



European Delegated Prosecutor: the twilight zone within the EPPO

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Abstract

The EPPO was created to tackle and prevent crimes against the financial interests of the European Union. However, some questions arise concerning the functioning of the EPPO, particularly in regard to the European Delegated Prosecutor.

From the analysis of the Council Regulation (EU) 2017/1939 of 12.10.2017, implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office, it is not clear that the European Delegated Prosecutor has enough autonomy in conducting the criminal proceedings.

With this paper, we intend to assert if the European Delegated Prosecutor has in fact autonomy and to what extent, and what are the consequences that may occur resulting from that autonomy or lack thereof.

For that purpose, we analyzed the pre-trial proceedings of the criminal case regarding the investigation and the decision to prosecute or to dismiss, bearing in mind the relevant jurisprudence of the Court of Justice of the European Union and European Court of Human Rights.

Finally, we conclude for the lack of autonomy of the European Delegated Prosecutor, showing the main problems and suggesting some possible solutions that may solve the problems at hand, and, if still it is not enough, we recommend, when assessing the implementation, impact, and functioning of the EPPO under the review clause foreseen in the Regulation, some possible legislative changes.

Keywords: European Public Prosecutor's Office (EPPO), European Delegated Prosecutor, Independence, Autonomy, European Criminal Law, Financial Interests of the European Union, Pre-Trial Proceedings

1. Introduction

Article 86.^o of the Treaty on the Functioning of the European Union (henceforth TFUE) represented a remarkable evolution of Member States in judicial cooperation in criminal matters and, without it, the implementation of the European Public Prosecutor's Office¹ (hereinafter EPPO) would not have been possible.

The EPPO was implemented to combat crimes affecting the financial interests of the European Union². However, now that the EPPO is finally a reality and soon will start functioning within Member States that chose to establish enhanced cooperation on the establishment of the EPPO, it remains to be seen how it will all work together, foreseeing that a few problems may arise.

Within the next pages, we intend to focus on the EPPO and its operation, specifically, with the European Delegated Prosecutor (henceforth EDP) and the streamlining in his performance in his national Member State with the instructions issued by the Permanent Chamber and the Supervising European Prosecutor.

We believe that the problem we propose to analyze and respond to is relevant at two levels: on the one hand, understanding the degree of independence and autonomy that the EDP has while carrying out the investigation and, consequently, the hierarchical relations between the EDP, the Permanent Chamber, and the Supervising European Prosecutor; on the other hand, the impact that the lesser (or greater) degree of autonomy and independence of the EDP has on the achievement of objectives under which the EPPO was established.

Due to the importance that the pre-accusatory phase assumes in the context of criminal proceedings together with the decision to prosecute or dismiss a case, we will focus on the identification of problems we consider that may arise in these two procedural steps and will conclude with some solutions and/or alternatives. These problems will arise within the articulation of powers between the EDP, the Permanent Chamber, and the Supervising European Prosecutor.

2. The European Public Prosecutor Office

As we highlighted before, EPPO emerges as a necessary response to defend the financial and economic interests of the European Union which, progressively, have been the target of fraud and irregularities, which have caused millions of euros in losses to the European Union³.

¹ Council Regulation (EU) 2017/1939, of 12.10.2017, implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), published in the Official Journal of the European Union L283 of 31.10.2017, available in <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2017:283:FULL&from=PT>.

² 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, available in <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32017L1371&from=pt>.

³ See article 1 (1) and (2) of The Directive (EU) 2017/1371, of 05.07.2017, on the fight against fraud to the Union's financial interests by means of criminal law, available in <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017L1371&from=pt>.

To adopt more appropriate measures to protect these interests, not only in terms of prevention and detection of situations of fraud and irregularity but also of effective punishment of offenders, Corpus Juris emerged, which represented the first step into the implementation of the EPPO and dates back to 2001, when the European Commission first proposed the creation of a Public Prosecutor to protect the financial interests of the European Union⁴.

Later in 2009, the Treaty of Lisbon came into force (also known as Treaty on the Functioning of the European Union and hereinafter TFUE), which provides in articles 86 and 329 the enhanced cooperation mechanism to implement the EPPO. Since not all Member States agreed to implement the EPPO, the enhanced cooperation mechanism allowed 17 Member States to trigger the process of discussion around the structure of the EPPO. Finally in 2017, after a long and tricky discussion at the European and National level, came the approval of the Council Regulation (EU) 2017/1939 of 12 of October of 2017 (henceforth Regulation), implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office⁵, which established the mandate of the EPPO and defined the structure and principles under which the EPPO would conduct its activity in the 22 Member States⁶ that agreed to adopt this newly European Institution.

The Regulation establishes the EPPO as a Union Body, with legal personality, that cooperates with Eurojust and relies on its support (article 3 and 100). According to Regulation, the EPPO is an independent institution of the European Union and its main goal is to direct, coordinate and supervise criminal investigations and to prosecute suspects in the courts of the Member States for the perpetration of crimes affecting the financial interests of the European Union (articles 4 and 6).

Without hindering the national systems that the Member States have in place concerning how criminal investigations are organized⁷ on the crimes affecting the financial interests of the Union, the EPPO strives for an improved criminal performance towards offenses while trying not to “*go beyond what is necessary in order to achieve those objectives and ensures that its impact on the legal orders and the institutional structures of the Member States is the least intrusive possible*” (recital 12) respecting the principles of legality, proportionality, impartiality and loyal cooperation (article 5).

Concerning the material competence of the EPPO, article 22 (1) of the Regulation establishes that the EPPO shall be competent in respect of the criminal offences affecting the financial interests of the Union that are provided for in Directive (EU) 2017/1371, as implemented by national law,

⁴ In 2001, the European Commission published the Green Paper that first presented the foundations of the European Public Prosecutor Office. Although other relevant documents inspired the creation of the European Public Prosecutor Office - namely the Corpus Juris in 1997 and the Corpus Juris 2000 (Florence Proposal) -, the Green Paper was the first institutional proposal for the creation of this new and important institution. For more developments on this subject, you can see *The European Public Prosecutor's Office (EPPO) - Past, Present and Future*, Francesco de Angelis, available in <https://eucrim.eu/articles/the-epo-past-present-and-future/> and the Green Paper of the European Commission available in https://ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/green_paper_en.pdf

⁵ Available in <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R1939&from=EN>

⁶ Hungary, Poland, and Sweden decided not to join the EPPO, and Denmark and Ireland have an opt-out regarding the areas of freedom, security, and justice.

⁷ See recital 15 of the Regulation.

irrespective of whether the same criminal conduct could be classified as another type of offence under national law, with some exceptions that either restrict or enlarged the EPPO material competence.

Regarding the structure of the EPPO, the European Commission proposed a decentralized structure where the tasks assigned to the EPPO were divided between the European Public Prosecutor (on a centralized level) and the Deputy European Public Prosecutor (on a decentralized level within the Member States). Our subsequent analysis needs to emphasize that according to the European Commission⁸ *"the Deputy Prosecutors would have a vital role to play, anything the chief Prosecutor could do he could delegate to his Deputies. In practice, they would be the channel through which he acted, because in most cases it would be a Deputy Prosecutor who would handle investigations or prosecutions"*.

A. Structure

Although the European Commission first intended to have a decentralized structure for the EPPO⁹, the final version of the Regulation established a centralized structure that operates at the European level, with functions of supervision and coordination of the ongoing investigations and prosecutions handed to the EDP in the Member States¹⁰.

According to article 8 (2) of the Regulation at the centralized level, the EPPO has the European Chief Prosecutor and the Deputy European Chief Prosecutors (article 11), the European Prosecutors (article 12), the College (article 9), and the Permanent Chambers (article 10) and, at the decentralized level, the EPPO has the EDPs (article 13), who conducts criminal investigations and prosecutions in the Member States.

The two mentioned levels of the EPPO must operate quickly and efficiently to allow the execution of criminal investigation and prosecutions while abiding by the criminal procedural law of the Member States and the principles contained in the Union Treaties, Charter of Fundamental Rights of the European Union, and in the Regulation.

At the central level, the fundamental competencies consist in the supervision and coordination¹¹ of the ongoing investigations that the EPPO develops in the 22 Member States and in the organization and coordination of the relations between the different bodies that compose the EPPO. In the first case, those tasks are primarily executed by the Permanent Chambers and in the second case by the College.

⁸ See page 30, paragraph 4.2.1.2. of the Green Paper 2001, available in https://ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/green_paper_en.pdf.

⁹ As we mentioned above, according to the Green Paper 2001 the European Commission proposed a decentralized structure for the EPPO since this model - in the opinion of the European Commission - was a more suitable answer to the tasks that were assigned to the EPPO and since the most important task of the EPPO is the pre-trial stage of the criminal proceedings, was the European Delegated Prosecutor must pursue his task according to the national law - see paragraph 4.2.1.2. Green Paper of the European Commission available in https://ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/green_paper_en.pdf.

¹⁰ Concerning the structure and operationalization of EPPO activities, also see recitals 20, 21, 22, and 23 of the Regulation.

¹¹ See recital 22 of the Regulation.

Despite his representative and organizational functions, the European Chief Prosecutor presides the College and the Permanent Chambers, supervises all ongoing investigations, and decides in cases of conflict between the different bodies of the EPPO. For each of his competencies, the European Chief Prosecutor is assisted by the Deputy European Chief Prosecutors, who oversee all the powers and tasks that are delegated to them¹² and substitute the European Chief Prosecutor in meetings and other events that he cannot attend.

Permanent Chambers and European Prosecutors work together to coordinate and supervise ongoing investigations and prosecutions carried out by the EDPs. These two EPPO bodies give instructions and directives to the EDPs and decide on the termination of investigations, prosecutions, and other decisions concerning the criminal proceedings that fall within the competency of the EPPO. In some specific cases¹³, and after the approval of the Permanent Chamber, the Supervising European Prosecutor can decide to personally conduct an ongoing investigation that was first assigned or not to the EDP. The powers granted to the Permanent Chamber and the European Prosecutor can be summarized in three words: coordination, supervision, and decision. These powers granted to the Permanent Chamber and the European Prosecutor are the translation of the two levels of activity of the EPPO: to coordinate, supervise, and decide about the ongoing investigations and prosecutions handled by the EDPs in the Member States.

B. European Delegated Prosecutor

As we mentioned earlier, the EDP carries out the ongoing investigations and prosecution within the Member States. In other words, EDPs are the national link between the EPPO and the judiciary and non-judiciary bodies in their Member States. Considering their powers and functions, we must agree with the European Commission¹⁴ when saying that the EDPs have a vital role in playing within the EPPO: they are the ones who know the criminal proceedings and the best course of action in the Member States, regarding the investigation and prosecution of the crimes that affect the financial interests of the European Union.

The EDPs are responsible for the ongoing investigations and prosecutions that are initiated by them or that are assigned by the Permanent Chambers. While carrying out the investigation, and although such investigations are put in place on behalf of the EPPO, the EDPs must act abiding by the national law of their Member States¹⁵. Therefore, so that they can perform their duties, the Member States must provide the EDPs with the same independent investigative powers that they assign to their national prosecutors or, in the Member States that do not recognize such powers, they

¹² For example, the European Chief Prosecutor can delegate to the Deputy European Chief Prosecutor the presidency of a Permanent Chamber (Article 11.° § 2 and Article 10 § 1 of the Regulation).

¹³ Article 28 (4) of the Regulation.

¹⁴Page 30, paragraph 4.2.1.2. of the Green Paper 2001, available in https://ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/green_paper_en.pdf

¹⁵ Recitals 69, 71, and 81 of the Regulation.

must approve legislation to assign them to the EDPs¹⁶. Since the EDPs can maintain their role as national prosecutors¹⁷ - in which case they have “two-hats”¹⁸-, the coordination between these two roles will be interesting to see in the future¹⁹. Probably, as most authors²⁰ predict, this “duplication of powers” will propel a reform of the prosecutor's role at a national level to standardize their functions across the Member States and, in consequence, in the EPPO.

While carrying out investigations, the EDPs act in abidance by the directives and instructions of the monitoring Permanent Chamber and the Supervising European Prosecutor. When the EDPs believe that an instruction of the monitoring Permanent Chamber violates national law or European law, they may propose to the monitoring Permanent Chamber to revoke or amend the instructions received²¹. If the monitoring Permanent Chamber, after consulting the Supervising European Prosecutor, decides not to revoke or amend the contested instruction, the EDP may submit a request to the European Chief Prosecutor for review²².

Adding to his or hers responsibilities concerning ongoing investigations, the EDP has the power to initiate an investigation or evoke a case²³, he or she is responsible for bringing a case to judgment and has the power to present trial pleas, participate in taking evidence and exercise the available remedies according to national law²⁴. All these responsibilities and powers must be executed following European law, national law, and the instructions of the monitoring Permanent Chamber and Supervising European Prosecutor.

3. Independence and Autonomy according to Court of Justice of the European Union and European Court of Human Rights²⁵

¹⁶ See Hans-Holger Herrfeld, in “The EPPO’s Hybrid Structure and Legal Framework - Issues of implementation - a Perspective from Germany”, that concludes that “... While the references to “national law” are therefore primarily intended to refer to the “regular” criminal procedural law of the Member States, the wording of the relevant provisions of the EPPO Regulation does not exclude the possibility for Member States to set out specific provisions in their national criminal procedural law that will apply only to the investigations conducted by the EPPO.” According to the author, for the EDPs to investigate on behalf of the EPPO, the Member States must implement the adequate legal framework to allow the effective and independent investigation of crimes by the EDPs, by assigning them the adequate powers to request and conduct at the national level all investigative measures that are needed.

¹⁷ Article 13 § 3 of the Regulation.

¹⁸ “The EDPs are national prosecutors who are simultaneously members of the EPPO. as a consequence, when they are not dealing with crimes within the competence of the EPPO, they continue to carry out their ordinary tasks: this peculiar status is usually referred to as ‘double hat’, meaning that when EDPs wear the national hat they continue to be national prosecutors for all intents and purposes, whereas when they wear the European hat they have to follow instructions from the central Office.”, see The European Public Prosecutor’s Office: King without kingdom? - Fabio Giuffrida (https://www.ceps.eu/wp-content/uploads/2017/02/RR2017-03_EPPO.pdf)

¹⁹ Regarding this matter, if the EDP needs legal assistance in criminal matters of a State or Organization that does not recognize the EPPO, the EDP will issue the request as a national prosecutor and not as an EDP. This follows from article 13 (1) of the Regulation.

²⁰ “In the context of the fight against fraud affecting the EU’s financial interests, we are witnessing a progression towards the integration of criminal law systems. The European Union and its Member States are walking a path marked by difficulties, but it is essential to advance towards a greater degree of liberty, security, and justice.”, in M. Ángeles Pérez Martín, “The European Public Prosecutor Office - Protecting the Union’s Financial Interests through criminal Law”, available in <https://eucrim.eu/articles/the-european-public-prosecutors-office-spain/>; also, José P. Ribeiro de Albuquerque, in “Building federal? A instituição da Procuradoria Europeia e os Estatutos dos Ministérios Públicos dos EM da EU: parâmetros mínimos de independência”, Ebook_Os Novos Desafios da Cooperação Judiciária e Policial na União Europeia e da Implementação da Procuradoria Europeia, pages 162-163, available in: https://www.jusgov.uminho.pt/wp-content/uploads/2018/02/Ebook_18-de-Maio_Os_novos_desafios_da_cooperacao_judiciaria_e_policial_na_Uniao_Europeia_e_da_implementacao_da_Procuradoria_Europeia_comp.pdf.

²¹ Article 47 §1 Internal Rules of the EPPO.

²² Article 47 §2 Internal Rules of the EPPO.

²³ Article 13 §1, second paragraph of the Regulation and Article 41 § 1 Internal Rules of the EPPO.

²⁴ Article 13 §1, third paragraph, Article 35 §1, Article 36 §1 and Article 39 §1 of the Regulation and Article 56 and Article 60 Internal Rules of the EPPO.

²⁵ Hereinafter ECtHR.

Implicit in the idea of what the Rule of Law means²⁶, although not stated in article 86 (1) of the TFEU, the EPPO also has the independence of a judicial body, with legal personality and the capacity to exercise it. Accordingly, the European Chief Prosecutor, the both Deputy Prosecutors, the European Prosecutors, the EDPs, the Administrative Director, as well as the staff of the EPPO, cannot “neither seek nor take instructions from any person external to the EPPO, any Member State of the European Union or any institution, body, office or agency of the Union in the performance of their duties under this Regulation.” and “shall respect the independence of the EPPO and shall not seek to influence it in the exercise of its tasks.” (Article 6 (1) of the Regulation).

Independence is the fundamental element of judicial authority in a Rule of Law – as confirmed by article 6 (1) of the European Convention on Human Rights (henceforth ECHR)²⁷ – so that they can adequately perform its specific function, exclusively, by the principle of separation of powers²⁸. Bearing in mind Prosecutors must serve society, have a pivotal role in the defense of human rights, must perform their duties with respect for the presumption of innocence and the right to a fair trial and equality of arms, it is, therefore, essential to guarantee their independence and effective autonomy²⁹. Only then can they act with total justice, impartiality, and objectivity in a decision that will make the difference between dismissing or prosecuting a case and following the ECHR³⁰.

The EPPO independence is established at an external level before the European institutions and the national authorities, but also at an internal level. This last aspect is, what we believe, to be more troublesome in regard, specifically, to the EDP independence or lack thereof, opposite the powers that the Permanent Chambers and the Supervising European Prosecutor must conform the EDP action³¹.

Concerning this matter, the CJEU and the ECtHR have carried out the task to determine the concepts of “judicial authority” or “judicial functions” or even “judicial bodies”.

²⁶ See the Rule of Law Checklist of the Venice Commission of the Council of Europe, pages 39-40.

²⁷ In the past years, the ECtHR issued decisions highlighting that for an “institution” - such as a prosecutor's office - to be considered as a “tribunal” under article 6 (1) the ECHR, must fulfill some requirements. For example, in the Case of Vasilescu vs Romania, 22.05.1998, the ECHR concluded that “The Court reiterates that only an institution that has full jurisdiction and satisfies several requirements, such as independence of the executive and also of the parties, merits the description “tribunal” within the meaning of Article 6 § 1” (paragraph 41), and in Case of Ringeisen v Austria, 16.07.1971, the ECtHR concluded that “... the Court observes that the Regional Commission is a “tribunal” within the meaning of Article 6, paragraph (1) (art. 6-1), of the Convention as it is independent of the executive and also of the parties, its members are appointed for a term of five years and the proceedings before it afford the necessary guarantees...” (§ 95)

²⁸ See, José P. Ribeiro de Albuquerque in “EPPO – Building federal...”, *op. cit.*, p. 136-172.

²⁹ “... sufficient autonomy must be ensured to shield prosecutorial authorities from undue political influence. In conformity with the principle of legality, the public prosecution service must act only based on, and under the law. This does not prevent the law from giving prosecutorial authorities some discretion when deciding whether to initiate a criminal procedure or not (opportunity principle). Autonomy must also be ensured inside the prosecution service. Prosecutors must not be submitted to strict hierarchical instructions without any discretion and should be in a position not to apply instructions contradicting the law. The concerns relating to the judiciary apply, *mutatis mutandis*, to the prosecution service, including the importance of assessing legal regulations, as well as practice”, in The Rule of Law Checklist, *op. cit.*, page 40.

³⁰ As stated by ECtHR in several cases, the ECHR also applies to the pre-trial stage, such as the inquiry or the investigation. See the case of Imbrioscia v. Switzerland, 24.11.1993, § 36, case of Dvorski v. Croatia, 20.10.2015, § 76, and the case of Ibrahim and others v. The United Kingdom, 13.09.2016, § 253. Also, Guide on Article 6 of the European Convention on Human Rights – Right to a fair trial, in https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf

³¹ “In order to determine whether a tribunal can be considered to be “independent” as required by Article 6 § 1, appearances may also be of importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused”, in Guide on Article 6 of the European Convention ..., *op. cit.*, page 24. Also, case of Şahiner v. Turkey, 25.09.2001, § 44.

About the CJEU jurisprudence, this issue is recurrent in decisions concerning judicial cooperation in criminal matters, referring that “*independence requires that there are statutory rules and an institutional framework capable of guaranteeing that the issuing judicial authority is not exposed, when adopting a decision to issue such an arrest warrant, to any risk of being subject, inter alia, to an instruction in a specific case from the executive*”, adding that “*concept of an 'issuing judicial authority, within the meaning of Article 6(1) of Framework Decision 2002/584, must be interpreted as including the Prosecutor General of a Member State who, whilst institutionally independent from the judiciary, is responsible for the conduct of criminal prosecutions and whose legal position, in that Member State, affords him a guarantee of independence from the executive in connection with the issuing of a European arrest warrant*” (Case C-509/18, paragraph 52 e 57).

The concept of “judicial authority” includes not only judges or judicial bodies, but also all the authorities that participate in the administration of criminal justice and whose “*action is taking place with a judicial review that tends to be immediate*” (Case C-508/19, paragraph 93 and C- 509/18, paragraph 29)³². Moreover “[t]he independence of national courts and tribunals is, in particular, essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267.° TFEU, in that, in accordance with the settled case-law referred to in paragraph 38 above, that mechanism may be activated only by a body responsible for applying EU law which satisfies, inter alia, that criterion of independence” (Case C-64/16, paragraph 43; also, Case C-216/18, paragraph 54).

Furthermore, the CJEU jurisprudence has stated that for a national authority to be considered a "judicial authority" it must exercise its functions with total autonomy, "*without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions*" (Joined Cases c-508/18 and C-82/19 PPU paragraph 87; see, also, Case C-64/16, paragraph 44 and Case C-216/18 paragraph 63).

The organization and internal functioning of the Public Prosecutor Office in the attribution and reassignment of cases must also correspond to an impartial criterion, otherwise, the Public Prosecutors will have the power to refuse orders that are illegal or contrary to their moral conscience through appropriate internal procedures, expressly established, and guaranteed by law.

³² The paradigm of understanding if the Public Prosecutor is considered a judicial authority is changing. Although there is still little jurisprudence, the CJEU in cases C - 324/17 and Case C-584/19 has decided that "Article 1(1) and Article 2(c) of Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters must be interpreted as meaning that the concepts of 'judicial authority' and 'issuing authority', within the meaning of those provisions, include the public prosecutor of a Member State or, more generally, the public prosecutor's office of a Member State, regardless of any relationship of legal subordination that might exist between that public prosecutor or public prosecutor's office and the executive of that Member State and of the exposure of that public prosecutor or public prosecutor's office to the risk of being directly or indirectly subject to orders or individual instructions from the executive when adopting a European investigation order" (Case C- 584/19). It is a fact that there is a difference between the EAW and the EIO, that is, the EIO is less intrusive in essence therefore its more likely to not violate the guarantees enshrined in Article 6 of the Charter.

Any Member State's administrative organization and hierarchy systems that fall short of these requirements will not ensure all guarantees required to be considered a “judicial authority”, particularly all those related to independence.

Given the disparity in understanding concepts and internal systems in the various Member States that call into question the general principles and the rights, freedoms, and guarantees of a fair and independent judicial system, the Consultative Council of European Prosecutors, in 2018, through the Opinion number 13, sought, in the light of the various instruments already referred, to standardize global norms and principles of independence, responsibility and ethics of prosecutors, work advisors and the attitude with which they should act. The following aspects represent some of the key elements to have in consideration when talking about independence³³:

- The independence, responsibility, and ethics of prosecutors should be included in a statute for prosecutors provided for in national law or even in the constitutions of Member States, with guarantees equal to that of judges.
- The actions of the prosecutors may not be subject to any undue or illegal interference by other public or non-public authorities (external independence), although they are not prevented from receiving instructions and general guidance on the priorities of their activities arising from the law, in an express manner, that is transparent, and which does not put at risk the prosecutor's own career.
- They must be able to exercise their functions objectively, freely, and impartially and decide independently of the mode of action of each legal system and following the hierarchical relationship (internal independence).
- The internal instructions within the Prosecution Service must be given in writing and in a transparent manner, to promote public confidence, providing clear mechanisms that allow lower-level prosecutors to refuse orders from their superior when they consider them illegal or unwarranted.
- The prosecutors' decisions may be subject to a judicial appeal or a hierarchic superior.

Subsequently, it can be concluded, without a doubt, that the EPPO is a body with complete independence from the other European Institutions, as well as from the Member States, and not subject to nor can request external instructions in its performance.

Even though there is no doubt the EPPO is independent, according to precedent considerations, we can also conclude the EDPs are not completely autonomous. Since the EPPO functions as a hierarchical structure and EDPs perform their functions according to the instructions

³³ See, Consultative Council of European Prosecutors (CCPE), Opinion No. 13(2018) of the CCPE, «Independence, accountability, and ethics of prosecutors», Strasbourg, of 23 November 2018, available in <https://rm.coe.int/opinion-13-ccpe-2018-2e-independence-accountability-and-ethics-of-pros/1680907e9d>.

of the Permanent Chamber and the Supervising European Prosecutor - which we consider substantially restricts their power of action -, we cannot ascertain the EDPs freely exercise their powers and independently decides what may be the course of action in an ongoing investigation.

The lesser or greater autonomy of the EDPs will vary depending on the breadth of the guidelines and instruction issued by the Permanent Chamber and the Supervising European Prosecutor to shape the performance of the EDPs and in the decision process of the Permanent Chamber to prosecute or dismiss a case.

4. The need to improve the European Delegate Prosecutor legal statute – problems and consequences

Concluding that the EDP lacks autonomy within the hierarchical framework of the EPPO, it has a significant impact on the performance of the EPPO and, consequently, in the pursuit of the objectives for which it was established. Despite the anticipation of some possible problems, we must underline that we will only be able to analyze with greater assertiveness such width of guidelines and instructions and, therefore, the impact that they have on EDPs powers when the EPPO initiate its activity.

Nevertheless, we think the more restricted, detailed, and personalized instructions the Permanent Chamber or Supervising European Prosecutor gives the lesser is the autonomy of the EDP. Less autonomy of the EDP can undoubtedly lead to serious consequences regarding ongoing investigations and concerning the prosecution or dismissal of a case.

A. Procedure on investigation and investigation measures

Regarding the investigation and investigative measures, as already mentioned, the EDP is obliged to initiate and follow up the ongoing investigations in cases where it may have been committed a crime³⁴ that falls within the scope of EPPO's material competence.

To gather inculpatory as well as exculpatory evidence on the pre-accusatory phase of the criminal procedure, the EDP has at his disposal a very wide range of investigative measures that he can adopt. However, some measures may be prohibited depending on whether the offense under investigation is or is not punishable by a maximum deprivation of liberty of not less than four years - Article 30 (1) of the Regulation³⁵.

³⁴ I.e., according to Article 22 of the Regulation, falls within the scope of the EPPO the investigation and prosecution of crimes previewed in Directive (EU) 2017/1371 of the European Parliament and of the Council, of 5 July 2017, and also "... offences regarding participation in a criminal organization as defined in Framework Decision 2008/841/JHA, as implemented in national law, if the focus of the criminal activity of such a criminal organization is to commit any of the offences referred to in paragraph 1."

³⁵ See Peter Csonka, Adam Juszcak, and Elisa Sason in "The Establishment of the European Public Prosecutor's Office – The Road from Vision to Reality", available in <https://eucrim.eu/articles/establishment-european-public-prosecutors-office/>.

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

In addition to these investigative measures, the EDPs can order or request any other investigative measures foreseen in the national law of their Member States applied to similar criminal proceedings.

The mentioned investigative measures can only be ordered or requested by the EDPs if there are reasonable grounds for considering that the specific measure in question may provide information or evidence useful for the investigation and if the same objective cannot be achieved by less intrusive means, being that all procedures and modalities for the application of the measures are governed by the applicable national law.

In the matter of obtaining and preserving the evidence, some challenges may arise that can call into question the efficiency and swiftness of the investigation. These challenges can be solved depending on the degree of functional autonomy that EDPs have while running ongoing investigations.

Moreover, despite the Regulation assigning these powers to the EDP, what will be his or her freedom of action? Does the EDP have to request instructions from the Permanent Chamber or the Supervising European Prosecutor each time he or she intends to carry out or request regarding any of these evidence procedures? Will the instructions given by the Permanent Chamber or by the Supervising European Prosecutor be generic guidelines to all investigations, or will they be for each specific investigation? And what is the extent of the instructions to be given, will it be the intention of the Permanent Chamber and the Supervising European Prosecutor to outline all the EDP's

performance in the scope of the investigation, or the EDP can conform his or her performance according to what seems appropriate, and necessary to obtain fast and effective results?

There are investigative measures that are difficult to obtain, on the one hand, because they require a set of measures before obtaining them (such as authorization by a judge), and on the other hand, because in the face of more time-consuming action by the national authorities they can easily be hidden and, on a threshold, destroyed.

Given the nature of crimes within the scope of EPPO's competence - criminal offenses that damage financial interests of the European Union - it may, for example, be necessary to conduct searches in any premises of the suspects or defendants to seize accounting books relevant to the investigation, searches to seize computer data stored in computer devices located in any premises, or even to intercept electronic communications of the suspects or defendants.

These investigative measures affect fundamental rights of suspects and defendants, such as the right to a private and family life, provided for in article 7 of the European Charter of Fundamental Rights (henceforth ECFR) or the right to data protection, provided for in article 8 ECFR. Therefore, since EDPs must follow the rules and procedures of national and European law³⁶, in most Member States, the abovementioned investigative measures can only be obtained and later used in trial with the prior authorization of a judge, as a way of ensuring that the restriction of these fundamental rights obeys a weighting judgment and criteria of absolute necessity, adequacy, and proportionality. In other words, it means that these investigative measures will never be promptly executed since EDPs are legally bound to a previous step of validation before the court of the Member State where the investigation measures are put into practice.

Given the above, the question that arises is what should EDPs do in these cases? Should they previously ask for instructions or validation from the Permanent Chamber or the Supervising European Prosecutor before they execute or ask for court validation of the mentioned investigative measures? If EDPs must ask for instructions to the Permanent Chamber or the Supervising European Prosecutor before the execution of a certain investigative measure, it will further delay the performance of the investigation and may endanger the obtaining of evidence in due time. EDPs have the immediacy³⁷ of the investigation, the knowledge³⁸ of the language of the Member State where the ongoing investigations are carried out, and, more importantly, the knowledge of national law³⁸,

³⁶ Article 30 (5) of the Regulation

³⁷ The principle of immediacy means the direct and immediate knowledge of the case and follows from the principles of orality and the immutability of the court. The ECtHR considers this principle to be an important guarantee to assure a fair criminal proceeding. See case of P.K. v. Finland, 09.07.2002, case of Cutean v. Romania, 02.12.2014, §§ 60-73, case of Cerovšek and Božičnik V. Slovenia, 07.03.2017, §§ 37-48; see also, the opinion of the Advocate General in Case C-38/18, 14.03.2019 (CJEU).

³⁸ "The benefits of the "national link" seem obvious. European Prosecutors, who are experienced in the legal system where the case is being investigated, prosecuted, and tried, are handling the case without facing any language barriers. To balance this "national way" of handling cases and to make sure that no bottlenecks arise if the supervisory role is entrusted to one European Prosecutor only, the Regulation foresees that it is the Permanent Chambers that monitor and direct the investigations and prosecutions (Art. 10(2)). Art. 12(1) accordingly clarifies that the European Prosecutors supervise the investigations and prosecutions conducted by the European Delegated Prosecutors on behalf of the Permanent Chambers and in compliance with any instructions the Permanent Chambers have given under Art. 10(3-5)).", see The Establishment of the European Public Prosecutor's Office - The Road from Vision to Reality (Peter Csonka, Adam Juszcak and Elina Sason) (<https://eucrim.eu/articles/establishment-european-public-prosecutors-office/>)

therefore being the most capable entity to decide what is the more suitable investigative measure. For this reason, there are no pertinent reasons that could lead the Permanent Chamber or the Supervising European Prosecutor to restrict EDP's actions due to the need to issue such specific instructions in each process.

It is also true that the Regulation says nothing about the extent of the powers that Permanent Chambers and Supervising European Prosecutors have on giving instructions to EDPs. In fact, from the analysis of the Regulation itself, it appears that the scope of action of Permanent Chambers and Supervising European Prosecutors will be quite wide, which results from the fact that EDPs are obliged to comply with the instructions issued, and may, in the event of non-compliance, be removed from the investigation³⁹. Such instructions may be that EDPs does not carry out a certain investigative measure because Permanent Chambers or Supervising European Prosecutors understand that it is not relevant, which may damage the investigation; they may also be for the EDPs to perform a certain investigative measure considered pertinent by Permanent Chambers or Supervising European Prosecutors, in which case the final investigation may also be harmed due to the length of the procedures.

Internal Rules of Procedure of the EPPO⁴⁰ foresees that EDPs can ask for a review of the instructions given by Permanent Chambers or Supervising European Prosecutor, but only in cases where the instructions are contrary to European law, the Regulation, or the applicable national law⁴¹. In this case, if an instruction from the Permanent Chamber or the Supervising European Prosecutor does not violate European law, the Regulation, or the applicable national law, but the EDP believes it is not suited to the ongoing investigation, or it is suited but the Permanent Chamber or the Supervising European Prosecutor thinks otherwise, he or she cannot react against that instruction. Consequently, the feasibility and purpose of the investigation itself will be at risk due to the impossibility of obtaining the necessary evidence to prosecute or due to obtaining evidence that is not relevant to the ongoing investigation (delaying it), which, consequently, frustrates the objectives for which the EPPO was created: prosecution on time of crimes that harm the Union's financial interests.

A second aspect, where EDPs functional autonomy is quite relevant, concerns the possibility of EDPs issuing arrest warrants. According to article 33 (1) of the Regulation, the competent EDP may order or request the detention of suspects or defendants under the national law applicable in similar national cases. And in cases where it is necessary to detain or surrender a person who is not in the Member State where the competent EDP is located, the latter may issue or request a European

³⁹ Article 28 (3), b) of the Regulation.

⁴⁰ College Decision 003/2020, available in <https://www.eppo.europa.eu/sites/default/files/2020-12/2020.003%20IRP%20-%20final.pdf>

⁴¹ See Article 47 (1), Internal Rules of Procedure.

Arrest Warrant⁴². Thus, if the EDP wants to order a pre-trial arrest of someone in his or hers Member State, he or she applies the national law, and if the person is in another Member State, the EDP shall issue a European Arrest Warrant.

The arrest warrant, whether national or European, relates to the need to detain a suspect or defendant to carrying out a criminal procedure or serving a precautionary measure. About the need to carry out a criminal procedure, this may refer to bringing the defendant into questioning when there is a high probability that he will not appear voluntarily for that purpose. Considering precautionary measures, they aim to prevent the verification of a specific cautionary necessity such as the risk of the defendant escaping to another country, the continuation of criminal activity or even the interference with the ongoing investigation.

Because the arrest of a suspect or defendant implies a restriction of their fundamental right to liberty⁴³, as noted above, in most Member States, as a way of ensuring that the restriction of this right obeys the criterion of legality, necessity, adequacy, and proportionality, the arrest warrant will have to be issued by a Court at the request of the EDP.

If the EDP identifies a cautionary necessity in an ongoing investigation that must be prevented, and if the cautionary necessity demands an arrest warrant, any delay on the part of the competent authorities in its authorization and execution may lead to the escape of the defendant. For instance, if the EDP has information that leads to the conclusion that the defendant may escape to another country if the procedure suffers a delay because the EDP is waiting for an instruction of the Permanent Chamber to later submit a request at the Court of his or hers Member State, the waiting may signify the evasion of the defendant to a Third State with which the Member State has no extradition protocol. In which case, there are no other legal procedures that allow the detention of the defendant. For these reasons, it is well understood that the decision to order or request an arrest warrant does not comply with the obligation of the EDP to obtain prior instructions from the Permanent Chamber or the Supervising European Prosecutor.

However, the Regulation does not mention the powers of the Permanent Chamber nor of the Supervising European Prosecutor to instruct EDP's in the matter of arrest warrants or other precautionary measures. The adoption of the precautionary measures seems essential to the effective pursuit of the investigation, either because the failure to prevent such cautionary necessities may mean the destruction of relevant evidence or because it may mean the defendant's escape.

Another issue may arise related to the European Arrest Warrant. As we mentioned above, about what should be understood by “judicial authority” and “judicial decision” within the meaning of article 1, paragraph 1 and article 6 (1) of the Council Framework Decision 2002/584 / JHA of 13

⁴² The European Arrest Warrant is issued under the Framework Decision 2002 / 584 / Council JHA (paragraph 2).

⁴³ Article 5 (1, c) and (3) of the ECHR and Article 6 of the CFREU.

July 2002, the CJEU already ruled on the requirements that must be fulfilled to a judicial authority of a Member State comply with the article.

For example, in cases where the EDP, under the national law of his Member State has the power to directly order a European Arrest Warrant, without the prior intervention of a judge, and does so by direct instruction from Permanent Chamber or Supervising European Prosecutor, will he be considered a “judicial authority” considering the recent CJEU rulings?

According to CJEU jurisprudence, a "judicial authority" must be independent of the executive branch, autonomous, and must have the power to make a free assessment as to the merits and requirements leading to the decision to issue an arrest warrant. Thus, a judicial decision can only be considered as such when issued by a judicial authority or when not originally issued by a judicial authority was the object of judicial control by a Court. Only then is the principle of the highest degree of confidence between the Member States respected. If the requirements are not fulfilled, the judicial authority of the executing Member State may refuse to execute the European Arrest Warrant.

The EPPO is an independent body, with a separation between its activities and the executive powers of the European Union and of the Member States, so, in principle, it is secure to sustain that the above-mentioned conditions are fulfilled for an EPPO decision to be considered a “judicial decision” issued by a “judicial authority”. But can we say that these assumptions uphold when it is the EDP who orders the European Arrest Warrant according to direct instruction from Permanent Chamber or Supervising European Prosecutor?

Following the jurisprudence of the CJEU, the Court accepts that judicial bodies with a hierarchical structure may be considered as “judicial authorities” since the hierarchical structure does not conflict with the principles of independence and autonomy. However, it is also mentioned that the underlying reason for the requirements is the necessity to ensure that there is judicial supervision that translates into a free assessment of the merits and requirements of the decision to issue a warrant. Thus, it could be difficult for the Permanent Chamber or the Supervising European Prosecutor to decide, in a considered and informed way, whether the EDP should issue or not a European Arrest Warrant when they do not have de immediacy of the case. And, to that extent, it can be understood that there is no such necessary and indispensable free assessment.

B. Termination of the investigation: prosecute or dismiss

Considering the general principles of criminal procedure, and regardless of the Member State in question, we can say beyond a doubt the power to prosecute or dismiss a case is the most important for the Prosecutor. This statement is as true for a national Prosecutor as it is for the EDP, as this decision-making power is decisive for assessing its degree of functional autonomy and has several practical consequences.

Article 35 (1) of the Regulation establishes that once the investigations are concluded, the EDP submits a report to the Supervising European Prosecutor containing a summary of the case and a draft decision whether to prosecute before a national court⁴⁴ or to consider a referral of the case⁴⁵, dismissal⁴⁶ or simplified prosecution procedure⁴⁷. After examining the report submitted by the EDP, the Supervising European Prosecutor forwards that report with his or hers own assessment of the proceedings to the monitoring Permanent Chamber, which will convey a final decision on the matter. The monitoring Permanent Chamber can decide not to take the decision proposed by the EDP, in which case it will undertake its own view of the case before taking a final decision or giving further instructions to the EDP⁴⁸⁻⁴⁹.

Nevertheless, the last part of article 36 (1)⁵⁰ of the Regulation foresees that if the EDP submits a report to the Supervising European Prosecutor proposing to bring the case to judgment, the monitoring Permanent Chamber cannot decide to dismiss the case. From the reading of this article, and according to some Authors⁵¹, this power of EDP does not allow derogations. If this is the case, is it possible to assume the EDP genuinely has autonomy in the decision to prosecute?

Some authors⁵² support article 36 (1) of the Regulation is *lex specialis* to article 35 (2) of the Regulation. Although it seems clear that if the EDP decides to prosecute, the monitoring Permanent Chamber cannot decide against it, it can give further instructions to the EDP to execute more investigative measures.

Reverting to the previous question, even though the monitoring Permanent Chamber can instruct the EDP to deliver additional investigative measures, does the monitoring Permanent Chamber have the power to dismiss the case when the EDP decides to prosecute? And, if it is possible, does that power reflects less autonomy to the EDP?

Article 10 (3) a) and b) of the Regulation foresees the power of the monitoring Permanent Chamber to bring a case to judgment under article 36 (1), (3), and (4) or to dismiss a case under point

⁴⁴ Article 36 of the Regulation.

⁴⁵ Article 34 of the Regulation.

⁴⁶ Article 39 of the Regulation.

⁴⁷ Article 40 of the Regulation.

⁴⁸ Article 35 (2) of the Regulation.

⁴⁹ "In principle, the Chamber is not bound either by the draft decision of the EDP or by the assessment of the supervising European Prosecutor, since it can undertake its own review of the case before taking a final decision or giving further instructions to the EDP", see Fabio Giuffrida in "The European Public Prosecutor's Office: King without kingdom?" in <https://www.ceps.eu/ceps-publications/european-public-prosecutors-office-king-without-kingdom/>.

⁵⁰ It reads as follows: "...The Permanent Chamber cannot decide to dismiss the case if a draft decision proposes bringing a case to judgment."

⁵¹ See Peter Csonka, Adam Juszcak and Elisa Sason, op. cit., "[i]t should be noted, however, that the Permanent Chamber cannot decide to dismiss a case if the handling European Delegated Prosecutor proposes to bring a case to judgment (Art. 36(1))." and Fabio Giuffrida, op. cit., "(...) if the EDP is of the opinion that a prosecution shall be launched, the Permanent Chamber cannot decide to dismiss a case, it can only "postpone it, e.g. by asking for further evidence."

⁵² "The provision contains a *lex specialis* rule to that Article 35 (2). It was introduced in the final stages of the negotiation process to further strengthen the role of the EDPs. Some delegations argued that it would be incompatible with the status of the prosecutors under national law if the Chamber could simply decide to dismiss a case where the handling EDP consider the case to require prosecution. This second sentence of paragraph 1 of Article 36, however, does not exclude the possibility that the competent Permanent Chamber takes a different position on whether to go ahead with the prosecution of the case: while this provision is intended to prohibit the Chamber from simply dismissing the case, the Chamber can instruct the EDP to reconsider his/her draft decision and/or request the EDP to provide further evidence and to submit a revised report.", see "EPPO Regulation Commentary", Hans-Holger Hermsfeld, page 334, paragraph 11.

(a) to (g) article 39. Concerning the power to dismiss a case, article 39 (1) establishes that where prosecution has become impossible, pursuant to the law of the Member State of the handling European Delegated Prosecutor, the Permanent Chamber shall, based on a report provided by the European Delegated Prosecutor handling the case in accordance with Article 35(1), decide to dismiss the case on account of the following grounds: (a) the death of the suspect or accused person or winding up of a suspect or accused legal person; (b) the insanity of the suspect or accused person; (c) amnesty granted to the suspect or accused person; (d) immunity granted to the suspect or accused person unless it has been lifted; (e) expiry of the national statutory limitation to prosecute; (f) the suspect's or accused person's case has already been finally disposed of concerning the same acts; and (g) the lack of relevant evidence.

Making a combined and systematic analysis of articles 10 (1) a) and b), 36 (1) and 39 (1) of the Regulation, it seems possible to interpret that, despite article 36 (1), last part, the monitoring Permanent Chamber would always have the power to dismiss the case in one of the situations of article 39 (1). Mainly because the last sentence of article 36 (1) of the Regulation is *lex specialis* to article 35 (2) of the Regulation, but not to article 39 (1).

So, for instance, if we have a situation in which the EDP decides to prosecute, but the monitoring Permanent Chamber considers there is no relevant evidence⁵³ in the process (article 39, paragraph 1, g) of the Regulation), can the monitoring Permanent Chamber decide to dismiss the case? And if so, what is the impact on the functional autonomy of the EDP and the effectiveness of the pursuit of the EPPO objectives?

Taking into account that the EDP carries out the investigation, has the immediacy of the evidence carried out to the investigation, has a deep familiarity of national law and language of his Member State, it can cause some perplexity that the monitoring Permanent Chamber may decide against the EDP decision, considering the monitoring Permanent Chamber's knowledge of the case is limited to the summary presented by the EDP and the Supervising European Prosecutor and in a different language of that used in the proceedings.

In these situations, the question that follows is going to be the criteria used by the monitoring Permanent Chamber to decide against the decision of the EDP? It can also cause some bewilderment the opposite situation: if the EDP decides to prosecute, but the monitoring Permanent Chamber - alerted by the Supervising European Prosecutor - concludes the accused was granted amnesty⁵⁴, the monitoring Permanent Chamber cannot decide for the dismissal of the case?

Dismissing a case due to the lack of relevant evidence is a good example of the wide margin of discretion the monitoring Permanent Chamber has, since the understanding of what means "lack

⁵³ Article 39 (1) (g) of the Regulation.

⁵⁴ Article 39 (1) (c) of the Regulation.

of relevant evidence” may differ⁵⁵ depending on who examines the evidence that was carried out to the investigation during the pre-accusatory phase.

How can the monitoring Permanent Chamber meet the necessary conditions to decide in a different direction from the EDP, abide by the criteria of objectivity, impartiality, and legality required in a process of this nature and that complies with the Rule of Law?

As it is not possible to determine what will be the criteria adopted by the monitoring Permanent Chamber when deciding to dismiss a case, and since some of the paragraphs of article 39 (1) of the Regulation present some margin of discretion, it may be possible that in some cases the decisions of the monitoring Permanent Chamber violate European Union law⁵⁶.

As anticipated above, can occur a situation in which the EDP submits a report to dismiss a case, but the monitoring Permanent Chamber decides against it. In this case, the problems mentioned above equally occur but with aggravating factors. A decision to prosecute means to bring the case to judgment, aiming to convict the defendant for crimes committed and punishing him with imprisonment or, in less serious cases, a fine, which has serious consequences.

Consequently, the decision to prosecute must obey the criteria of objectivity and impartiality, as this is the only way to guarantee that the defendant has a fair, equitable, and legal process. Otherwise, we run the risk of violating the various legal provisions⁵⁷ that protect the right to a fair trial, which must be interpreted in the sense that it must apply to all stages of the proceedings⁵⁸.

So, as to the question of whether the EDP lacks autonomy in terms of the decision to prosecute or dismiss a case, we must reply affirmatively. As to the impact that less autonomy of the EDP has on the pursuit of the goals of the EPPO, we can only ascertain that the unawareness of the monitoring Permanent Chamber of the national law and language in which the proceedings are developed can damage the justice of the final decision of the Chamber on this matter.

5. Conclusion

The EPPO represents an important step towards the European integration project in the context of criminal cooperation.

The need to ensure the coherence and uniformity of action and protection of the European Union's financial interests dictated that the EPPO's internal structure was organized hierarchically. The essential element of the EPPO's activities is the EDP, which, because it is linked to the guidelines

⁵⁵ Like some authors conclude “*Relevant evidence is lacking not only if no relevant evidence at all supports the incrimination of the suspect, but also if there is insufficient support for the allegation. Depending on the specifics of national law, prosecution before national courts may only be permissible if a preponderance of inculpatory evidence exists, or only if a high likelihood of conviction exists, based on a preliminary analysis of the evidence.*”, see “*EPPO Regulation Commentary*”, Hans-Holger Hemsfeld, page 365, paragraph 36.

⁵⁶ Namely, given the material scope of the EPPO's, articles 83 and 86 (2) of the TFEU, Directive (EU) 2017/1371, and the Regulation.

⁵⁷ Such as article 2 and article 3 (1) TFEU, article 47 and 48 of the CDFEU, and article 6 of the Convention.

⁵⁸ See footnote 30.

and instructions issued by the Permanent Chamber and the Supervising European Prosecutor, leads us to affirm that the EDP is not truly autonomous in the EPPO's internal structure.

As mentioned above, this lack of autonomy of the EDP predicts several problems in the functioning of the EPPO and raises several practical questions. The most important of all is: how does this lack of autonomy affects the efficient and effective functioning of the EPPO?

In the investigation phase, which is essential to any criminal procedure because it is here that all evidence is obtained in order to prosecute or dismiss a case, it is up to the EDP to assess the facts and proceed to obtain and collect the evidence accordingly with the guidelines and instructions of the Permanent Chamber, but always in compliance with the national law of the Member State where the investigation is ongoing. Also, the EDP is only able to request a review of the instructions of the Permanent Chamber when he or she considers them to be contrary to European Union law, including the Regulation, or to the national law applicable under the terms of article 47 of the EPPO's Rules of Procedure, which does not solve the problem in our opinion. Consequently, it is necessary to understand how the EDP can carry out investigations in the most efficient way if it is not free to act according to his or hers understanding?

A second step in the criminal procedure, for which we believe it is equally essential that the EDP has functional autonomy, is related to the decision to prosecute, or dismiss the case. As mentioned, the EDP has the immediacy of the evidence produced in the investigation, having extensive knowledge of the law of the Member State and its language, being the most competent to make this decision. However, the EDP only prepares a report with a summary and draft decision for the Supervising European Prosecutor, who refers everything to the Permanent Chamber with his or hers own assessment of the case if it so chooses. The final decision is made by the Permanent Chamber, except for Article 36 (1) of the Regulation, when the EDP proposes to prosecute, but which we have already stated is open to interpretation. This is another problem.

How to avoid or solve these problems?

First, it is important that the Permanent Chamber and the Supervising European Prosecutor are aware of the obstacles that excessive intervention can cause in the swift and effective development of investigations and should regulate their interventions accordingly. Therefore, their intervention with the EDP must be restricted to the minimum essential and indispensable, and should only issue general, abstract, and generic guidelines that aim to establish uniform procedures between the EDPs of all Member States, and not instructions for each case, except when it is essential to that specific case. Although it seems like an amazingly simple solution, the truth is that this would permit a much more efficient, less bureaucratic, and sharper articulation between the EDP and the Permanent Chamber and the Supervising European Prosecutor.

On the other hand, since it is the EDP who has the immediacy of the investigation, the Supervising European Prosecutor, in his or hers assessment, and the Permanent Chamber, in its decision, should respect the recommendation of the EDP. Only in exceptional and reasoned cases should the Permanent Chamber decide differently from the EDP proposal. In such cases, it ought to use the power provided for in Articles 35 (2) and 46, paragraph 2, and access the case file and carry out its own analysis, to ensure wide knowledge of the entire case file, before making its final decision or giving further instructions to the EDP. Only in this way, can it be said that in these cases the Permanent Chamber delivered an informed and considered opinion, respecting article 6 of the ECHR.

To fully conform with these solutions, the European Union should begin to create a minimum standard of what should be understood by ‘Court’ and ‘Public Prosecutor’. Also, the European Union should create common criminal procedural rules to uniformize criminal proceedings across the Member States, most importantly with regard to the collection of evidence.

Finally, article 119 (1) provides for an evaluation of the Regulation up to five years after the EPPO has started its functions (article 120 (2), paragraph 2) to assess its impact, as well as its effectiveness and efficiency and their work practices. At that time, if these problems subsist, an alteration to the Regulation (article 119 (2)) should be considered, eventually, granting Permanent Chamber an advisory and non-decision-making role in these matters, and exercising the control of EDP's performance only through the Supervising European Prosecutor.

Member States recognize the importance and necessity of the EPPO, but, at the same time, the EPPO represents a decrease in their sovereignty, because the power to conduct investigations into crimes of the PIF Directive is now transferred to the EPPO as well as the power to decide whether to prosecute or dismiss a case and the Member States do not have any say in none these matters. These financial interests are also interests of the Member States, either because they contribute to the European Union's budget or because they receive financial assistance from it, which makes it less likely that they will accept giving more autonomy to EDP. But the cost of groundless prosecution or dismissal when there are grounds to prosecute or dismiss is far greater than any fear Member States may have about the actions of EDPs, when fundamental principles of European Union and International law are at stake, such as the right to a fair and equitable process.

Judicial cooperation measures in criminal matters, like their equivalents, aim at greater European integration between the Member States, united by the same principles and objectives. Today we know that there is still a long way to go to overcome the fragmentation that exists in the third pillar of the European Union, and the reality is still far from what was imagined. The EPPO was not immune to these vicissitudes: the idealized project is far from the intended reality. The European Delegated Prosecutor is the link between the imagination and the reality of what the EPPO is and what it should be, and if it is not granted full autonomy, the dream will hardly come true.