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THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE FROM THE PERSPECTIVE OF THE EUROPEAN COURT OF HUMAN RIGHTS**

The hybrid structure of the EPPO and its strong links to the national legal order raise many questions. One of these is the possibility for EPPO cases to reach the European Court of Human Rights via the role envisaged for national law and national authorities in future EPPO cases. This paper analyses the possibilities of certain EPPO cases being subject to review before the European Court of Human Rights and the avenues that could lead to such an outcome.

Keywords: European Court of Human Rights, European Public Prosecutor's Office, protection of human rights

1. INTRODUCTION

Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (hereinafter: the Regulation) is the culmination of years of work and discussion on the idea of a European Public Prosecutor's Office[1] (hereinafter: EPPO). The adopted Regulation continues to be controversial and a subject of detailed academic debate.

Considering that the idea of the EPPO is one of a supranational, European prosecution body, the human rights issue is at the forefront of the debate. Given

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[1] See in detail in: A. Novokmet, "The European Public Prosecutor's Office and the Judicial Review of Criminal Prosecution" 8(3) 2017 *New Journal of European Criminal Law* 2017, pp 374–402.

its investigative and prosecutorial function,[2] the EPPO will significantly intervene in fundamental rights and freedoms and will make an impact on them. Aside from the human rights issues that habitually arise when discussing a prosecution body, the human rights issues are even more highlighted with respect to the EPPO because of its novelty, its European Union character, the complexity of its structure, as well as other intricacies of its normative framework arising from the Regulation itself.

The EPPO comes into being in a landscape in which multiple actors are already involved in human rights protection, both procedurally and substantively. It is a landscape characterised by interplay and varying levels of mutual influence between the actors. International, regional and domestic mechanisms can be identified.[3] Thus, the human rights question with respect to the EPPO can be analysed from multiple points of view.

This contribution attempts to shine light on the perspective of the European Court of Human Rights (hereinafter: the Court) on the EPPO. Its focus is the possibility of the EPPO's actions coming under the scrutiny of the Court in proceedings instituted before the Court by an individual alleging violation of his or her rights under the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention). Where does this possibility arise from? The question of a European Union body – the EPPO – coming under the scrutiny of the Court arises from the complexity of the EPPO's design, often described as "hybrid" and "double hat".[4] Specifically, the role of national law and, most importantly, of national courts, is key to answering the question of the Court's scrutiny over the EPPO and its cases.

In discussing the issue, reasons for the need to look at the Court`s perspective on the EPPO will be clarified and two key facets of the Court`s perspective indicated. The Court`s current viewpoint regarding the Union and its law will be presented, followed by its application on the EPPO as it arises from the Regulation. Finally, possible avenues for the EPPO's actions to be the subject of Convention proceedings will be discussed. These avenues will focus on the connection between EPPO cases and Member States that open the possibility of EPPO cases being scrutinised before the Court.

[2] Ibid.

[3] To name a few, the United Nations and bodies under its auspices, the European Union and its bodies, national jurisdictions and national bodies, the Council of Europe, the European Court of Human Rights as established by the Council of Europe's Convention on Human Rights and Fundamental Freedoms.

[4] A. Met-Domestici, "The Hybrid Architecture of the EPPO: From the Commission's Proposal to the Final Act" (2017) 3 *eucrim*, pp 143-148, p 144. Also, H.-H. Herrnfeld, "The EPPO's Hybrid Structure and Legal Framework: Issues of Implementation – A Perspective from Germany" (2018) 2 *eucrim*, pp 117-120.

2. TWO MAIN FACETS OF THE EUROPEAN COURT OF HUMAN RIGHTS' PERSPECTIVE ON THE EPPO

2.1. First facet or the substantive dimension

Regarding the Court's perspective on the EPPO, two main facets can be identified. The first is a substantive one. It is the view that covers the role of the rights and freedoms, as guaranteed by the Convention and interpreted by the Court, in the functioning of the EPPO and in the EPPO`s pursuit of efficient investigation and prosecution of offences affecting the financial interests of the Union. Thus, it covers the question of the substantive respect of Convention rights by the EPPO itself, as well as the more general question of respect of those rights in criminal proceedings in which the EPPO acts. The second and more general question reflects the possibility of human rights issues arising in proceedings in which the EPPO has exercised its function, even though the breach itself may not necessarily be attributed directly to the EPPO, or the breach is not the result of any deficiencies in the Regulation.

Speaking of guaranteeing the protection of fundamental rights by the EPPO, the Regulation stipulates that the EPPO shall ensure that its activities respect the rights enshrined in the Charter.[5] It also provides that the activities of the EPPO shall be carried out in full compliance with the rights of suspects and accused persons enshrined in the Charter, including the right to a fair trial and the rights of defence.[6] The procedural rights of suspects and accused persons are guaranteed as provided by the EU's procedural rights directives.[7] The Regulation therefore contains provisions on human rights protection which are explicitly and understandably linked to EU law. However, the previously mentioned procedural rights directives are to a large extent the codified case law of

[5] Article 5(1) of the Regulation. For the applicability of the Charter on EPPO proceedings, see V. Mitsilegas and F. Giuffrida, "The European Public Prosecutor's Office and Human Rights" in Geelhoed, Erkelens, Meij (eds), *Shifting Perspectives on the European, Public Prosecutor's Office* (T.M.C. Asser Press, 2018) pp 59-99, pp 61-66.

[6] Article 41 of the Regulation.

[7] For the procedural rights directives and the Convention standards in the area covered by them, see: E. Ivičević Karas, Z. Burić, M. Bonačić, "Unapređenje procesnih prava osumnjičenika i okrivljenika u kaznenom postupku: pogled kroz prizmu europskih pravnih standarda" (2016) 23(1) *Hrvatski ljetopis za kaznene znanosti i praksu*, pp 11-58.

the Court,[8] with some notable improvements.[9] It must also be noted that the directives are implemented in national law with varying degrees of success, depending on the State. The solutions adopted at the national level are open to criticism,[10] as are the differences that exist in implementation in various Member States,[11] even though there are common minimum rules.

Moreover, it should be borne in mind that fundamental rights, as guaranteed by the Convention and as they result from the constitutional traditions of Member States, constitute general principles of the Union's law.[12] Insofar as the Charter on Fundamental Rights contains rights which correspond to rights guaranteed by the Convention, the meaning and scope of these Charter rights should be the same as those laid down by the Convention.[13] Mitsilegas and Giuffrida state that nevertheless "an explicit reference to the ECHR would have been welcome"[14] in the Regulation. One can agree with this statement.

Thus, for Charter rights corresponding to Convention rights, the case law of the Court is crucial. For example, Article 48 of the Charter corresponds to Articles 6(2) and 6(3) of the Convention.[15] Essentially, its meaning and scope should therefore be the same as the rights under Article 6(2) and 6(3) of the Convention as they arise from the Court's case law. Despite its at times problematic rela-

[8] Đurđević states this in referring to the right of access to a lawyer. See Z. Đurđević, "The Directive on the Right of Access to a Lawyer in Criminal Proceedings: Filling a Human Rights Gap in the European Union Legal Order" in Đurđević, Ivičević Karas (eds), *European Criminal Procedure Law in Service of Protection of European Union Financial Interests: State of Play and Challenges* (Croatian Association of European Criminal Law 2016) p 20.

For the right to information in criminal proceedings, see S. Allegrezza and V. Covolo V, "The Directive 2012/13/EU on the Right to Information in Criminal Proceedings: Status Quo or Step Forward?" in Đurđević, Ivičević Karas (eds), *European Criminal Procedure Law in Service of Protection of European Union Financial Interests: State of Play and Challenges* (Croatian Association of European Criminal Law 2016) pp 49-50.

[9] For example, Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 contains provision on the quality of legal aid and training (Article 7).

[10] See A. Novokmet, "The Europeanization of the Criminal Proceedings in the Republic of Croatia through the Implementation of the Directive 2013/48/EU" (2019) 27 *European Journal of Crime, Criminal Law and Criminal Justice*, pp 97-125. The author refers to the effects and perception of the implementation of Directive 2013/48/EU in Croatian criminal procedure and criticises some domestic legal solutions whilst offering a different approach.

[11] Similarly for issues arising from the differing national transposition of directives and human rights issues arising from the structure of the Regulation, see G. Illuminati, "Protection of Fundamental Rights of the Suspect or Accused in Transnational Proceedings Under the EPPO" in Bachmaier Winter Lorena (ed.), *The European Public Prosecutor's Office: The Challenges Ahead* (Springer Nature 2018) pp 184, 195.

[12] Article 6 (3) of the Treaty on European Union.

[13] Article 52 (3) of the Charter on Fundamental Rights.

[14] Mitsilegas and Giuffrida (n 5) p 66.

[15] Explanations relating to the Charter of Fundamental Rights [2007] OJ C 303/02.

tionship with the Strasbourg Court, this basic principle is confirmed in the Court of Justice's case law.[16] Convention standards are in fact a minimum standard below which the protection provided by Union law should not go.[17]

2.1.1. Interference with specific Convention rights

Turning back to the EPPO and specific Convention rights that might come into play in its work, those rights include, but are not limited to, respect of rights guaranteed under Articles 3, 5, 6, 7, 8 of the Convention and Article 1 of Protocol no. 1 to the Convention. The EPPO can interfere with these rights. Other bodies working in EPPO proceedings, such as national law enforcement, can interfere with these rights.[18] However, the question of concrete interference itself is separate and should not be mistaken for the attribution of responsibility under the Convention framework (see *infra* under 3).

A thorough analysis of all the possible actions of the EPPO that could interfere with human rights as guaranteed by the Convention, and all the human rights issues that could arise in EPPO-led cases, exceeds the limits of this contribution, but a presentation of such actions is given for a more complete understanding of the Court`s perspective.

Article 30 of the Regulation regulates the investigation measures available to the EPPO, stipulating six groups of investigation measures the European Delegated Prosecutors should be entitled to order or request, in addition to other measures in Member States available to prosecutors under national law in similar national cases.[19] The Regulation in Article 30(2) to 30(5) provides for express safeguards for individuals, specific to investigation measures. With respect to safeguards, conditions and limitations to investigation measures, it essentially refers back to national law. It stipulates in paragraph (5) that European Delegated Prosecutors "may only order the measures referred to in paragraphs 1 and 4 where there are reasonable grounds to believe that the specific measure in question might provide information or evidence useful to the investigation, and where there is no less intrusive measure available which could

[16] See judgment in Case C-612/15 of 5 June 2018 (*Kolev and Others*) §§ 103-106.

[17] Article 52(3) of the Charter on Fundamental Rights, second sentence.

[18] See *The European Public Prosecutor's Office: Strategies for Coping with Complexity* (Study requested by the CONT Committee) p 90, available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2019/621806/IPOL_STU(2019)621806_EN.pdf (30 September 2019).

[19] Article 31(1) and (5) of the Regulation. Member States shall ensure that the European Delegated Prosecutors are entitled to order or request the enumerated investigation measures at least in cases where the offence subject to the investigation is punishable by a maximum penalty of at least 4 years of imprisonment.

achieve the same objective". However, the procedures and modalities for taking the measures again refer to national law.

All the measures enumerated in Article 30(1) (a)-(c) and (e)-(f) interfere with the right to respect for private and family life, home and correspondence as guaranteed in Article 8 of the Convention.[20] Generally, interference with Article 8 rights must be "in accordance with the law", referring not only to a legal basis but also to the quality of law. In the case law of the Court, written, statutory "law" is defined as "the enactment in force as the competent courts have interpreted it".[21] The interference must further pursue a "legitimate aim" and it must be "necessary in a democratic society". The Court`s case law places emphasis on sufficient and effective safeguards that must be afforded to the individual in question, be it a physical or legal person.[22] These safeguards must be effective not only as a normative solution but must operate effectively in the concrete circumstances of a particular case.[23] Judicial control[24] is of the utmost importance, meaning that automatic and superficial judicial scrutiny is insufficient.[25]

For example, the search of premises, transport, private homes, property, computer systems, etc., under Article 30(1)(a) of the Regulation interferes with the right to respect for private life and home and should thus comply with the above requirements. When allegations of unlawful searches arise, for example, an effective investigation into those allegations might also be required under the Convention.[26] Furthermore, depending on the manner of execution of the search of any type of premises or buildings, the investigation measure might also interfere with Convention rights under Article 3 – the accused person`s rights or those of third persons[27] (such as an overly violent and intrusive search affecting the people found on the premises).

Furthermore, although the issue of admissibility of evidence does not in principle fall under the Court`s scrutiny, the use of evidence obtained in breach

[20] For investigation measures in the context of Charter rights, see J. Inghelram, "Search and Seizure Measures and their Review" in Erkelens, Meij, Pawlik (eds), *The European Public Prosecutor's Office: An Extended Arm or a Two-Headed Dragon* (Asser Press, 2015) pp 128-129.

[21] See *K.S. and M.S.* v Germany, judgment, 33696/11, 06 October 2016, § 34.

[22] See *Saint-Paul Luxembourg S.A. v Luxembourg*, judgment, 26419/10, 18 April 2013.

[23] See *Iliya Stefanov v Bulgaria*, judgment, 65755/01, 22 May 2008, § 38.

[24] For types of judicial control, see Z. Đurđević, "Judicial Control in Pre-Trial Criminal Procedure Conducted by the European Public Prosecutor" in K. Ligeti, *Toward a Prosecutor for the European Union, Volume 1, A Comparative Analysis* (Hart Publishing, 2013) pp 986-911.

[25] For the level of scrutiny before the Court depending on the type of judicial control in the context of a search, see *Harju v Finland*, judgment, 56716/09, 15 February 2011, §§ 42-46. For superficial and inadequately reasoned judicial orders for secret surveillance, see *Bosak and Others v Croatia*, judgment, 40429/14 et al., 6 June 2019, § 45.

[26] See *Vasylchuk v Ukraine*, judgment, 24402/07, 13 June 2013, § 84.

[27] See *Gutsanovi v Bulgaria*, judgment, 34529/10, 15 October 2013, §§ 125-137.

of Convention rights might affect the fairness of the trial as a whole[28] and thus lead to a violation of Article 6 of the Convention. Therefore, the use in criminal proceedings of evidence obtained by undertaking measures enumerated in Article 30(1) of the Regulation might raise a fair trial issue.

The freezing of instrumentalities or proceeds of crime, including assets, under Article 30(1)(d), interferes with the right to peaceful enjoyment of possessions under Article 1 of Protocol no 1 to the Convention.[29] However, even seizing computers containing data could raise issues under Article 1 of Protocol no 1 to the Convention. In addition to potentially breaching the right to a trial within a reasonable time, protracted proceedings in EPPO cases risk further breaches of Convention rights. Measures that include the freezing of assets, confiscation, conservatory measures limiting access to any kind of possessions or property and that last too long risk falling foul of Article 1 of Protocol no 1 to the Convention.[30]

Further, under Article 33 of the Regulation, the handling European Delegated Prosecutor (hereinafter: EDP) may order or request the arrest or pre-trial detention of the suspect or accused person in accordance with the national law applicable in similar domestic cases. This authority given to the handling EDP means that actions of the EPPO, depending on the national law, will lead to interference with the right to liberty and security. Therefore, all the considerable case law of the Court under Article 5 of the Convention must be observed. As it stands, the Regulation itself provides for no express prerequisites for ordering or requesting arrest or detention.[31] Given the central importance of the right at issue and the ambiguity of the Regulation, i.e. its reference back to national law, implementation measures in Member States and the national law will be responsible for ensuring Convention compliant, sufficiently precise, legal norms. Essentially, the States will bear, through the national law, significant responsibility, although the EPPO remains the body "ordering or requesting the arrest or pre-trial detention". This ambiguity of the Regulation and the space left to national law also means that it is currently hard to delineate the extent to which the EPPO itself will act in particular situations, as well as its

[28] The Court examines whether the proceedings as a whole were fair, which includes the way in which the evidence was obtained. In case of breaches of Article 8 of the Convention, the accused must have the opportunity to oppose the use of evidence so obtained and to dispute its authenticity; the quality of the evidence is taken into consideration. See *Dragojević v Croatia*, judgment, 68955/11, 15 January 2015, §§ 127-135, for evidence obtained through secret surveillance in breach of Article 8, but not falling foul of Article 6 of the Convention. Different standards apply to evidence obtained in breach of Article 3 of the Convention.

[29] See *Džinić v Croatia*, judgment, 38359/13, 17 May 2016.

[30] Regarding the right to peaceful enjoyment of possessions, see also Article 38 of the Regulation. For case law, see, for example, *Vuković v Croatia*, judgment, 47880/14, 15 November 2018.

[31] For the scope of rights of suspects and accused persons, see Article 41 of the Regulation.

manner. The possible interferences with Convention rights arising from the EPPO`s work do not end with the above, as the decision to dismiss a case might also raise questions of the rights of victims of crime,[32] while issues on the choice of forum in EPPO cases might raise questions under Article 7 of the Convention.[33]

As shown, the question of whether the EPPO's actions as they stem from the Regulation would be compliant with Convention rights as the Court interpreted them, or whether they would fall short of applicable standards, is a complex one. A large number of very specific questions arise from the text of the Regulation itself, but not enough clear and detailed answers can be found in the text, given the importance of the institution of the EPPO and the sensitive area it interferes with.[34] In fact, at important points, the Regulation refers to national law. The substantive perspective and the wide issue of respect of human rights have been the subject of academic debate[35] and, given all the above, these will certainly continue to be important topics in discussions on the EPPO.

2.1.2. The second facet or the procedural dimension

The second facet, and the main focus of this contribution, is the possibility of the EPPO's actions coming under the scrutiny of the European Court of Human Rights in proceedings instituted before that Court by an individual alleging a violation of his or her Convention rights. It has been stated that the EPPO interferes with human rights. This is not in doubt. However, can a suspect, an accused or a victim of a crime[36] lodge an application before the Court in connection with an EPPO-led case without that application being declared

[32] Article 39 of the Regulation.

[33] Compare *Seychell v Malta*, judgment, 43328/14, 28 August 2018, in which the applicant was unable to know which court he would be tried before and what consequences his actions could entail, owing to the discretion of the State Attorney as to the choice of court, and leading to a violation of Article 7 of the Convention; and similarly *Camilleri v Malta*, judgment, 42931/10, 22 January 2013.

[34] As to choice of forum, see, for example, Michele Panzavolta, "Choosing the National Forum in Proceedings Conducted by the EPPO: Who Is to Decide?" in Lorena Bachmaier Winter (ed), *The European Public Prosecutor's Office: The Challenges Ahead* (Springer Nature 2018) pp 82-83.

[35] For example, see an extensive analysis by Mitsilegas and Giuffrida (n 5) pp 59-99.

[36] All those enumerated – the suspect, accused, victim of crime – must be able to claim the status of "victim" of a violation of a Convention right in order for an application to be admissible. A victim of a violation of a Convention right is also an appropriate term once the Court finds a violation by a judgment. Thus, one needs to use the term victim with clarity and precision in order to avoid confusion.

inadmissible? If so, what would be the (procedural) path for such an application, under which conditions would this be possible, and in which situations? This can be described as a procedural issue. The origin of this issue and the key to clarifying it lie in the significant role given to national courts in EPPO proceedings. Thus, the answer is not a clear-cut "no".

An analysis of the Court`s perspective is necessary given that all EU Member States participating in the enhanced cooperation are subjected to the Convention and the Court's supervision concerning respect of Convention rights. Convention rights and the Court's case law also play an important role within the framework of EU law, as sketched above. Applications against States that participate in the EPPO's establishment are normally lodged with the Court. The cases against those EU States increasingly touch upon EU law, as will be shown below. At the same time, the Regulation, despite establishing the EPPO as an EU body, nonetheless leaves the door open to interpretation when it comes to the possible activation of the Court's jurisdiction *via* the actions and decision of national bodies.

3. THE EUROPEAN COURT OF HUMAN RIGHTS' CASE LAW RELEVANT TO THE PROCEDURAL FACET

3.1. Admissibility questions

Every High Contracting Party to the Convention undertook to secure Convention rights for everyone within their jurisdiction,[37] with the Court established as the guardian and supervisor.[38] The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto.[39] The Court's jurisdiction extends to all matters concerning the interpretation and application of the Convention, with the Court having the last say in the event of a dispute.[40] In setting the admissibility criteria, the Convention provides for, *inter alia*, time limits, exhaustion of domestic remedies, and that the Court shall declare inadmissible any individual application submitted under Article 34 if it considers that the application is incompatible with the provisions of the Convention or the Protocols thereto.[41]

[37] Article 1 of the Convention.
[38] Article 19 of the Convention.
[39] Article 34 of the Convention.
[40] Article 32 of the Convention.
[41] Article 35 of the Convention.

In order for an application to be admissible, it must, *inter alia*, be lodged against a Member State, lodged within the six-month time limit after a final decision was taken, lodged by a Convention-recognised petitioner claiming to be a victim of a violation of a Convention right, and lodged after all available and efficient domestic remedies were exhausted.[42] The application must be admissible under all grounds related to the Court's jurisdiction (admissibility *ratione personae*, *ratione loci, ratione temporis, ratione materiae*)[43] and under the so-called merits based grounds.[44]

The admissibility criteria, although in the Court's case law much more nuanced, complex and casuistic than the above would suggest, is a baseline for the consideration of possible avenues for EPPO related cases to reach the merits stage.

3.2. The Court's position towards the European Union and its law[45]

Turning to the European Union, as a non-member of the Convention it cannot be a respondent before the Court. Applications lodged against all EU Members but aimed directly at the Union or its acts are inadmissible *ratione personae*. Applications essentially directed against decisions of EU bodies fall outside the Court's jurisdiction. These applications are declared inadmissible. In order for a complaint to fall within the Court's jurisdiction, there must be an act or an omission that can be attributed to the Member States.

Bearing the above in mind, today the relationship of the Court towards the European Union and its law is generally defined through the presumption of equivalent protection.

The basis underpinning this relationship is the understanding that a State which concludes a treaty assuming certain obligations, after which it concludes a second treaty preventing it from discharging its obligations under the first treaty, will be answerable under the first treaty.[46] This principle applies *a fortiori* when the first treaty affects the public order of Europe, as the Convention does, and thus the (partial) transfer of sovereignty from a State does not absolve

[42] See in detail in the Court's admissibility guide, available at: https://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf (30 September 2019).

[43] Ibid., pp 47-58.

[44] Ibid., pp 61-78.

[45] The author wrote in detail on the issue of European Union law in the case law of the European Court of Human Rights. This part of the contribution draws on that article and is partly based on it, although updated and modified. See M. Konforta, "Pravo Europske unije u praksi Europskog suda za ljudska prava s posebnim osvrtom na europski uhidbeni nalog" (2018) 25(1) *Hrvatski ljetopis za kaznene znanosti i praksu*, pp 65-97.

[46] *X. v Germany*, 235/56, 10 June 1956, and *Etienne Tête v France*, decision 11123/84, quoting the decision in *Austria v Italy*, 788/60, 11 January 1961.

the State of its obligations under the Convention.[47] The Court emphasised that a State "is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. Article 1 makes no distinction as to the type of rule or measure concerned and does not exclude any part of a Contracting Party's 'jurisdiction' from scrutiny under the Convention".[48] The presumption of equivalent protection and its prerequisites were detailed in the *Bosphorus* judgment[49] rendered in 2005 and later developed in *Michaud v France*,[50] *M.S.S. v Belgium and Greece*,[51] and *Avotiņš v Latvia*.[52]

In short, State action taken in compliance with legal obligations flowing from Union law is justified as long as the Union is considered to protect fundamental rights in a manner equivalent to the Convention.[53] The equivalency of protection encompasses both the substantive guarantees and the mechanisms controlling their observance.[54] The Court has explicitly held that equivalent does not mean identical, but comparable.[55] The Union, formerly the Community, was held to provide such protection due to the role and position of human rights in its legal order, the position and protection of the Court of Justice, the respect for Union law secured through the Commission's competence and actions, and the dialogue between national courts and the Court of Justice.[56]

The presumption is applicable only if the State was merely following its strict international, or, in this case, Union obligation.[57] It is applicable if the State had no margin for a different action but had to take the impugned action (the so-called "margin for manoeuvre" condition), and the full spectrum of the Union's protection mechanisms was applied.[58] The presumption will be rebutted if the protection of Convention rights is manifestly deficient in the particular case.[59]

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[47] *Etienne Tête v France,* decision, 11123/84, 9 December 1987.

[48] *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland*, Grand Chamber judgment, 45036/98, 30 June 2005 (hereinafter: *Bosphorus* judgment).

[49] Ibid.

[50] *Michaud v France,* 12323/11, judgment of 6 December 2012 (hereinafter: *Michaud* judgment).

[51] *M.S.S. v Belgium and Greece*, 30696/09, judgment of 21 January 2011 (hereinafter: *M.S.S judgment*).

[52] *Avotiņš v Latvia*, 17502/07, Grand Chamber judgment of 23 May 2016 (hereinafter: *Avotiņš* judgment).

[53] *Bosphorus* judgment, § 155.

[54] *Bosphorus* judgment, § 155.

[55] *Bosphorus* judgment, § 155.

[56] *Michaud* judgment, §§ 106-111. Konforta (n 45) pp 70-71.

[57] *Bosphorus* judgment, §§ 156-157.

[58] Konforta (n 45) p 71. *Bosphorus* judgment, §§ 156-157. *Avotiņš* judgment, § 105.

[59] *Bosphorus* judgment, § 156.

A prime example of the application of the presumption and the indication of possible issues to arise for the EPPO in connection with the "margin for manoeuvre" condition is the *M.S.S. v Belgium and Greece* judgment. The Court considered that under "the Dublin Regulation, the Belgian authorities could have refrained from transferring the applicant if they had considered that the receiving country, namely Greece, was not fulfilling its obligations under the Convention. Consequently… the impugned measure taken by the Belgian authorities did not strictly fall within Belgium's international legal obligations".[60] Therefore, the specific State behaviour disputed before the Court was not in fact a strict legal obligation.

Procedurally, the mentioned EU law cases were brought against Member States, alleging that certain measures of the respondent Member State, committed by a Member State body, violated Convention rights. Therefore, through the Member State's application of EU law, EU law and the activities of EU institutions indirectly come under the scrutiny of the Court.

The crux of the matter in relation to the EPPO is: (i) whether its actions can be attributed to Member States in order to attract the Court's jurisdiction, and (ii) can actions of Member States (in reality, actions of their bodies) be considered a fulfilment of strict obligation flowing from EU law, thus meeting the first condition of the presumption? Firstly, to establish the Court's jurisdiction, there must be State action – action of State organs. If there is no such action, but the impugned measure is one of an EU body, the application would be inadmissible.[61] Secondly, in order for the presumption to be activated, State action must be an expression of a strict EU obligation, and the State must not have had a margin for manoeuvre. Although the Court has examined the issue of the presumption in admissibility decisions,[62] at the merits stage[63] and in a special section of the judgment called responsibility of the State,[64] the main issues in the EPPO context remain the same. For the EPPO and the possible review of its cases before the Court, the key question remains that of impugned measures that can be attributed to the State. The EPPO being an EU body, logic would seemingly dictate that its actions fall outside the Court's jurisdiction and are not attributable to Member States. The situation is, however, not as clear cut as it might appear.

[60] *M.S.S.* judgment, § 340.

[61] *Cooperatieve Producentenorganisatie Van De Nederlandse Kokkelvisserij U.A. v Netherland*, decision, 13645/05, 20 January 2009.

[62] See *Povse v Austria*, decision, 3890/11, 18 June 2013.

[63] *Avotiņš* judgment (n 52).

[64] M.S.S. judgment, §§ 338-340.

3.3. Possible application in relation to the EPPO

The EPPO is without question a body of the European Union, with legal personality.[65] Structurally, the EPPO is organised at a central and at a decentralised level. It is often referred to as having a hybrid structure – both supranational and national.[66] The EPPO remains an EU body even when acting through its decentralised level and notwithstanding the "double hat" function of the European delegated prosecutors.[67] It is the body of a non-member to the Convention. As such, and as with all other EU bodies, its actions should not fall under the Court's scrutiny.

Firstly, as a body, and not a subject under international law, its actions cannot directly be the subject of the Court's scrutiny. In this respect, the Union's membership of the Convention is irrelevant. A body cannot be a respondent before the Court. However, as indicated previously, the issue is to whom the EPPO's actions are attributable. As a body of the Union, the EPPO's actions are attributed to the Union. But the Union is not a Convention member. Therefore, to the extent that the EPPO's actions are attributed exclusively to the Union, there would be no circumventing the fact that the Union did not accede to the Convention and cannot answer for the actions of its bodies before the Court. In the event of the accession of the Union to the Convention, an application could be lodged against the Union alleging a violation of Convention rights committed by the EPPO as a Union body.

What other possible situation exists for a case, stemming from the EPPO's actions, to come before the Court? The answer lies in the EPPO's hybrid structure, specifically in the role of national courts and national law. Essentially, the answer is in possible applications against particular Member States which, through their bodies, most notably the courts, interfered with individual Convention rights, such as the rights under Articles 3, 5, 6 or 8, for example.

The interwoven elements opening the door to the Court's supervision over EPPO cases can be summarised in the following: a) national law; b) national courts and national bodies; c) judicial review. The combined effect of these

[65] Article 3 of the EPPO Regulation.

[66] See Z. Đurđević, "Legislative or Regulatory Modifications to Be Introduced in Participant Member States to the Enhanced Cooperation, in *International Conference on Enhanced Cooperation for the Establishment of the EPPO*, Rome 24-25 May 2018, pp 101-102.

[67] Luchtman and Vervaele state that although "the legal consequences of EPPO activity are ultimately felt within the legal orders of the Member States, the fact remains that the EPPO is a European body, which is entrusted with a series of tasks that – by their very definition – cannot be clearly attributed to a single Member State". M. Luchtman and J. Vervaele, 'European Agencies for Criminal Justice and Shared Enforcement (Eurojust and the European Public Prosecutor's Office)' (2014) 10(5) *Utrecht Law Review*, 144.

factors provides a strong argument for a future review of EPPO cases before the Court.

Firstly, national law applies to the extent that a matter is not regulated by the EPPO Regulation.[68] Specifically, and unless otherwise specified in the Regulation, the applicable national law is the law of the Member State whose European Delegated Prosecutor is handling the case.[69] The EPPO is a Union body even when applying national law. However, the extensive embeddedness of the national legal framework in the Regulation, the expression and effect of the inter-governmental model for the establishment of the EPPO, weakens the supranational element, the EU element. It weakens the EU nature of the EPPO, which is what keeps it from the Court's scrutiny.

In fact, many key questions are referred back to national law, most importantly national procedural law.[70] To mention a few, "the handling European Delegated Prosecutor may order or request the arrest or pre-trial detention of the suspect or accused person in accordance with the national law applicable in similar domestic cases",[71] rules on investigation measures and other measures, and Article 28 referring to conducting the investigation. It also bears mentioning that the EPPO shall be competent in respect of criminal offences affecting the financial interests of the Union that are provided for in Directive (EU) 2017/1371, as implemented by national law.[72]

Therefore, national law plays an important role in the designed future functioning of the EPPO, whether national law as it currently exists or future national law.[73] This is a link to national, State, legal systems. It is a strong link.

The role given to national authorities by the Regulation is essential. Prosecution is to be conducted before the national courts.[74] Trials are to be before the national courts, applying national procedural rules. The fact that the national legal order is so interwoven in the EPPO Regulation means that national authorities will be included in EPPO cases. This, in turn, leads to a Member State's action or omission via its authorities possibly triggering Convention responsibility.

Generally, when the implementation and application of EU law is in play, the State most often has a sufficient margin for its actions. The EPPO Regulation and the Directive (EU) 2017/1371 are no different. They do not impose such strict obligations on the national legal system and national authorities so

[68] Article 5 of the EPPO Regulation.
[69] Herrnfeld (n 4) p 119. Article 5 of the EPPO Regulation.
[70] Herrnfeld (n 4) p 119.
[71] Article 33 of the EPPO Regulation.
[72] Article 22 of the EPPO Regulation.
[73] Herrnfeld (n 4) p 119.
[74] Article 36 of the EPPO Regulation.

as to fall under the presumption of equivalent protection. It cannot be said that the EPPO Regulation imposes on Member States and their bodies an obligation so strict that the domestic authorities would have no choice in their decision-making. There is nothing automatic in the role given to national courts by the Regulation. In the decision *Povse v Austria*, the Court held that the Austrian courts did no more than implement their obligation under Union law.[75] Such restriction and automatism in national decision-making does not stem from the EPPO Regulation. On the contrary, the *M.S.S.* judgment[76] shows a more likely path for the Court's consideration.

In EPPO cases, a judgment shall be rendered by a national court following criminal proceedings conducted under national procedural law, with the prosecutor being the EPPO, i.e. a Union body. This raises the issue of possible applications to the Court against a particular Member State, complaining about the fairness of such criminal proceedings. When a judgment on guilt is pronounced by a national court, the road is open to Strasbourg. An individual disputes a national judgment, rendered by a national court, following a procedure conducted under national procedural law, just as in other Court cases with an EU connection. Provided he or she complies with so-called regular admissibility conditions, an inadmissibility decision or triggering the presumption of equivalent protection seems unlikely.

Furthermore, the investigation measures and other measures envisaged by the Regulation provide that the procedures and modalities for taking measures shall be governed by the applicable national law, despite some conditions established by the Regulation for requesting or ordering such measures.[77]

The issue of judicial review is a further element corroborating the possibility of an EPPO case being brought and reviewed before the Court. Procedural acts of the EPPO that are intended to produce legal effects vis-à-vis third parties are subject to review by the competent national courts in accordance with the requirements and procedures laid down by national law.[78] The same applies to failures of the EPPO to adopt procedural acts which are intended to produce legal effects vis-à-vis third parties and whose adoption was legally required under this Regulation.[79] This provision is an argument for future Strasbourg cases due – again – to a strong Member State link.

However, one should be careful of the jurisdiction of the Court of Justice in conducting judicial review as specified in Article 42, as the judicial review was in fact divided between national courts and the Court of Justice. It should be

[75] *Povse v Austria* decision (n 62) para 82.
[76] See note 53 above, the *M.S.S.* judgment, §§ 338-340.
[77] See Article 30 of the EPPO Regulation.
[78] See Article 42 of the EPPO Regulation.
[79] Article 42 of the EPPO Regulation.

noted that from a Strasbourg perspective the Court of Justice jurisdiction (Article 42(2) of the Regulation), generally and by itself, does not exclude a possible Strasbourg case, where a domestic court's decision follows the preliminary ruling, as can be seen in the *Bosphorus* judgment. Moreover, one should mention the Court's case of *O'Sullivan McCarthy Mussel Development Ltd v. Ireland*.[80] In that case, the Court found that "[w]hile it was therefore clear that the respondent State had to comply with the directive and, with immediacy, the CJEU judgment, both were results to be achieved and neither mandated how compliance was to be effected. The respondent State was therefore not wholly deprived of a margin of manoeuvre in this respect".[81] The CJEU judgment referred to was rendered in EU infringement proceedings against Ireland. Also noteworthy is the fact that the conclusion was reached in the merits part of the Court's judgment.

It is further noteworthy that a decision on the dismissal of a case appears to be in the jurisdiction of the Court of Justice, as stipulated by Article 42(3) of the Regulation, although there might be certain confusion due to the wording "in so far as they are contested directly on the basis of Union law". Additionally, the Court of Justice is competent for the compensation of damages in accordance with Article 268 TFEU. The basic principle from the Court's perspective is that where judicial review ends with the Court of Justice, there is no procedural link to the national legal system which would enable a case to be reviewed before the Strasbourg Court. The impugned measure remains within the EU legal order and does not have an avenue to reach the Court when judicial review of a measure interfering with Convention rights ends with the Court of Justice.

The issue of judicial review and its split between the national courts and the Court of Justice has already been the subject of significant criticism and it is argued that judicial control over acts of a Union body should be left to a Union body.[82] Böse states that the "Union courts are competent for judicial review on the basis of Union law whereas review on the basis of national law falls within the exclusive competence of national courts".[83] The author goes on to elaborate that the idea of shared judicial review ignores the interaction between Union law and national law[84] and is incompatible with the Treaty system of judicial

[80] *O'Sullivan McCarthy Mussel Development Ltd v. Ireland,* judgment, 44460/16, 7 June 2018.

[81] Ibid., § 112.

[82] See in detail M. Böse, "Judicial Control of the European Public Prosecutor's Office" in T. Raffaraci, R. Belfiore (eds), *EU Criminal Justice Fundamental Rights, Transnational Proceedings and the European Public Prosecutor's Office* (Springer, 2019) pp 191-202.

[83] Ibid., p. 195.

[84] Ibid., p. 195.

control.[85] Nonetheless, the fact remains that the Regulations provides for a form of shared judicial control. In areas where judicial review is reserved for national courts, the decisions rendered by the national courts in such a process are likely to be disputed before the Strasbourg Court.

Aside from Bose's well-reasoned criticism, shared judicial review could lead to a further conflict between the Court and the Convention system on one hand, and the Court of Justice and the EU system on the other. This is in addition to the inevitable confusion and conflict that will, at least in the beginning, characterise the interaction between the national system and the EU system when it comes to the EPPO. Legal certainty and the coherence of the protection of fundamental rights do not speak in favour of a result that puts some interferences with human rights in EPPO cases under the Court's jurisdiction and others not. Neither is the protection of those rights helped by such fragmented protection, by multiple actors at a regional (European) and national level.

However, to conclude with the Court's perspective, and in any event, it is hard to imagine a State successfully arguing that it had to undertake a certain action in concrete criminal proceedings and that it was bound to do so by the Regulation and Union law, which would be one way of avoiding responsibility under Union law. It is hard to imagine how State responsibility would not be triggered with an EPPO system designed with such reliance on the national legal system. If the individual complains that important defence witnesses were not heard in an EPPO case trial, how can the State convincingly claim that it was merely fulfilling its strict legal obligation? How could the national authorities claim that such a decision in a criminal trial was the pure result of EPPO actions, of EU body actions? Does the arbitrary reasoning of a criminal judgment fall under strict EU obligations? Is ordering a search and seizure of the home or the freezing of assets, without basic Convention rights being respected, a requirement of EU law? Similarly, the chance of measures including a deprivation of liberty escaping Strasbourg's supervision in EPPO proceedings are non-existent when the Regulation itself refers back to national law and envisages that the requesting or ordering of an arrest or pre-trial detention be "in accordance with the national law applicable in similar domestic cases".[86] It is hard to imagine such situations happening in reality. Importantly, it is hard to imagine coherent and justified reasoning excluding these issues from the Court's scrutiny with the Regulation standing as it is. This is in view of the extent to which the impugned measures would be based in national law and given that the final decision would in most cases be rendered by a purely domestic authority, notably the domestic court. This is not to say that

[85] Ibid., p. 201.

[86] Article 33(1) of the Regulation.

the Convention would be violated, but one can see a way for an EPPO case to be admissible before the Court. The examples mentioned are the simplest, most straightforward ones.

However, one different situation could be the actions of domestic law enforcement acting under the EPPO's orders. Depending on the factual circumstances and the extent of domestic judicial control, the impugned action would still be attributed to the EPPO and thus to the EU.[87] Therefore, even when the action itself is undertaken by national law enforcement if the EPPO (and only the EPPO) has full control of it, I believe that specific interference would not be subject to the Court`s scrutiny. The connection between the national element and the interference would not be of such a nature and strength to enable the Court`s supervision.

The main conclusion to be drawn from all the above is the complexity and insecurity that remain. As a rule, with respect to human rights in criminal cases, this is not desirable or even acceptable.

Therefore, the possible review by the Court of respect for individual rights in EPPO cases is not necessarily the desirable or the best option for the coherent protection of human rights at the European level. On the contrary, many faults can be found in such an outcome. On the other hand, one cannot deny the extensive case law and the comprehensive role of Strasbourg in protecting individual rights in criminal cases thus far. Indeed, there is significant value in its role. Despite the pros and cons of possible supervision by the Court in EPPO cases (there are many of each) such supervision is a possibility that may come to pass in reality.

A desirable outcome would be a fully coherent and structurally sound system encompassing the EPPO.

4. CONCLUDING REMARKS

The Court has always been particularly sensitive to criminal law cases, which is entirely understandable as these cases go to the core of the Convention. It is therefore not likely that a case brought before it would be dismissed because the prosecution and investigation in the case were under the EPPO's competence (of course, depending on the concrete violation alleged). This, however, applies only to cases and instances that include national bodies. Where the decision remains with the EPPO, where the actions are completely with the EPPO and under its control, and where they remain in the Union legal

[87] See *European Public Prosecutor's Office* (n 18) p 90. The study also indicates the further possibility for the case to be scrutinised by the Court, i.e. a rethinking of the presumption of equivalent protection.

order, there can be no road to Strasbourg via the national legal system if there is no national link.

The hybrid structure and regulation of the EPPO leaves room for future conflicts between Strasbourg and Luxembourg. The complete removal of EPPO cases from the Court's supervision is not likely. The hybrid structure and legal framework of the EPPO will, in my opinion, lead to some cases being reviewed in Strasbourg due to their link with the national legal system. However, a desirable system would be one that is fully coherent and structurally sound, but one which currently does not seem to be on the horizon. The desirable system in question is unlikely to arise from the current normative framework given the manner in which it connects the national, Convention and EU system. Personally, and given the huge contribution of the Court to the protection of human rights, I am very reluctant to argue for reaching a coherent system by removing the Court from the equation. One of the reasons for my reluctance is, in my view, the unique perspective and focus the Court has and has built concerning the individual`s rights. However, I cannot deny that the complexity that comes with the Regulation and the EPPO`s activity is in itself not beneficial to individual rights. And, in that complexity, the Court will also have its role.

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Sažetak

URED EUROPSKOG JAVNOG TUŽITELJA IZ PERSPEKTIVE
EUROPSKOG SUDA ZA LJUDSKA PRAVA

Uredba Vijeća (EU) 2017/1939 od 12. listopada 2017. o provedbi pojačane suradnje u vezi s osnivanjem Ureda europskog javnog tužitelja kulminacija je godina rada na ideji europskog javnog tužitelja. Uspostavlja Ured EJT-a kao tijelo EU-a s pravnom osobnošću, kojemu je dan zadatak istraživanja i progona kaznenih djela koja utječu na financijske interese Unije. Međutim Ured EJT-a ima hibridnu strukturu, s vidljivim jakim izrazima tzv. međuvladina modela i ima jake veze s nacionalnim pravom.

Osnivanje Ureda EJT-a otvara pitanje moguće perspektive Europskog suda za ljudska prava na taj ured. Navedena perspektiva ima dva aspekta, odnosno dimenzije – materijalnu i postupovnu.

Prvi aspekt obuhvaća ulogu prava i sloboda kako su zajamčeni Konvencijom za zaštitu ljudskih prava i tumačeni u praksi Suda, u funkcioniranju Ureda EJT-a i njegovoj težnji za

učinkovitom istragom i progonom. Ured EJT-a će se u svojem radu nedvojbeno miješati u ljudska prava, kao što su ona zajamčena člancima 3., 5. i 8. Konvencije itd.

Drugi aspekt obuhvaća mogućnost – postupovni put – da aktivnosti Ured EJT-a dođu pod nadzor Suda u postupku koji bi pred njim pokrenuo pojedinac tvrdeći da su mu povrijeđena konvencijska prava. Naime EU, koji nije članica Konvencije, ne može biti tužen pred Sudom. Međutim u temelju je današnjeg odnosa Suda prema EU-u i pravu EU-a presumpcija ekvivalentne zaštite, što znači da je aktivnost države koja je u skladu s obvezama koje proizlaze iz prava Unije opravdana dok god Unija štiti temeljna prava na način ekvivalentan Konvenciji. Presumpcija je primjenjiva ako je država samo ispunjavala svoje stroge obveze prema EU-u i nije imala prostora za drukčije postupanje, a bio je primijenjen puni spektar Unijinih zaštitnih mehanizama.

U odnosu na Ured EJT-a bit je u tome: (i) može li se njegovo postupanje pripisati državi članici tako da privuče nadležnost Suda te (ii) mogu li se postupci države članice (u stvarnosti, postupci njezinih tijela) smatrati ispunjavanjem strogih obveza iz prava EU-a, čime bi bio ispunjen prvi uvjet presumpcije.

Međusobno isprepleteni elementi koji otvaraju put nadzoru Suda nad predmetima Ureda EJT-a jesu: a) nacionalno pravo, b) nacionalni sudovi i tijela, c) sudska kontrola. Kombinirani učinak tih čimbenika pruža snažan argument za buduću kontrolu predmeta Ureda EJT-a pred Sudom. Međutim osnovni zaključak koji se može izvući jest složenost i nesigurnost koji slijede. U pravilu, kad je riječ o poštovanju ljudskih prava u kaznenim predmetima, to nije poželjno ni prihvatljivo.

Ključne riječi: Europski sud za ljudska prava, Ured europskog javnog tužitelja, zaštita ljudskih prava