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# The European Public Prosecutor's Office from the perspective of the European Court of Human Rights[2]

**Abstract:**

The hybrid structure of the EPPO and its strong links to the national legal order open many questions. One of those is the possibility for EPPO cases to reach the European Court of Human Rights via the role that national law and national authorities are envisioned to play 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

The 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) the EPPO) is a culmination of years of work and discussion on the idea of a European Public Prosecutor[3] (hereinafter: the EPPO). The adopted Regulation continues to be controversial and a subject of detailed academic debate.

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[3] See in detail in: Novokmet, A., The European public prosecutor's office and the judicial review of criminal prosecution, New Journal of European Criminal Law 2017, Vol 8 (3) pp 374–402.

Considering that the idea of the EPPO is one of a supranational, European prosecution body, the human rights issue is at the forefront of debate. Given its investigative and prosecutorial function,[4] EPPO will significantly interfere with fundamental rights and freedoms, that is make an impact upon them. Aside from the human rights issues that regularly arise when discussing a prosecution body, the human rights issues are more highlighted with respect to the EPPO because of its novelty, its European Union character and the complexity of its structure, as well as 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 characterized by interplay and varying levels of mutual influence between the actors. International, regional and domestic mechanisms can be identified.[5] Thus, the human rights question with respect to the EPPO can be analyzed from multiple points of view.

This contribution attempts to shine a light on the perspective of the European Court of Human Rights (hereinafter: the Court) on the EPPO. Namely, its focus is the possibility of EPPO's actions coming under the scrutiny of the Court in proceedings instituted before the Court by an individual alleging a 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' design, often described as "hybrid" and "double hat".[6] Specifically, the role of national law, but most importantly, national courts, is key to answering the question of the Court's scrutiny over the EPPO and its cases.

In discussing the issue, the reasons necessitating a look at the Court`s perspective on the EPPO shall be clarified. Firstly, two different but key facets of the Court`s perspective shall be indicated. Secondly, the current viewpoint of the Court regarding the Union and its law shall 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 shall be discussed. These shall

[4] Ibid.

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

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

focus on the connection between EPPO cases and Member States that open the possibility to scrutiny of EPPO cases before the Court.

## 2. Two main facets of the European Court of Human Rights' perspective upon the EPPO

Speaking of the Court's viewpoint regarding the EPPO, two main issues (or perspectives) can be identified. The first issue or facet of the Court's perspective in relation to the EPPO, is in fact a substantive one. A more precise description would be that 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 EPPOs pursuit of efficient investigation and prosecution of offences affecting the financial interests of the Union. Thus, it covers the question of substantive respect of Convention rights by the EPPO.

Speaking of the protection of fundamental rights, the Regulation stipulates that the EPPO shall ensure its activities respect the rights enshrined in the Charter.[7] It also provides that 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 defense.[8] The procedural rights of suspects and accused persons are guaranteed as provided by the EU's procedural rights directives.[9] 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 codified case law of the Court,[10] with some notable

[7] Artice 5 (1) of the Regulation. For applicability of the Charter on EPPO proceedings see Mitsilegas V., Giuffrida, F., 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, The Hague, (2018), pp 59-99, pp 61-66.

[8] Article 41 of the Regulation

[9] For the procedural rights directives and the Convention standards in the area covered by them see: Ivičević Karas E., Burić Z., Bonačić M., Unapređenje procesnih prava osumnjičenika i okrivljenika u kaznenom postupku: pogled kroz prizmu europskih pravnih standarda, Hrvatski ljetopis za kaznene znanosti i praksu, vol 23, no 1/2016, pp 11-58.

[10] Đurđević states this in referring to right of access to a lawyer. See Đurđević, Z.: The Directive on the Right of Access to a Lawyer in Criminal Proceedings: filling a human rights gap in the European Union legal order, page 20; 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, Zagreb, 2016. pp 9-25.

For the right to information in criminal proceedings see Allegrezza, S., 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

improvements. Although, it must be noted that the directives are implemented in national law with varying degrees of success, depending on the State. The solutions adopted on national level are itself open to criticism,[11] not to mention the difference in implementation between Member States, notwithstanding that they 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] In so far as the Charter on Fundamental Rights contains rights which correspond to rights guaranteed by the Convention, the meaning and scope of those Charter rights shall 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. On 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 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 relationship with the Strasbourg Court, this basic principle is confirmed in the Court of Justice' case law.[16] Convention standards are in fact a minimum standard below which the protection provided by Union law should not go.[17]

Turning back to the EPPO and specific Convention rights that might come into play in its work, those rights include, but are not necessarily limited to, respect of rights guaranteed under Article 5, 6, 7, 8 of the Convention and Article 1 of Protocol no. 1 to the Convention. The EPPO can interfere with those rights. The question of whether EPPO's actions as they stem from the

Criminal Procedure Law in Service of Protection of European Union Financial Interests: State of Play and Challenges, Croatian Association of European Criminal law, Zagreb, 2016, pp 41-53, pages 49-50.

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

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

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

[14] Mitsilegas V. Giuffrida F., above note 7, p. 66.

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

[16] See judgment in case 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.

Regulation would be compliant with the enumerated Convention rights as the Court interpreted them, or would they fall short of applicable standards, is a wide one. This substantive perspective, as well as the wider issue of human rights respect, was a subject of academic debate.[18] It shall also certainly continue to be an important topic in the discussion on the EPPO.

A second perspective, and the focus of this contribution, is the possibility of 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. Can a suspect, an accused or a victim of a crime[19] lodge an application before the Court in connection with an EPPO led case without that application being declared inadmissible? If so, what would be the (procedural) path for such an application, under which conditions would this be possible, in which situations? This can be described as the procedural issue. The origin of this issue and the key to clarifying it is in the significant role given to national courts in EPPO proceedings.

Finally, all of the mentioned in this section shows us why an analysis of the Court's perspective is necessary. All EU Member States participating in the enhanced cooperation are subjected to the Convention and the Court's supervision concerning the respect of Convention rights. Convention rights and the Court's case law also play an important role within the framework of EU law, as was sketched above. Applications against those States that participate in EPPO's establishment are regularly, normally lodged with the Court. Those cases increasingly touch upon EU law, as will be shown below. 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.

[18] For example, see an extensive analysis by Mitsilegas V. Giuffrida F., above note 7, pp 59-99.

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

## 3. European Court of Human Rights' case law relevant for the issue

### *a) Admissibility questions*

Every High Contracting Party to the Convention undertook to secure Convention rights to everyone within their jurisdiction,[20] with the Court established as the guardian and supervisor.[21] 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.[22] The Court's jurisdiction extends to all matters concerning the interpretation and application of the Convention, with the Court having the last say in case of a dispute.[23] In setting the admissibility criteria, the Convention provides for, *inter alia*, time-limits, exhaustion of domestic remedies, as well as 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.[24]

In order for an application to be admissible, it must be, *inter alia*, lodged against a Member State, lodged within the six-month time limit after a final decision was taken, lodged by a Convention recognized petitioner claiming to be a victim of a violation of a Convention right, lodged after all available and efficient domestic remedies were exhausted.[25] The application must be admissible under all grounds related to the Court's jurisdiction (admissibility *ratione personae*, *ratione loci*, *ratione temporis*, *ratione materiae*)[26] and under the so-called merits based grounds.[27]

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

[20] Article 1 of the Convention
[21] Article 19 of the Convention
[22] Article 34 of the Convention
[23] Article 32 of the Convention
[24] Article 35 of the Convention
[25] See in detail in the Court's admissibility guide, available at: https://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf (30.09.2019.).
[26] Ibid. pp 47-58.
[27] Ibid. pp 61-78.

*b) The Court's position towards the European Union and its law*

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*.[28] 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.

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.[29] This principle applies *a fortiori* when the first treaty affects the public order of Europe, as the Convention does. Thus, the (partial) transfer of sovereignty from a State does not absolve the State of its obligations under the Convention. [30] The Court emphasized 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."*[31] The presumption of equivalent protection and its prerequisites were

[28] 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 is based on that article, although updated and modified. See Konforta M., Pravo Europske unije u praksi Europskog suda za ljudska prava s posebnim osvrtom na europski uhidbeni nalog, Hrvatski ljetopid za kaznene znanosti i praksu, vol 25, no 1, (2018), pp 65-97.
[29] *X. v Germany*, 235/56, 10. 6. 1956, and *Etienne Tête v France*, decision 11123/84, quoting decision in *Austria v Italy*, 788/60, 11. 1. 1961.
[30] *Etienne Tête v France,* decision,, 11123/84, 9. 12. 1987.
[31] *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland*, Grand Chamber jugdment, 45036/98, 30. 6. 2005. (hereinafter: *Bosphorus* judgment).

detailed in the so-called *Bosphorus* judgment[32] rendered in 2005 and lated developed in *Michaud v France*,[33]*M.S.S. v Belgium and Greece*[34]and *Avotiņš v Latvia.*[35]

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.[36] The equivalency of protection encompasses both the substantive guarantees and the mechanisms controlling their observance.[37] The Court explicitly held that equivalent does not mean identical but comparable.[38] The Union, that is 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 Commissions' competence and actions and the dialogue between the national courts and the Court of Justice.[39]

The presumption is applicable only if the State was merely following its strict international, or in this case, Union obligation.[40] It is applicable if the State had no margin for a different action but had to take the impugned one and the full spectrum of the Union's protection mechanisms was applied.[41] The presumption shall be rebutted if the protection of Convention rights was manifestly deficient in the particular case.[42]

A prime example of the application of the presumption and the indication of possible issues to come for the EPPO in connection with the "margin of maneuver" 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*

[32] Ibid.
[33] *Michaud v France*, 12323/11, judgment of 6. 12. 2012. (hereinafter: *Michaud* judgment)
[34] *M.S.S. v Belgium and Greece*, 30696/09, judgment of 21.01.2011. (hereinafter: *M.S.S judgment*)
[35] *Avotiņš v Latvia* , 17502/07, Grand Chamber judgment of 23. 5. 2016. (hereinafter: *Avotiņš* judgment)
[36] *Bosphorus* judgment, § 155.
[37] *Bosphorus* judgment, § 155.
[38] *Bosphorus* judgment, § 155.
[39] the *Michaud* judgment, §§ 106-111. Konforta, note 28, pp 70-71.
[40] *Bosphorus* judgment, §§ 156-157.
[41] Konforta M., note 28, p 71. *Bosphorus* judgment, §§ 156-157., *Avotiņš* judgment, § 105.
[42] *Bosphorus* judgment, § 156.

*Belgium's international legal obligations"*[43] Therefore, the concrete State behavior 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 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 State's 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.[44] In order for the presumption to be activated, State action must be an expression of a strict EU obligation, the State must not have had a margin of maneuver. Although the Court has examined the issue of the presumption in admissibility decisions,[45] in the merits stage[46] and in a special section of the judgment called responsibility of the State,[47] 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.

*c) Possible application in relation to the EPPO*

EPPO is without question a body of the European Union, with legal personality.[48] Structurally, the EPPO is organized at a central and at a decentralized level. It is often referred to as having a hybrid

[43] *M.S.S* judgment, § 340.
[44] *Cooperatieve Producentenorganisatie Van De Nederlandse Kokkelvisserij U.A. v Netherland,* decision, 13645/05, 20.01.2009.
[45] See *Povse v Austria,* decision, 3890/11, 18.06.2013.
[46] *Avotins* judgment, note 34.
[47] *M.S.S.* judgment, §§ 338-340.
[48] Article 3 of the EPPO Regulation.

structure – both supranational and national.[49] EPPO remains an EU body even when acting through its decentralized level and notwithstanding the "double hat" function of the European delegated prosecutors.[50] It is body of a non-member to the Convention. As such, and like 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 are EPPO's actions 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 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 case of 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 venue exists for a case stemming, originating 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 that through its bodies, most notably the courts, interfered with individual Convention rights, such as Article 5, 6 or 8 rights, for example.

The interwoven elements opening the door to the Court's supervision over EPPO cases, can be summarized in the following: a) national law, b) national courts and national bodies c) judicial review. The combined effect of these factors provides a strong argument for future review of EPPO cases before the Court.

[49] See Đurđević, Z., Legislative or regulatory modifications to be introduced in participant member states to the enhanced cooperation, pp 101-110, pages 101-102, in International Conference on Enhanced Cooperation for the establishment of the EPPO, Rome 24-25 May 2018. Fondazione Basso, Rome 2018.

[50] 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". Luchtman, M. Vervaele, J. 'European Agencies for Criminal Justice and Shared Enforcement (Eurojust and the European Public Prosecutor's Office)', (2014) 10 *Utrecht Law Review*, no 5, pp. 132-150., p. 144.

Firstly, national law applies to the extent that a matter is not regulated by the EPPO Regulation.[51] 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.[52] EPPO is a Union body even when applying national law. However, the extensive embeddedness of the national legal framework in the Regulation, an expression and influence 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, a lot of key questions are referred back to national law, most importantly national procedural law.[53] 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,"[54] rules on investigation measures and other measures, article 28 referring to conducting the investigation. It also bears mentioning 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.[55]

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.[56] 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 before the national courts.[57] 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 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

[51] Article 5 of the EPPO Regulation
[52] Herrnfeld, note 6, p. 119. Article 5 of the EPPO Regulation.
[53] Herrnfeld, note 6, p. 119.
[54] Article 33 of the EPPO Regulation
[55] Article 22 of the EPPO Regulation.
[56] Herrnfeld, note 6, p. 119.
[57] Article 36 of the EPPO Regulation.

different. They do not impose such strict obligations unto national legal system and national authorities so as to fall into 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.[58] Such restriction and automatism in national decision-making does not stem from the EPPO Regulation. On the contrary, the *M.S.S. judgment*[59] 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. As long as he/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 also provide that procedures and the modalities for taking the measures shall be governed by the applicable national law, despite certain specific conditions established by the Regulation for requesting or ordering such measures.[60]

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.[61] The same applies to failures of the EPPO to adopt procedural acts which are intended to produce legal effects vis-à-

[58] *Povse v Austria* decision, note 45. 11.
[59] See note 34 above, *the M.S.S. judgment*, §§ 338-340.
[60] See Article 30 of the EPPO Regulation.
[61] See Article 42 of the EPPO Regulation

vis third parties and which it was legally required to adopt under this Regulation.[62] This provision is an argument for future Strasbourg cases due to – again - 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 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.*[63] In that case, the Court found that "*While 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*".[64] 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 decision on dismissal of a case appears to be in the jurisdiction of Court of Justice, as stipulated by Article 42 (3) of the Regulation, although there might be certain confusion due to the syntagm "in so far as they are contested directly on the basis of Union law." Additionally, the Court of Justice is competent for compensation of damages in accordance with Article 268 TFEU. The basic principles 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 Court of Justice was already a subject of significant criticism and it is argued that judicial control over acts of a Union

[62] Article 42 of the EPPO Regulation
[63] *O'sullivan Mccarthy Mussel Development Ltd v. Ireland*, judgment, 44460/16, 07.06.2018.
[64] Ibid. § 112.

body should be left to a Union body.[65] 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*"[66] and goes on to elaborate that the idea of shared judicial review ignores the interaction between Union law and national law[67] and is incompatible with the Treaty system of judicial control.[68] Nonetheless, the fact remains that the Regulations provides for a form of shared judicial control. In areas where such control, that is judicial review, is reserved for national courts, the decisions rendered by the national courts in such process are likely to be disputed before the Strasbourg Court.

Aside from the well reasoned Bose' criticism, a shared judicial review could lead to a further conflict between the Court and the Convention system at one side, and the Court of Justice and EU system on the other side. This is in addition to the inevitable confusion and conflict that will, at least in the beginning, characterize the interaction between the national system and EU system when it comes to the EPPO. Legal certainty and coherency of protection of fundamental rights do not speak in favor of a result that puts some interferences with human rights in EPPO cases in the Court's jurisdiction and some not. Neither is the protection of those rights helped by such a fragmented protection, by multiple actors on 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, 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 defense 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 a pure result of EPPO actions, of EU body actions? Does arbitrary reasoning of a criminal judgment fall under strict EU obligations? Is ordering a search and seizure of home or freezing of assets without basic

[65] See in detail Böse M., Judicial Control of the European Public Prosecutor's Office, in Raffaraci T., Belfiore R., (eds.) EU Criminal Justice Fundamental Rights, Transnational Proceedings and the European Public Prosecutor's Office, Springer Switzerland 2019, pp. 191-202.
[66] Ibid. p. 195.
[67] Ibid., p. 195.
[68] Ibid. p. 201.

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 requesting or ordering of arrest or pre-trial detention be "in accordance with the national law applicable in similar domestic cases".[69] It is hard to imagine such situations happening in reality. Importantly, it is hard to imagine a 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 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.

The above elaborated does not mean that the conclusion – possible review by the Court of respect for individual rights in EPPO cases is desirable option or the best option for coherent protection of human rights on an European level. On the contrary, many faults can be found in such an outcome. On the other side, one cannot deny extensive case-law and comprehensive role of Strasbourg in protecting individual rights in criminal cases thus far. There is significant value in its role thus far.

However, despite the pros and cons of a possible supervision by the Court in EPPO cases (both of which are many) such supervision is a possibility that may come to pass in reality.

## 4. Concluding remarks

The Court was always, and still is, particularly sensitive to criminal law cases, which is completely understandable as those 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 was in 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 its control, and where they remain

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

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

The hybrid structure and regulation of EPPO leaves room for future conflicts between Strasbourg and Luxembourg. A 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.

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