Cross-Border Crimes and the European Public Prosecutor's Office

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ABSTRACT

This contribution aims to shed light on some issues concerning the cross-border cases (already or potentially) falling within the competence of the EPPO. The notion of "cross-border cases" – them being PIF offences or other offences – encompasses at least three scenarios:
i) Cases involving two or more Member States participating in the EPPO, including cases where the criminal activity is carried out in a single country, but the suspect has a habitual residence in, or is a national of, another Member State;
ii) Cases involving two or more Member States, one of which is not part of enhanced cooperation;
iii) Cases involving at least one third country.
In the scenarios under ii) and iii), the controversial topic is how to regulate the relations of the EPPO with the competent authorities of non-participating Member States or third countries. In contrast, the scenario under i) brings to the fore issues concerning the efficient handling of investigations and prosecutions throughout the EU and, more precisely, throughout the legal systems of Member States participating in the EPPO. This article focuses on the latter scenario and discusses cross-border cases from two different perspectives.

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I. Introduction

On the 5th of October 2017, the European Parliament gave its consent to the draft Council Regulation establishing the European Public Prosecutor's Office (EPPO), bringing to an end the legislative procedure initiated in 2013. Published in the Official Journal at the end of October 2017,[1] the final text of the Regulation had been previously agreed upon by 20 Member States – within the framework of an enhanced cooperation established in April 2017[2] – in the Justice and Home Affairs Council of 8 June 2017.[3] In the Commission press release of the same date, the answer to the question why there is need for a European Public Prosecutor was as follows: "Every year at least 50 billion euro of revenues from VAT are lost […] through *cross-border fraud*. *Transnational* organised crime is making billions in profit every year […] National prosecutors' tools to fight large-scale *cross-border* financial crime are limited. The new EU prosecutor will conduct swift investigations *across Europe* […]."[4] The mission of the EPPO is thus intertwined with crimes affecting the financial interests of the EU (so-called PIF offences), especially those having a cross-border dimension; yet this does not capture the whole picture, since the EPPO will also be competent for PIF offences concerning one Member State only.

In addition, Art. 86(4) TFEU provides that the European Council – after consulting the Commission and obtaining the consent of Parliament – can adopt a unanimous decision widening the competence of the EPPO to include "serious crimes affecting more than one Member State." Although (at least) three years will be necessary before the EPPO can start its activities,[5] the extension of its mandate to cross-border cases of terrorism has already received support in political and academic circles.[6] In the recent 2017 State of Union address, the President of the European Commission forecast that the Commission would table a Communication on the matter in September 2018.[7] Likewise, in his speech at the Sorbonne University in late September 2017, French President Emmanuel Macron included the extension of the EPPO's competence to transnational terrorism among his proposals for relaunching the European Union.[8]

Against this backdrop, this contribution aims to shed light on some issues concerning the cross-border cases (already or potentially) falling within the competence of the EPPO. The notion of "cross-border cases" – them being PIF offences or other offences – encompasses at least three scenarios:

1. Cases involving two or more Member States *participating in the EPPO*, including cases where the criminal activity is carried out in a single country, but the suspect has a habitual residence in, or is a national of, another Member State;[9]

2. Cases involving two or more Member States, one of which is *not part of enhanced cooperation*;

3. Cases involving at least one *third country*.

In the scenarios under ii) and iii), the controversial topic is how to regulate the relations of the EPPO with the competent authorities of non-participating Member States or third countries. In contrast, the scenario under i) brings to the fore issues concerning the efficient handling of investigations and prosecutions throughout the EU and, more precisely, throughout the legal systems of Member States participating in the EPPO. This article focuses on the latter scenario and discusses cross-border cases from two different perspectives.[10]

First, the role of transnational cases within the architecture of the EPPO will be analysed from a constitutional point of view (II). The competence of the EPPO in cross-border cases will be discussed in more detail in the context of the principle of subsidiarity (II.1), followed by some remarks on the rule of voting set out in Art. 86(4) TFEU (II.2).

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Second, a criminal law perspective will be adopted. The analysis will focus on the choice of forum, assessing the compatibility of the Regulation with the principle of legality and the right of defence (III).

II. A Constitutional Perspective: The Mandate of the EPPO between Subsidiarity and Enhanced Cooperation

1. Cross-border cases and the principle of subsidiarity

As reflected in the above-mentioned Commission press release, the compliance of the EPPO with the principle of subsidiarity is motivated *inter alia* by the allegedly *transnational* nature of PIF offences, which are not adequately tackled by Member States and EU bodies (Eurojust, Europol, and OLAF).[11] Among the elements to be taken into account in the assessment of this principle, the Protocol to the Treaty of Amsterdam on subsidiarity listed the occurrence of "transnational aspects which cannot be satisfactorily regulated by action by Member States."[12] Although the guidelines provided in that Protocol have not been restated in Protocol No. 2 to the Lisbon Treaty, the Commission declared that it will continue to use them in the evaluation of the principle of subsidiarity,[13] as confirmed in the recent "Better Regulation Toolbox."[14] The establishment of a European body can thus be an appropriate solution to the deficiencies of national investigations into cross-border fraud. Convincing at first glance, this conclusion has been criticised for a number of reasons, and several national parliaments submitted that the Commission's Proposal for a Council Regulation on the EPPO did violate the principle of subsidiarity.[15] The Commission rejected these objections and maintained the Proposal, yet doubts over compliance of the Regulation with the principle at stake have not been entirely dispelled.[16]

First, although the Commission argues that a huge amount of EU money is lost annually or diverted because of fraud, the quantification of similar losses is not – and can never – be precise: "by definition fraudulent activities are meant to remain in the shadows,"[17] and this holds true both for domestic and cross-border cases. Occasional estimates represent only the "tip of the iceberg" of the real phenomenon.[18] For instance, the EPPO Impact Assessment estimates that around €3 billion per year "could be at risk from fraud."[19] In the light of such an uncertainty over the true scale of the problem, one could wonder whether other solutions by which to cope with fraud against the EU budget would have been more appropriate, rather than opting for the establishment of a new body.

Second, the EPPO is supposed to overcome the alleged deficiencies of the existing instruments and bodies of judicial cooperation at EU level. However, the 2010 Stockholm Programme had envisaged a "step-by-step approach:"[20] the implementation of the new Council Decision on Eurojust had to be assessed first, whereas it would only have been possible to discuss the available options to enhance the existing legal landscape at a second stage, including the creation of the EPPO.[21] The Commission adopted a "parallel approach" instead,[22] i.e., it put forward its Proposal for the EPPO Regulation together with a Proposal for a Regulation on Eurojust without waiting for the conclusion of the evaluation of the implementation of the 2009 Eurojust Council Decision.[23]

Furthermore, emphasis on the transnational dimension of PIF offences risks overshadowing the fact that the EPPO is competent in cases having an exclusively national dimension as well. It is claimed that a significant part of the EU's losses are actually due to (minor) fraud committed within *national borders* and for *limited amounts of money*.[24] Most EU funds are indeed given to European citizens and legal entities by national bodies through national procedures on behalf of the EU.[25] The competence of the EPPO over purely national cases was one of the points touched upon by some national Parliaments,[26] which did not see any real added value in creating a European body (also) dealing with domestic cases. The Commission dismissed the argument, pointing in particular to the "intrinsic Union dimension" of PIF offences.[27]

This shows that the EPPO and, more generally, the PIF sector are typical examples of a harmonious – but politically sensitive – combination of the two rationales behind subsidiarity. As noted by *Wieczorek*, subsidiarity is traditionally thought of as a principle to select the sectors in which EU action is more e*fficient* than that of Member States; in the field of criminal justice, the typical example is the fight against cross-border criminality.[28] However, the Union has recently intervened in this and other fields also on the basis of normative assumptions, i.e., not because of the cross-border dimension of given phenomena but in light of its "willingness to express its moral position on a particularly important subject" or the "need to enforce its own norms,"[29] such as those on the protection of the Union budget.

The PIF sector thus conflates both aspects of the principle of subsidiarity. On the one hand, transnational PIF offences are allegedly not adequately tackled by Member States; their scope hence calls for an intervention from the EU. The *cross-border* nature of PIF offences sits very well with the traditional interpretation of subsidiarity of the Union's action in criminal law matters, yet it is only one side of the coin. On the other hand, in line with the emerging normative facet of the principle of subsidiarity, the remit of the EPPO also includes national cases, since the interest at stake (the Union budget) is purely and inherently *European*. It is precisely for the latter reason that the question remains as to whether the creation of a European Public Prosecutor's Office by only 20 Member States is truly compliant with the principle of subsidiarity. In fact, if the EPPO aims at establishing "a *coherent European system* for the investigation and prosecution"[30] of PIF offences and at protecting an EU interest *par excellence*, it is "paradoxical"[31] that the Office is composed of less than three quarters of EU Member States.[32] Nevertheless, in terms of *Realpolitik*, the setting up of the EPPO is a historical achievement on the part of the European Union and, in the future, the Office could also gain consensus among the non-participating Member States.

In light of the foregoing, the (potential) competence of the EPPO for serious cross-border cases beyond the PIF sector, as envisaged by Art. 86(4) TFEU, should be less controversial from the subsidiarity perspective. The extension of the mandate of the Office could not cover purely domestic crimes, as in the case of PIF offences; once the link with the PIF sector is lost, the mission of the EPPO would be justified by the traditional, purely "efficiency-based rationale," rather than the emerging "normative" one.[33] These "two very different embryos"[34] of Art. 86 TFEU can be explained by bearing in mind that this provision is included in the Title of the Treaty concerning the Area of Freedom, Security and Justice, i.e., an area in which EU action has been endorsed and gradually enhanced because of the *cross-border dimension* of the phenomena concerned, such as transnational criminality.[35] Thus, while it is still being debated whether (most) PIF offences have a transnational dimension that justifies the establishment of the EPPO, this issue would not arise if the EPPO were to be given powers to fight serious cross-border crime. However, although the extension of the powers of the EPPO in accordance with Art. 86(4) TFEU would probably be less contentious from a constitutional perspective as far as the subsidiarity principle is concerned, it was never a consideration in the negotiations on the Regulation. It is self-evident that such an extension would signify a bold step forward in the direction of a "federal" Europe, one in which a European prosecution service would counter crimes affecting common security interests. The time for this is probably not ripe yet, but things seem to be slowly changing.

In sum, it is understandable why the Commission – in public statements and official documents – plays both cards: the cross-border dimension of PIF offences and their European nature. On the one hand, the supranational essence of the protected interest justifies the establishment of the EPPO. Still, when a given PIF crime does not have any link with other Member States, the competence of the EPPO to investigate and prosecute such a crime turns out to be a contentious issue, since the powers of the Office represent a considerable intervention into national sovereignty. On the other hand, the argument involving the transnational scale of PIF offences is rather convincing and well entrenched in EU constitutional law, but some have cast doubts as to its validity in the PIF sector. It is somehow even ironic that the competence of the EPPO for VAT carousel fraud, i.e., the PIF offence with a cross-border dimension by definition, has been limited to the most serious cases in which the total damage caused by such fraud is at least €10 million.[36]

Moreover, the combination of these two factors is convincing in some respects; a single EU body competent for PIF offences would be in an ideal position to detect, for instance, possible links among national cases. These links would, admittedly, not be easy to discover if, as is sometimes the case, national authorities focus only on the domestic side of a given case and are reluctant to extend their investigations to transnational aspects.[37] For the very same reason, the commitment of the Commission to launch a debate on the extension of the EPPO's competence in serious cross-border cases next year already is to be welcomed. Such an extension would be in line with the traditional interpretation of the principle of subsidiarity in EU criminal law and will leave untouched the competences of Member States in purely national cases. Nevertheless, it would represent a further, if not groundbreaking, example of increasing integration among national criminal justice systems in the name of common needs and interests. Hence, the Treaty provides that such a bold move needs to be taken by the European Council and by means of a unanimous vote, i.e., including Member States not participating in enhanced cooperation. As will be argued below, however, Art. 86(4) TFEU is not without controversy.

2. Cross-border cases beyond the PIF sector: the question of voting

The principle according to which enhanced cooperation shall be open to the participation of other Member States (Art. 328(1) TFEU) and the political sensitivity of the decision to enlarge the mandate of the EPPO beyond the PIF sector justify the choice by the drafters of the Treaty to leave such a decision in the hands of the European Council, which shall act *unanimously*. Yet, the issue remains controversial. Empowering non-participating Member States to veto the adoption of the decision provided for by Art. 86(4) TFEU jeopardises the other overarching principles of enhanced cooperation, namely that *only* Member States participating in en-
hanced cooperation can decide on how such a cooperation shall be developed and that its implementation *shall not be impeded* by non-participating Member States (Art. 327 TFEU). In *Spain and Italy v. Council*, concerning enhanced cooperation in the field of the unitary patent protection, the ECJ clarified as follows: "While it is, admittedly, essential for enhanced cooperation not to lead to the adoption of measures that might prevent the non-participating Member States from exercising their competences and rights or shouldering their obligations, it is, in contrast, permissible for those taking part in this cooperation to prescribe rules with which those non-participating States would not agree if they did take part in it."[38] The Court added that the adoption of such rules "does not render ineffective the opportunity for non-participating Member States of joining in the enhanced cooperation. As provided by the first paragraph of Article 328(1) TFEU, participation is subject to the condition of compliance with the acts already adopted by those Member States that have taken part in that cooperation since it began."[39] In other words, non-participating Member States cannot steer or impair enhanced cooperation from the outside. If and when they decide to take part in it, they will have to accept what the "insiders" have already decided.

Nevertheless, Art. 86(4) TFEU is rather clear and does not seem to leave room for alternative interpretations, such as that of reading this provision as requiring the unanimity of all and *only* the Member States participating in enhanced cooperation. This is currently provided for by the Treaty in relation to the voting system of the Council within the framework of enhanced cooperation (Art. 330 TFEU). In principle, the application of this rule to the European Council's decision regulated by Art. 86(4) TFEU would not be so surprising. After all, the European Council, which finally "joined the fold of formal Union institutions after Lisbon,"[40] would not decide by consensus but rather by unanimity, i.e., with a vote.[41] However, since alternative readings do not seem feasible, the only way to fully comply with the above-mentioned principles concerning enhanced cooperation would be to amend Art. 86(4) TFEU, in order to allow only participating Member States to take part in the decision on the competence of the EPPO.

A further argument can be made on the basis of Art. 22(1) of the EPPO Regulation, which establishes the mandate of the Office mostly by referring to the PIF Directive. The Directive applies *inter alia* to VAT fraud but only when the offence is connected with the territory of two or more Member States and involves a total damage of at least €10 million.[42] These requirements have also been copy-pasted into Art. 22(1) of the EPPO Regulation. The consequence is that a modification of this provision – and not of the Directive – will be necessary if Member States decide to extend (or reduce) the mandate of the EPPO for VAT fraud. This is due to the concerns of some Member States that an extension of the EPPO's competence to a broader range of VAT fraud – in particular by lowering the above-mentioned threshold (€10 million) or removing the criterion of transnationality – would be indirectly obtained through an amendment of the PIF Directive. The nub of the issue is that, whereas the EPPO has been set up by a *unanimous* decision of 20 Member States and any amendment of the Regulation requires their unanimity as well, the PIF Directive can be modified by means of a decision adopted by a qualified majority of *all* Member States, including those not participating in the EPPO.[43]

Hence, if it is reasonable that the competence of the Office regarding VAT fraud can be changed only by the unanimous consent of Member States participating in the EPPO, it would likewise be reasonable to apply the same regime to the decision provided for by Art. 86(4) TFEU.

III. A Criminal Law Perspective: The Choice of Forum

The competence of the EPPO in cross-border cases spotlights the issue of the choice of forum. The main rules of the Regulation on the matter are the following:

1. *Investigations* shall be initiated in the Member State where "the focus of the criminal activity is or […] where the bulk of the offences has been committed" (Art. 26(4) of the EPPO Regulation);

2. Deviations from the principle of territoriality are admitted, since the Permanent Chamber (PC) can instruct the European Delegated Prosecutor (EDP) of a different Member State to initiate the investigations on the basis of the criteria listed in Art. 26(4), namely, in hierarchical order: i) the place of habitual residence of the suspect; ii) his/her nationality; and iii) the country that has suffered the main financial damage. On the basis of these criteria, the PCs can also reallocate the case to an EDP in another Member State at a later time, i.e., *during the investigations*, if this is "in the general interest of justice" (Art. 26(5));

3. In principle, the case shall be brought to *prosecution* in the same Member State of the EDP who handles the cases. On the basis of the criteria mentioned in under b), the PC can decide to initiate the prosecution before the courts of another Member State that is equally competent, if there are "sufficiently justified grounds" (Art. 36(3)).

These rules aim to balance the need to leave the EPPO a minimum of flexibility with the guarantees attached to the right of defence (Arts. 48(2) CFR and 6(3) ECHR) and the principle of legality (Arts. 49(1) CFR and 7 ECHR). In essence, the latter principle stipulates, according to *Luchtman,* that "certain issues may only be dealt with by a competent lawmaker. By doing so, effective safeguards can be provided against arbitrary prosecution, conviction and punishment."[44] Thus, in line with the case law of the ECtHR, not only shall substantive criminal legislation be accessible and its effects foreseeable, but "procedural rules have to comply with the principle of legal certainty" as well.[45] Against this premise, it should be noted that – in comparison with the much vaguer provisions of the Commission's Proposal – the final text of the Regulation omits contentious criteria, such as the location of evidence, and instead introduces a *hierarchical* order for the criteria listed in Art. 26(4). *Prima facie*, this satisfies the required legal certainty that shall underpin the activities of the EPPO.[46]

Some concerns arise, however, upon closer inspection. Assuming that investigations are regularly initiated in the Member State of the *locus commissi delicti* (State A), this means that the investigative measures are adopted, and can be challenged by the suspect (X) in that Member State. Since, in principle, the trial would also take place in A, X can organise his/her defence strategy accordingly. If, during the investigations, the case is then allocated to the EDP from the Member State of the habitual residence of X (say, State B), such a strategy could become useless, and the defendant would then have to adjust it to the rules of B. Even worse, the case could in fact be brought to *prosecution* in a different Member State altogether (say State C, the country of which X is a national): in this "patchwork proceeding,"[47] the accused would have no chance to adopt any effective line of defence. As *Panzavolta* puts it, "[t]he key word here is foreseeability. To choose jurisdiction means also to choose rules and context. […] It is a matter of organising and preparing the defence effectively, both in practical and legal terms."[48] Thus, these likely violations of the principle of legality are intertwined with, or may rather result in, breaches of the right of defence, if not of fair trial: in the scenario sketched above, the allocation of jurisdiction to a Member State different from that in which investigations were initiated would realistically bring about a substantial disadvantage to the defendant *vis-à-vis* the EPPO.[49]

In sum, the foreseeability *in abstracto* of the legal system in which investigations and prosecutions will take place is not enough; once the EPPO has initiated its activities *in concreto* in a Member State, relevant consequences follow, and the suspect is called upon to make choices in order to better defend him-/herself. Hence, an interpretation of the rules at stake in conformity with the above-mentioned rights and principles would imply that, once the suspect becomes *aware* of investigations concerning him/her, the EPPO shall refrain from reallocating the investigations or launching the prosecution in another Member State, unless duly justified by a case of extraordinary circumstances. This is what the guidelines issued by Eurojust already suggest: the choice of forum shall be made "*as early as possible* in the investigation or prosecution process" and "[w]hen an investigation is already in an *advanced stage* in one jurisdiction, transferring the case to another jurisdiction *might not be appropriate.*"[50]

Ultimately, the Regulation does not provide for any *judicial control at the European level* as regards both the choice of the Member State where to initiate (or reallocate) the investigations and that of the Member State where the trial shall take place. Focusing on the latter, only *national courts* can scrutinise the choice of forum made by the EPPO.[51] Some authors have defended this, since national judiciary would be in a better position to take a swift decision on the matter compared to the ECJ, would have access to the case file, and could resort to the ECJ pursuant to Art. 267 TFEU in any case.[52]

A number of arguments can, however, be marshalled for an opposite conclusion. First, the decision on the choice of forum is taken at the EU level of the EPPO (the Permanent Chamber), it follows criteria set out by

EU rules (the Regulation), and it should not even raise concerns in terms of confidentiality, since the investigations are over. Thus, judicial control at the EU level would be appropriate. True, a quick decision on the conflict of jurisdiction is necessary, especially if the suspect is being deprived of his/her liberty, but the ECJ has already shown itself to be able to decide within a short time in similar circumstances.[53]

Moreover, as already pointed out in the 2001 Commission's Green Paper, if control over the choice of forum is left to national courts, "there could be a few cases of declined jurisdiction and possibly even of negative conflicts of jurisdiction."[54] Going back to the previous example, if investigations are initiated in State A and later moved to State B, and the case is finally brought to prosecution in State C, the suspect can challenge the jurisdiction of C before the courts of this Member State. Assuming that the courts of C reject their jurisdiction because the PC has not correctly applied the Regulation, the PC could lodge an appeal against the decision, if national law so provides. If the appeal fails, or if the EPPO considers it more appropriate to initiate the prosecution in another Member State, say B, the case can be brought before courts in B. Here again, the courts could refuse their jurisdiction: assuming they decline their jurisdiction as well, a *negative* conflict of jurisdiction therefore arises, as foreseen by the Commission's Green Paper. As things stand, this conflict could not be settled at the *European* level by a European court. The only way to avoid a stalemate would be for national authorities to find an agreement pursuant to the 2009 Framework Decision on conflicts of jurisdiction[55] and/or involving Eurojust.

In conclusion, the Regulation sets out clear criteria for the EPPO to follow in the choice of forum. In order to guarantee a stronger protection of the rights of suspected persons, these rules may be interpreted as progressively limiting the powers of the EPPO to switch jurisdiction as the investigations proceed. The lack of judicial review of the choice of forum at the EU level is deplorable and could potentially lead to unfortunate deadlocks.

IV. Conclusion

After four years of negotiations, the EPPO Regulation was finalised in October 2017. When the added value of the EPPO is discussed, emphasis is often placed on the need to establish a supranational prosecuting authority to cope with cross-border cases of fraud. This paper has demonstrated that such a competence over transnational PIF offences sits very well with the traditional interpretation of the principle of subsidiarity in EU law. However, the Commission has justified the establishment of the EPPO also in light of what has been identified as the – emerging – normative facet of the principle of subsidiarity. In other words, the EPPO aims at the protection of an inherently European interest (the budget of the Union) and, as a consequence, it is also entrusted with investigations and prosecutions concerning purely domestic cases of PIF offences. Despite this two-fold justification, the assessment of the real need to establish the EPPO has been one of the sticking points of the negotiations on the Regulation. The choice of a number of Member States not to join the Office – at least for the time being – confirms that doubts have not been entirely dispelled.

Art. 86(4) TFEU also provides for a procedure to broaden the mandate of the EPPO in such a way as to include serious cross-border crimes. Such an extension would be in line with the traditional interpretation of the principle of subsidiarity in EU criminal law and would not encroach upon the competences of Member States on purely national cases. Since it implies a further integration into national criminal justice systems, it is the European Council that shall make this highly sensitive choice. Especially in times when action against some criminal threats would benefit from a European response, it is regrettable, if not incompatible with other EU principles, that the European Council needs to decide by unanimity, since non-participating Member States are basically allowed to impair further development of enhanced cooperation.

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Finally, note should be taken that cross-border PIF offences raise a number of issues when it comes to the choice of forum. In particular, once the EPPO has initiated its activities in a Member State, due consideration must be paid to the right of defence and the right to a fair trial, both of which are intertwined with the principle of legality in this context. In other words, because the suspect has the right to organise his/her defence, the EPPO shall use the flexibility it enjoys in the choice of forum only in extreme and well-justified instances, especially if the suspect has already become aware of investigations concerning offences allegedly committed by him/her. Ultimately, it is definitely positive that the Regulation lists hierarchical criteria for the Office to follow in the choice of forum, yet some concerns continue to emerge, not least because judicial control over such a choice would be necessary at the EU level.

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1. Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), O.J. L 283, 31 October 2017.↩
2. See Council doc. 8027/17 of 5 April 2017.↩
3. Council press release, "20 member states agree on details on creating the European Public Prosecutor's office (EPPO)", 8 June 2017.↩
4. Commission press release, "Commission welcomes decision of 20 Member States to establish the European Public Prosecutor's Office", 8 June 2017. Emphasis added.↩
5. Commission Fact Sheet, "Frequently Asked Questions on the European Public Prosecutor's Office", 8 June 2017. See also Recital 121 and Art. 106(2) of the EPPO Regulation.↩
6. In particular, this has been and still is the stance of the Italian Minister of Justice Andrea Orlando: see "Guardasigilli Orlando: estendere la Procura Europea anche ai reati di terrorismo", (2017) *Diritto e Giustizia*. In the literature, see many of the contributions in G. Grasso *et al.* (eds.), *Le sfide dell'attuazione di una Procura europea: definizione di regole comuni e loro impatto sugli ordinamenti interni*, 2013 and especially those of: R. Sicurella, "Il diritto penale applicabile dalla Procura europea: diritto penale sovrannazionale o diritto nazionale 'armonizzato'? Le questioni in gioco", p. 7, 34-36; D. Flore, "A European Public Prosecutor's Office: guidelines for the European agenda", p. 705, 707-709; G. Grasso, "Relazione di sintesi", p. 715, 766-768.↩
7. Commission, "State of the Union 2017. Roadmap for a more united, stronger and more democratic Union", 13 September 2017.↩
8. "Les principales propositions d'Emmanuel Macron pour relancer le projet européen" *Le Monde*, 27 September 2017 <http://www.lemonde.fr/europe/article/2017/09/26/les-principales-propositions-d-emmanuel-macron-pour-relancer-le-projet-europeen_5191799_3214.html> (accessed 8 November 2017).↩
9. Habitual residence and nationality of the suspect are two criteria to be considered in the choice of forum by the EPPO. See section III.↩
10. For some remarks on the other scenarios, as well as for further considerations on a previous version of the Regulation (largely similar to the final text), see F. Giuffrida, "The European Public Prosecutor's Office: King without kingdom?", CEPS Research Report No 2017/03 <https://www.ceps.eu/publications/european-public-prosecutor%E2%80%99s-office-king-without-kingdom> (accessed 8 November 2017).↩
11. Commission, Explanatory Memorandum to the "Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office", COM(2013) 534 final, pp. 2-7.↩
12. Protocol on the application of the principles of subsidiarity and proportionality, O.J. C 340, 10 November 1997, 105.↩
13. Report from the Commission on Subsidiarity and Proportionality, COM(2011)344 final, p. 2. See I. Wieczorek, "The Principle of Subsidiarity in EU Criminal Law", in: A. Weyembergh and C. Brière (eds.), *The Needed Balances in EU Criminal Law. Past, Present and Future*, forthcoming.↩
14. Commission, "Better Regulation 'Toolbox', SWD(2015) 111 final.↩
15. See more in F. Giuffrida, (2017) *op. cit.* n. 11, pp. 4ff. For an analysis of the different opinions of national parliaments, see I. Wieczorek, "The EPPO Draft Regulation Passes the First Subsidiarity Test: An Analysis and Interpretation of the European Commission's Hasty Approach to National Parliaments' Subsidiarity Arguments", (2015) 16 *German Law Journal*, 1247, 1252ff.↩
16. 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. For some remarks on the Communication, see V. Mitsilegas, *EU Criminal Law after Lisbon. Rights, Trust and the Transformation of Justice in Europe*, 2016, pp. 40-44.↩
17. H. Xanthaki, "What is EU fraud? And can OLAF really combat it?', (2010) 17 *Journal of Financial Crime* 133, 133.↩
18. See, *inter alia*, A. Williams, "Fighting fraud in the EU: a note on icebergs and evidence", (2013) 14 *ERA Forum*, 227, 228.↩
19. 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 final, p. 4.↩
20. P. Jeney, "The future of Eurojust", Study for the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, 2012, p. 133. See: European Council, "The Stockholm Programme: an open and secure Europe serving and protecting citizens", O.J. C115, 4.5.2010, p. 13.↩
21. P. Jeney, (2012) *op. cit.* (previous n.), pp. 132-133.↩
22. Ibid., p. 133.↩
23. In 2011, the Council Working Party on General Matters including Evaluation (GENVAL) decided to devote the sixth round of mutual evaluation to the Member States' implementation of the Council Decisions on Eurojust and on the European Judicial Network. The final report of this round of evaluation was published in December 2014 (Council doc. 14536/2/14 of 2 December 2014), almost a year and half after the Commission's Proposals for a Council Regulation on the EPPO and for a Regulation of the European Parliament and the Council on Eurojust (COM(2013) 535 final) were issued.↩

24. W. Tupman, “Keeping under the radar: watch out for the ‘Smurfs’”, (2012) 17 *Journal of Financial Crime*, 152, 155. See also A. Williams, (2013) *ERA Forum*, *op. cit.* (n. 19), 227, 231-232; P. Asp, “Jeopardy on European Level – What is the Question to which the Answer is the EPPO?”, in: P. Asp (ed.), *The European Public Prosecutor’s Office. Legal and Criminal Policy Perspectives*, 2015, p. 51, 62-63.↩
25. See, *inter alia*, B. Quirke, “EU Fraud: institutional and legal competence”, (2009) 51 *Crime, Law & Social Change*, 531, 532; A. Williams, (2013) *ERA Forum*, *op. cit.* (n. 19), 227, 232; V. Covolo, *L’émergence d'un droit pénal en réseau. Analyse critique du système européen de lutte antifraude*, 2015, p. 692.↩
26. For instance, see the opinions of the Czech Senate (Council doc. 16030/1/13 of 16 November 2013, p. 3) and of the Romanian Chamber of Deputies (available at <http://www.ipex.eu/IPEXL-WEB/home/home.do> accessed 8 November 2017). See also I. Wieczorek, (2015) 16 *German Law Journal*, *op. cit.* (n. 16), 1261-1263.↩
27. COM(2013) 851 final, *op. cit.* (n. 17), p. 11.↩
28. I. Wieczorek, “The Principle of Subsidiarity in EU Criminal Law”, *op. cit.* (n. 14).↩
29. Ibid.↩
30. COM(2013) 534 final, *op. cit.* (n. 12), p. 5. Emphasis added.↩
31. A. Weyembergh and C. Brière, “Towards a European Public Prosecutor’s Office”, Study for the LIBE Committee, 2016, p. 46.↩
32. See also, among the many, H. Labayle, “Mise en perspective”, in: P. Ghaleh Marzban (ed.), *Quelles perspectives pour un Ministère Public Européen? Protéger les intérêts financiers et fondamentaux de l’Union*, 2010, p. 49, 50; A. Suominen, “The Functionality of the EPPO”, in: P. Asp (ed.), *op. cit.* (n. 25), p. 88, 104-109; I. Wieczorek, (2015) 16 *German Law Journal*, *op. cit.* (n. 16), 1247, 1260-1261.↩
33. I. Wieczorek, “The Principle of Subsidiarity in EU Criminal Law”, *op. cit.* (n. 14).↩
34. M. Wade, “A European public prosecutor: potential and pitfalls”, (2013) 59 *Crime, Law & Social Change*, 439, 443. See also K. Ligeti, “Approximation of substantive criminal law and the establishment of the European Public Prosecutor’s Office”, in: F. Galli and A. Weyembergh (eds.), *Approximation of Substantive Criminal Law in the EU. The Way Forward*, 2013, p. 73, 75-76.↩
35. See V. Covolo, *op. cit.* (n. 26), pp. 667-668.↩
36. Art. 22(1) of the EPPO Regulation. See more in section II.2.↩
37. COM(2013) 851 final, *op. cit.* (n. 17), p. 11.↩
38. ECJ, 16 April 2013, Joined Cases C-274/11 and C-295/11, *Spain and Italy v. Council*, para. 82. Emphasis added.↩
39. Ibid., para. 83.↩
40. A. Dashwood *et al.*, *European Union Law*, 6th ed., 2011, p. 4.↩
41. “The formal difference between ‘unanimity’ and ‘consensus’ is that unanimity is, or is supposed to be, the result of a vote” (J.J.E. Schutte, “Establishing Enhanced Cooperation Under Article 86 TFEU”, in: L. H. Erkelens *et al.* (eds.), *The European Public Prosecutor’s Office. An Extended Arm or a Two-Headed Dragon?*, 2015, p. 195, 200).↩
42. Art. 2(2) of the Directive (EU) 2017/1371 on the fight against fraud to the Union’s financial interests by means of criminal law, O.J. L 198, 28.7.2017, 29.↩
43. See Council doc. 8231/17 of 24 April 17. For further remarks on the competence of the EPPO and the PIF Directive, see G. Grasso and F. Giuffrida, “The material competence of the EPPO”, in: K. Ligeti and M. João Antunes (eds.), *The European Public Prosecutor’s Office at a Crossroads. ECLAN Symposium, Coimbra, 29-30 April 2017*, forthcoming.↩
44. M. Luchtman, “Towards a Transnational Application of the Legality Principle in the EU’s Area of Freedom, Security and Justice”, (2013) 9 *Utrecht Law Review*, 11, 13.↩
45. M. Böse, “Choice of Forum and Jurisdiction”, in: M. Luchtman (ed.), *Choice of Forum in Cooperation Against EU Financial Crime. Freedom, Security and Justice and the Protection of Specific EU-Interests*, 2013, p. 73, 80. See also F. Zimmermann, “Choice of Forum and Choice of Law under the Future Regulation on the Establishment of a European Public Prosecutor’s Office”, in: P. Asp (ed.), *op. cit.* (n. 25), p. 156, 161-162.↩
46. F. Faletti, “The European Public Prosecutor’s Office and the Principle of Equality”, (2017) *eucrim*, 25, 26. See also, A. Weyembergh and C. Brière, *op. cit.* (n. 32), p. 30.↩
47. “A Manifesto on European Criminal Procedure Law. European Criminal Policy Initiative”, (2013) *Zeitschrift für Internationale Strafrechtsdogmatik*, 430, 435.↩
48. M. Panzavolta, “Choice of Forum and the Lawful Judge Concept”, in: M. Luchtman (ed.), *op. cit.* (n. 46), p. 143, 160.↩
49. On equality of arms as a fundamental component of the right to a fair trial, see ECtHR, 22 June 2000, *Coëme and others v Belgium*, Appl. nos. 32492/96 *et al.*, para. 102.↩
50. Eurojust, “Guidelines for Deciding ‘Which Jurisdiction Should Prosecute?’”, 2016, p. 3. Emphasis added.↩
51. See also M. Wasmeier, “The Choice of Forum by the European Public Prosecutor”, in: L. H. Erkelens *et al.* (eds.), *op. cit.* (n. 42), p. 139, 153-157.↩
52. F. Faletti, (2017) *eucrim*, *op. cit.* (n. 47), 25, 26. For further remarks on the issue and references to authors supporting an opposite view, see F. Giuffrida and V. Mitsilegas, “Judicial review of the acts of the EPPO”, in: K. Ligeti and M. João Antunes (eds.), *op. cit.* (n. 44), forthcoming.↩
53. See F. Giuffrida and V. Mitsilegas, *op. cit.* (previous n.), forthcoming↩
54. 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, p. 56.↩
55. Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, O.J. L 324, 15.12.2009, 42.↩

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