than five days after

63. Judgment of Federal Constitutional Court of 30 June 2009, *Lisbon judgment*, Case 2 BvE 2/08, 5/08, 2BvR 1010/08, 1022/08, 1259/08, 182/09 (2009), para. 352.

64. Article 325 TFEU.

65. This is one of the key justifications for recognizing an implied legislative power; Joined Cases 281, 283-285, 287/85 *Germany and Others v. Commission*, EU:C:1987:351, para. 28.

66. Those incentives were discussed in detail in the previous section II (A) 'Substantive scope of competence'.

67. Coherent and effective application of EU law is the central argument for conferring exclusive competence on the EU: Opinion 1/03, Lugano Convention, para. 122, 126, 128; Opinion 1/76, Draft Agreement establishing a European laying-up fund for inland waterway vessels, para. 3; Case 22/70 ERTA, para. 16.

68. COM (2013) 534 final, p. 2; SWD (2013) 274, p. 6, 25.

69. Concurrent competence was subject to controversy in the early negotiations of the EPPO Regulation. Some Member States wished to underline the priority of the EPPO, whereas others argued that national prosecution authorities should retain a certain discretion to decide to exercise their national competence for the same offence: Council doc 9834/1/14, pp. 3, 23. See also Council docs 15862/1/14, 6318/1/15; 16993/14; 7070/15; 7876/15; 7876/15.

70. Article 25(1) of Regulation (EU) 2017/1939.

receiving information from national authorities of an offence falling within the EPPO's jurisdiction. During this period 'the national authorities shall refrain from taking any decision . . . that may have the effect of precluding the EPPO from exercising its right of evocation'.⁷¹

These provisions seem to be in line with the general rules on EU competences, according to which the EPPO's powers fall within the broader area of AFSJ – the latter constituting a shared competence between Member States and the EU.⁷² Member States will only lose their competence within the regime of shared power 'to the extent' that the Union has exercised *its* competence.⁷³ This implies that the EPPO is not capable of precluding the concurrent exercising of a Member State competence. The rules on exercising competence in the EPPO Regulation are based on the idea that the Member States have a 'dormant' competence to prosecute PIF offences (and 'inextricably linked offences') 'to the extent' that the EPPO has decided to not exercise its competencies. The rules in Article 22 and 25 of the Regulation also mean that powers to prosecute offences falling outside the PIF Directive and the EPPO's remit under the Regulation (VAT fraud under 10 MEUR,⁷⁴ minor PIF offences or inextricably linked offences where those offences have a stronger link to national law⁷⁵) remain within the power of national prosecutors.

The rules on exercising competence in the EPPO Regulation will, however, ultimately give priority to the EU level.⁷⁶ Thus, if the EPPO exercises competence or employs its right of evocation the case will be handled by the EPPO. This means that the EPPO's competence in practice might *become* exclusive in case of a conflict with national authorities.⁷⁷ This is, however, defensible, in light of the principle of sincere cooperation, which states that the Member States – including their judicial authorities – shall take any appropriate measures to ensure fulfilment of the obligations resulting from the acts of the Union.⁷⁸ For this purpose, those authorities must refrain from any measure which could jeopardize the attainment of the EPPO's objectives, which is to effectively prosecute offences against the Union's financial interests.⁷⁹

It is argued that the EPPO Regulation strikes the correct balance in this regard. It confers the EPPO with right of evocation and priority in terms of more serious PIF offences that have a strong Union dimension, and defers to national prosecutors the prosecution of offences that have a stronger national dimension.⁸⁰ This suggests that the core remit for the EPPO and its right of evocation concerns prosecution of the offences in the PIF Directive, i.e. the 'real' PIF offences.⁸¹ In these instances, because of the implications of those offences for the EU budget there is a strong Union interest to prosecute these offences.⁸² Although the rules on exercise of competences are

71. *Ibid.*, Article 27.

72. Article 4(2) (J) TFEU; Article 86 TFEU.

73. Article 2(2) TFEU.

74. See Article 22(1) of Regulation (EU) 2017/1939.

75. See in particular the complex rules in *ibid.*, Articles 25(2) and 25(3).

76. In the pre-emption terminology, the EPPO situation seems to sit closest to 'rule pre-emption', which ensures that it is impossible for the EPPO and the national prosecutor to simultaneously exercise their powers for the same offence: R. Schütze, 'Supremacy Without Pre-emption? The Very Slowly Emergent Doctrine of Community Pre-emption' 43 *Common Market Law Review* (2006), p. 1040-1043.

77. Article 25(1) of Regulation (EU) 2017/1939; Art 2(2) TFEU.

78. Article 4(3) TEU.

79. Article 25(1), Art 27 and 28 of Regulation (EU) 2017/1939.

80. Reflecting the negotiations of the Council, see Council doc ST 18120/13, p. 4.

81. Articles 22(1) and 25(2) of Regulation (EU) 2017/1939.

82. *Ibid.*, Articles 22(3), 25(2) and 25(3) .

intricate, they strive to ensure that the EPPO performs its main task of protecting the interests of the EU budget, whilst also respecting the powers of national authorities in this sensitive area where they are better equipped and enjoy stronger legitimacy to prosecute the offences at issue.

D. The type of powers conferred upon the EPPO

The type of competence transferred matters greatly in determining the nature of the EPPO. In this respect, it is apparent that the EPPO stands out among other EU agencies in having been conferred with very significant powers. The EPPO will be a central prosecution authority whose powers will extend to all participating Member States and all individuals within their jurisdiction. The Treaties suggests that the EPPO is intended to have competences equivalent to those of a national prosecutor and to exercise those competences without any need to act through a national authority. In that respect the EPPO shall have binding powers to undertake investigations,⁸³ and carry out acts of prosecution (i.e. dismiss cases, allocate cases, reallocate cases and reopen investigations) for offences that fall within the EPPO's jurisdiction.⁸⁴ The decision whether to indict the accused person should – in principle – be made by the competent Permanent Chamber on the basis of a draft decision by the European Delegated Prosecutor (EDP) to ensure a coherent prosecution policy.⁸⁵ The EDP shall subsequently have powers to bring a case to judgment, in particular the power to present trial pleas, participate in taking evidence and exercise all available remedies in national law.⁸⁶

The EPPO would be in charge of the whole process from the initial criminal investigation to the formal prosecution, and be vested with all corollary powers such as giving instructions to national police forces in the course of the investigations. For this purpose, the EPPO will be empowered to employ coercive measures such as searching premises, private homes, and personal property, and requiring the production of documents, freezing instrumentalities or proceeds of crime, and will have powers to request the arrest or pre-trial detention of suspects.⁸⁷ However, the EPPO should rely on national law enforcement authorities for the execution of coercive measures,⁸⁸ who will carry out such acts pursuant to the instructions of the EPPO.⁸⁹

In essence, the establishment of the EPPO suggests a significant transformation of the 'enforcement' paradigm according to which EU law relies on Member States for enforcement. The EPPO has been conferred with real, comprehensive and independent enforcement powers. The powers that have been granted to the EPPO are those associated with the core areas of state sovereignty, such as policing powers, law enforcement and prosecution competences.⁹⁰ Within the EPPO's jurisdiction, the operation of this agency will remove borders between national criminal justice systems and create an integrated single area of criminal prosecution.⁹¹

83. *Ibid.*, Article 26.

84. *Ibid.*, Article 4; Article 86(2) TFEU. In principle all of these powers lie with the Permanent Chambers: Articles 10(3) and 10(4) of Regulation (EU) 2017/1939.

85. Recital 78 of Regulation (EU) 2017/1939; *ibid.*, Articles 35 and 36.

86. *Ibid.*, Article 13(1).

87. *Ibid.*, Articles 30(1) and 33(1).

88. *Ibid.*, Recital 69.

89. *Ibid.*, Recital 87.

90. See L. Besselink, 'Sovereignty, Criminal Law and the New European Context', in P. Alldridge and C. Brants (eds), *Personal Autonomy, the Private Sphere and Criminal Law: A Comparative Study* (Hart Publishing, 2001), p. 101–116.

91. J. Monar, *14 Perspectives on European Politics and Society* (2013), p. 351.

3. Management and operation of the EPPO

Some observers have predicted that EU agencies, as a new form of EU body – in contrast to the traditional supranational EU institutions – may become politicized, thus allowing for stronger intergovernmental governance with adjacent control by Member States or their executives.⁹² Given this, the following discusses the EPPO's governance structure, and the extent to which the EPPO is still 'managed' by the Member States.

The key principle of the Regulation is that the EPPO should be autonomous of the Member States and the EU institutions. The Regulation contains a general provision emphasizing that 'the EPPO shall be independent' and that all the staff, directors and prosecutors working for and under the supervision of the EPPO 'shall act in the interest of the Union as a whole', and 'neither seek nor take instructions from any Member State . . . in the performance of their duties under this Regulation'.⁹³ The independence of the prosecutors chosen to act on behalf of the EPPO is also repeatedly highlighted throughout the Regulation.⁹⁴ However, the respective roles of the EU institutions and the Member States in the appointment procedure vary. In the appointment procedure, the European Chief Prosecutor is visualized as a more 'European' prosecutor, being appointed by the Council and the Parliament by common accord by means of a shortlist drawn up by those institutions.⁹⁵ Conversely, it is apparent that the Member States have stronger powers in the appointment process with regard to the European Prosecutors, who are nominated by Member States and appointed by the Council,⁹⁶ and the European Delegated Prosecutors, who are nominated by the Member States and appointed by the College.⁹⁷

Pressing questions have recently been asked about the role of Member States in the appointment procedure of European Prosecutors. Quite recently, Member States sidelined the independent selection committees⁹⁸ in appointing the European Prosecutors who were to be made part of the EPPO. Whilst the Council followed the order of preference indicated by the selection panel for the candidates from – in principle – all participating states, it did not follow the selection panel's proposal for candidates from Belgium, Bulgaria and Portugal. The Council also failed to provide its reasons for deviating from the independent committee's ranking (it simply referred to making a different assessment of the merits of those candidates, carried out in the relevant preparatory bodies of the Council).⁹⁹ According to the Regulation, the Council was entitled to proceed along those lines.¹⁰⁰ However, the response to the Council's actions suggests that the management of the EPPO is a very contentious and contested issue. The Council's way of handling this matter may, in

92. See S. Wolff, 'Integrating in Justice and Home Affairs A Case of New Intergovernmentalism Par Excellence?', in C.J. Bickerton, D. Hodson, and U. Puetter (eds), *The New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era* (Oxford University Press, 2015), p. 140.

93. See Article 6 of Regulation (EU) 2017/1939.

94. *Ibid.*, Articles 14(2), 16(2) and 17(2).

95. *Ibid.*, Article 14.

96. *Ibid.*, Article 16.

97. *Ibid.*, Article 17.

98. The independent selection committees are made up of 12 persons chosen from among former members of the Court of Justice and the Court of Auditors, former national members of Eurojust, members of national supreme courts, high-level prosecutors and lawyers of recognized competence: *ibid.*, Article 14(3).

99. Council Implementing Decision appointing the European Prosecutors of the European Public Prosecutor's Office, 14830/19, 22 July 2020, recital 13.

100. Articles 14(3) and 16 of Regulation (EU) 2017/1939.

the long term, jeopardize the integrity of the EPPO. It is arguable that the Council, by appointing candidates different to those proposed by the selection committee, may have bound those prosecutors to serve the interests of the Member States rather than that of the EU itself.¹⁰¹

Returning to the operational management of the EPPO, it appears that this body enjoys a multifaceted and complex governance structure.¹⁰² The Commission's original vision of an entirely supranational prosecution service organized at central level was quickly abandoned.¹⁰³ 'Decentralization' became the preferred governance model for the EPPO. The basic design is that the EPPO will constitute an indivisible EU body, operating as one single office with a central and decentralized level. The central level will consist of a Central Office (in Luxembourg) made up of the College, the Permanent Chambers, the European Chief Prosecutor, the Deputy European Chief Prosecutors and the European Prosecutors. The decentralized level will consist of the European Delegated Prosecutors, who will be located in the Member States.¹⁰⁴

In order to assess the nature of the EPPO, the following discussion concentrates on those entities that take the most important operational decisions under the Regulation. Commencing with the central level, the European Chief Prosecutor is apparently the most 'European' prosecutor and is supposed to be entirely devoted to European interests.¹⁰⁵ The competences of the European Chief Prosecutor have, however, been substantially reduced when compared to the Commission's original proposal,¹⁰⁶ and the European Chief Prosecutor has now been transformed into a general manager in charge of representing the EPPO.¹⁰⁷ The College also has a markedly 'European' dimension in its set-up. It will consist of the European Chief Prosecutor and one European Prosecutor per Member State. The College will take decisions on strategic matters and on general issues arising from individual cases, with a view to ensuring coherence in the prosecution policy of the EPPO. The College may subsequently set up Permanent Chambers,¹⁰⁸ which will be chaired by the European Chief Prosecutor and will have two permanent members apart from the Chair.¹⁰⁹

The Permanent Chambers are similarly, through their 'collegial' nature, supposed to go beyond the defence of merely national interests.¹¹⁰ For this purpose they have been conferred with central competencies under the Regulation, including powers to bring a case to judgment, to dismiss a case, to instruct the European Delegated Prosecutors to initiate an investigation and instruct them to exercise the right of evocation. They are also bestowed with powers to allocate and reallocate a case and give specific instructions to the European Delegated Prosecutor handling

101. See the Open Letter by M. Maduro and others to the European Parliament, Call out the Council on its hypocrisy, 4/10/2020, Euronews. See also questions to the Commission for written answer by Monika Hohlmeier (PPE), Caterina Chinnici (S&D), Viola Von Cramon-Taubadel (Verts/ALE), Sophia in 't Veld (Renew), E-005287/2020.

102. Chapter 3 of Regulation (EU) 2017/1939.

103. See A. Weyembergh and C. Brière, *Towards a European Public Prosecutor*, p. 11, for a discussion of the earlier proposals.

104. Article 8 of Regulation (EU) 2017/1939.

105. *Ibid.*, Article 11.

106. COM (2013) 534 final, Articles 6 and 15–18, p. 18, 22.

107. Article 10(1) of Regulation (EU) 2017/1939.

108. *Ibid.*, Article 8.

109. *Ibid.*, Article 10(1).

110. Marianne Wade has, however, expressed doubts about whether prosecutors initially appointed by Member States will be able to fulfil this role: 'The European Public Prosecutor: Controversy Expressed in Structural Form', in T. Rafaraci and R. Belfiore (eds.), *EU Criminal Justice Fundamental Rights, Transnational Proceedings and the European Public Prosecutor's Office* (Springer, 2019), p. 174.

the case.¹¹¹ The European Prosecutors, on the other hand, sit closer to the ‘decentralized’ level, and function as liaisons between the Permanent Chambers and the European Delegated Prosecutors. Following the instructions of the Permanent Chambers, the European Prosecutors shall supervise the investigations and prosecutions for which the European Delegated Prosecutors are responsible. The European Prosecutors may, for this purpose, give instructions to the handling European Delegated Prosecutor whenever necessary to ensure a coherent prosecution practice.¹¹²

Whilst the Chief European Prosecutor, the Permanent Chambers, and the European Prosecutors are seemingly envisaged as ‘European’ prosecutors, the European Delegated Prosecutors’ role is more ambiguous. The key concern pertains to the ‘double-hatted’ function of the European Delegated Prosecutors. This issue is significant, as the European Delegated Prosecutor has many powers under the Regulation, including those to initiate an investigation and exercise the right of evocation,¹¹³ undertake investigation measures (or instruct national authorities to this effect)¹¹⁴ and powers in the trial stage that correspond to those of a national prosecutor.¹¹⁵ However, the European Delegated Prosecutors are, when performing these duties on behalf of the EPPO, also simultaneously members of the national prosecutorial authorities and therefore bound by their loyalty to their respective national authorities.¹¹⁶ The European Delegated Prosecutors may also exercise functions as national prosecutors, to the extent that this does not prevent them from fulfilling their obligations under the EPPO Regulation.¹¹⁷ Irrespective of this, the European Delegated Prosecutors still act under the direct authority of the ‘supranational’ entities of the EPPO, with the consequence that they are mandated to follow the directions and instructions of the Permanent Chamber as well as those deriving from the supervising European Prosecutor.¹¹⁸

As the EPPO is not yet operational, it is impossible to assess whether, and to what extent, the European Delegated Prosecutors will act independently in their daily activities (or whether they will in fact be ‘controlled’ by the Member States).¹¹⁹ However, under the current structure, it seems that the strongest formal powers of the EPPO (including decisions to commence an investigation and bring a case to judgment) lie in the hands of the Permanent Chambers. The Permanent Chambers (and the European Prosecutors) are in charge of monitoring, coordinating and directing the investigations and prosecutions conducted by the European Delegated Prosecutors.¹²⁰ In addition, whilst the European Prosecutors are originally constituted by appointment of the Member States, it is conjectured that gradually such prosecutors, by acting collectively and recreating their identities, will assume a stronger ‘European’ mindset. ‘Pooled sovereignty’ entails not only a devolution of powers from the Member States to the EPPO but also a process whereby the

111. Article 10(3) and 10(4) of Regulation (EU) 2017/1939.

112. *Ibid.*, Article 12.

113. *Ibid.*, Articles 26(1) and 27(6).

114. *Ibid.*, Article 28.

115. *Ibid.*, Article 13(1).

116. *Ibid.*, Recital 33 and Article 13(1) and 13(3).

117. *Ibid.*, Article 13(3). Member States would thus – as predicted by E. Herlin-Karnell and C. Gomez Jara, 19 *German Law Journal* (2018), p 1202 – theoretically be able to channel their concerns regarding the enforcement actions of the EPPO in any actual case through the European Delegated Prosecutor.

118. Articles 13(1) and 26(3) of Regulation (EU) 2017/1939.

119. See J. Monar, 14 *Perspectives on European Politics and Society* (2013), p. 343; J.D. Occhipinti, ‘Still Moving Toward a European FBI? Re-Examining the Politics of EU Police Cooperation, Intelligence and National Security’, 30 *Intelligence and National Security* (2015), p. 238.

120. Article 10(3) of Regulation (EU) 2017/1939.

members of the EPPO begin to create ‘new definitions of the self’.¹²¹ The prosecutors making up the EPPO will jointly constitute this body as an entity separate from national governments, with a distinct loyalty and exercising genuine autonomous power.¹²² This all suggests that the current management structure of the EPPO, viewed in the long term, tilts in a distinctively supranational direction.

4. Conclusions

This article has critically analysed the extent to which the EPPO can be claimed to constitute a paradigmatic instance of supranational criminal law on the basis of the general ‘integration’ literature. It argued that the scope, type and character of the EPPO’s powers, the observation that the EPPO’s strategic management is derived from ‘supranational’ management positions and the fact that the EPPO independently is capable of enforcing PIF offences before the national courts makes it stand out as the most integrated and supranational EU agency.

The article suggests that the establishment of the EPPO has tangible ramifications for national criminal justice systems. The ‘Europeanization’ of domestic criminal justice prompted by the establishment of the EPPO changes the nature of national criminal enforcement, as national prosecutors will be bestowed with ‘European’ functions to prosecute under the direction of the EPPO. The discussion in the article emphasizes that the EPPO forms a powerful constitutional challenge to Member States’ sovereignty in the area of criminal law.¹²³ The conferral of a power on an EU agency to directly take decisions in criminal matters is an inherently contested and sensitive issue. The granting of this power outside the national sphere will potentially compromise respect for the Member States as autonomous entities responsible for law enforcement in their territories.¹²⁴

The analysis above also provides some lessons for the general debate on integration in the area of EU criminal justice. The establishment of the EPPO is a paradigmatic example of a shift from a rationale of ‘cooperation’ to one of ‘integration’ of national criminal justice systems based on formal powers exercised by EU criminal justice agencies.¹²⁵ Whilst not all Member States take part in this development,¹²⁶ it clearly reshapes our current view of EU criminal justice as a Member State-controlled policy field. The creation of an integrated EU prosecution authority with significant and autonomous law enforcement powers is strong evidence that Member States are no longer in the driving seat in the field of criminal policy.¹²⁷ This conclusion sits uneasily with the Member States’ claim prior to the Lisbon Treaty, that they were taking back control from the

121. P. Gourevitch, ‘The Governance Problem in International Relations’, in D. Lake and R. Powell (eds.), *Strategic Choice and International Relations* (Princeton University Press, 1999), p. 159-160.

122. W. Wessels, ‘The EC Council: The Community’s Decisionmaking Center’, in R.O. Keohane and S. Hoffmann (eds.), *The New European Community: Decisionmaking and Institutional Change* (Westview Press, 1991), p. 137, 149.

123. See R. Schütze, 43 *Common Market Law Review* (2006), p. 1087; J.H.H. Weiler, ‘The Community System: the Dual Character of Supranationalism’, 1 *Yearbook of European Law* (1981), p. 296.

124. *Lisbon judgment*, Case 2 BvE 2/08, 5/08, 2 BvR 1010/08, 1022/08, 1259/08, 182/09 (2009), para. 252-253, 355-362; L. Besselink in P. Alldridge and C. Brants (eds.), *Personal Autonomy, the Private Sphere and Criminal Law*, p. 101.

125. See C.J. Bickerton, D. Hodson and U. Puetter (eds.), *The New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era* (Oxford University Press, 2015), p. 1.

126. See Regulation (EU) 2017/1939, recitals 5–9.

127. See J. Monar, 14 *Perspectives on European Politics and Society* (2013), p. 339; Occhipinti, 30 *Intelligence and National Security* (2015), p. 234.

'creeping' competences of the EU. The establishment of the EPPO, in conjunction with the adoption of the new PIF Directive, makes a compelling argument for holding that the EU appears to have adopted a 'federal vision' of criminal law to protect its financial interests.¹²⁸

It must be conceded that this 'federalization' of criminal law is – for the time being – confined to the prosecution and investigation of offences directed against the EU's budget. This development, however, asks more fundamental questions about the scope of EU criminal policy should the EPPO stand as a role model for the future direction of integration in this area. The EPPO indeed, perhaps unintentionally, has created a path towards a European criminal justice system. If the EU has its own prosecutor, there is a pressing need for structures to hold such a body accountable and to ensure that its actions can be subject to judicial scrutiny. The latter is a crucial point for the overall legitimacy of the EPPO's operations in the near future. If the EPPO acts as a federal prosecutor, then there must consequently be put in place equivalent supranational safeguards to ensure that this prosecutor respects the central tenets of the rule of law.¹²⁹ This point would become even more important if the EPPO's powers were to be extended beyond the EU's financial interests. It is apparent that the drafters of the TFEU probably had in mind a broader jurisdiction for the EPPO, to include other offences. Article 86(4) TFEU specifically enables the European Council to extend the powers of the EPPO. In this respect it is plausible that the Commission, in the not so distant future, might wish to extend the powers of the EPPO to the areas of financial crime¹³⁰ – an area in which the EU already has legislated by means of harmonization measures under Article 83(1) and 83(2) TFEU. This could include money laundering,¹³¹ corruption, counterfeiting¹³² and market abuse/insider trade.¹³³

The most central (and controversial) extension of remit, however, pertains to terrorism – an area in which the EU has already adopted harmonization measures.¹³⁴ This is, furthermore, the most realistic option for an extension of the EPPO's mandate, as there is already a Commission Communication addressing the issue.¹³⁵ At this stage, it is not necessary to discuss whether – and to what extent – this proposal might be realized. It suffices to say that, to ensure the legitimacy of this institution, any extension of the EPPO's remit must be confined to protecting clearly defined transnational ('Union') interests. It is only in such instances that the EPPO can provide significant added value, by pooling expertise, competencies and investigative resources. If the EPPO could

128. E. Herlin-Karnell and C. Gomez Jara, 19 *German Law Journal* (2018), p. 1191.

129. See V. Mitsilegas, *EU Criminal Law After Lisbon: Rights, Trust and the Transformation of Justice in Europe*, p. 113.

130. See Herlin Karnell and Gomez Jara, 19 *German Law Journal* (2018), p. 1206.

131. Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law, [2018] OJ L 284/22.

132. Directive (EU) 2019/713 of the European Parliament and of the Council of 17 April 2019 on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA, [2019] OJ L 123/18; Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law and replacing Council Framework Decision 2000/383/JHA, [2014] OJ L 151/1.

133. Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse, [2014] OJ L 173/79.

134. Directive (EU) 2017/541 of the European Parliament of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, [2017] OJ L 88/6.


135. Communication from the Commission to the European Parliament and the European Council, A Europe that protects: an initiative to extend the competences of the European Public Prosecutor's Office to cross-border terrorist crimes, COM(2018) 641 final.

contribute to addressing serious cases of transnational crime that individual Member States are unable to deal with adequately, there might be a case for an extension of the EPPO's powers. Complex and multifaceted transnational criminal activity circumscribes the proper scope for EU intervention in the area of criminal justice. Crimes that are facilitated by close transnational cooperation and open borders are possibly a legitimate subject for a European criminal justice system.¹³⁶ This brings home the simple point that there is a compelling need for a more comprehensive theoretical discussion on the justifications for having a transnational prosecutor at the EU level.

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136. M. Wade, *Euro NEEDS – Evaluating the need for and the needs of a European Criminal Justice*, p. 143.