Chapter 10
Forum Choice and Judicial Review Under the EPPO's Legislative Framework

Michiel Luchtman

Abstract The EPPO proposal introduces a new authority that will be competent to act on the joint territories of over twenty Member States. The EPPO structure as it is now is a highly decentralized model. Rules of substantive criminal law and criminal procedure have only been partially harmonized, even after the PIF directive and the Roadmap on defence rights will be fully implemented. The choice of the forum therefore affects the powers, safeguards and remedies of all the actors involved (EPPO, defendants, victims, state authorities). To which extent are/should these forum choices be guided by clear legal rules? Which remedies are available, and if so, for whom and at which level? This chapter deals with these issues and aims to provide an oversight and appraisal of the state of play. It analyses the proposed rules on choice of forum, including judicial review, and seeks inspiration from the Swiss system to propose some amendments.

Keywords Choice of forum · Fundamental rights · European Public Prosecutor's Office

Contents

Unless otherwise provided, the provisions referred to in this chapter are those of Council document 13459/16, 28 October 2016.

M. Luchtman (✉)
Utrecht University, Boothstraat 6, 3512 BW Utrecht,
The Netherlands
e-mail: m.luchtman@uu.nl

W. Geelhoed et al. (eds.), *Shifting Perspectives on the European Public Prosecutor's Office*, https://doi.org/10.1007/978-94-6265-216-3_10

10.1 Introduction

The European Union has set itself the goal of creating and maintaining an Area of Freedom, Security and Justice, wherein free movement of persons is to be reconciled with measures to combat crime (Article 3(2) TEU). The proposal for a European Public Prosecutor's Office is by far one of the most innovative means to achieve that goal. It is, however, also quite controversial. According to Article 3 of the proposal, set up as a single body of EU law, the EPPO has the competence to investigate alleged offences on the whole of the territories of the participating Member States. Unlike most other modes of governance of the AFSJ, it is conceived as a single authority of EU law and not a permanent or temporary cooperative structure of two or more autonomous (national or EU) authorities. In this transnational setting, eventually covering over 20 different Member States,[1] choices of forum determine *in which state* the stages of criminal investigation, prosecution and trial and the execution of sanctions will take place.[2] Thus, the choice of the competent court also determines the applicable criminal law. By allowing to move EPPO investigations (or investigatory acts) from one country to another, the proposed structure automatically has implications for the applicable legal regime and, therefore, the rights and duties of all actors involved. Indeed, forum choices determine the scope of offences and sanctions, the competent courts, and the rules of procedure (including investigatory powers, safeguards and defence rights and remedies).[3]

The key issue, therefore, is how it is determined which European Delegated Prosecutor handles the case. It goes without saying that this subject is extremely relevant not only to the EPPO itself, but also for the national authorities, defendants and their lawyers, victims and third parties (e.g. those persons whose telephones are

[1] After the Brexit and reservations in other Member States, this seems to be the most accurate qualification, for the time being.

[2] The focus of this chapter is therefore on the allocation of competences *ratione territorii* (and its review). The determination of the applicable rules also depends on considerations *ratione materiae*, for instance dealing with inextricably linked offences and 'minor' PIF offences. Those issues also trigger many interesting aspects of judicial review (cf. Article 20(5) of the proposal). They are not dealt with in this chapter.

[3] Article 23 of the proposal determines that the European Delegated Prosecutor handling a case may, in accordance with this Regulation and with national law, either undertake the investigation measures and other measures on his/her own or instruct the competent authorities in his/her Member State.

tapped). Because of the strong impact of such choices of forum on the applicable fundamental rights regimes, but also because of the need to provide for mediators in cases of conflicts between the legal orders involved, the issue of judicial review automatically comes into play.

This chapter focusses on the proposed framework for choice of forum and will make an initial assessment of that framework (Sect. 10.2), including judicial review (Sect. 10.3). Its central argument is that legislative guidance and judicial control of forum choices in a common area of transnational criminal justice are a matter of procedural fairness. As I hope to demonstrate in the following, the proposed framework is not sufficiently developed to adequately protect the interests of the many players involved. This is why, before I make my concluding remarks (Sect. 10.5), some attention is paid to one of the most advanced systems of case allocation/forum choice on the European continent, i.e. the Swiss system (Sect. 10.4).

10.2 Choice of Forum in the EPPO Proposal

Ever since the introduction of the proposal in 2013,[4] Member States have gone to great lengths to decentralize the operational and decision making structures of the EPPO. If adopted, EPPO will consist of a college, Permanent Chambers, a European Chief Prosecutor, European Prosecutors and European Delegated Prosecutors. In such a decentralized system, rules on the determination of the responsible unit within the EPPO structure are very important. Article 22(1) holds that where there are reasonable grounds to believe that an offence within the competence of the European Public Prosecutor's Office is being or has been committed, a European Delegated Prosecutor in a Member State which, according to its national law, has jurisdiction over the offence, shall initiate an investigation.

Less clear, however, is what happens where a case is linked to more than one Member State, or connected to other offences in other Member States, for which the EPPO is also competent. In such instances, according to Article 22(4) the case shall, as a rule, be initiated and handled by a European Delegated Prosecutor from the Member State where *the focus of the criminal activity is*. Alternatively, if several connected offences within the competence of the Office have been committed, the case shall be handled by a European Delegated Prosecutor from the Member State *where the bulk of the offences has been committed*. Interesting interpretative questions arise. How is the 'focus' or 'bulk' determined? Do we only count the number of offences? Or do we also take into account such factors as he legal interests involved, the nature and degree of the offences and/or the penalties? Is the focus or bulk of the offences also determined by the status of the alleged offenders (perpetrator, accomplice, etc.)? Do attempt and the separate criminalization of

[4] COM(2013) 534.

preparatory acts play a role? No doubt that it would have been easier to solve these questions, had the ambitions of the proposed PIF directive been set higher. All these questions are related closely to national legal doctrine and will therefore be very much defined according to national conceptions. This could lead to diverging practices along national lines.

The system becomes even more complicated, because the proposal—rightfully, in my opinion—recognizes that deviations from the main rule should be possible and that there is a need for flexibility. A European Delegated Prosecutor of a different Member State than the state where the focus (or the bulk) of the criminal activity (or offences) is and that has jurisdiction for the case may initiate or be instructed by the competent Permanent Chamber to initiate an investigation where a deviation from these starting points ('focus'; 'bulk') is duly justified. But then, it has to take into account the following criteria, in order of priority: (a) the place where the suspect or accused person has his/her habitual residence; (b) the nationality of the suspect or accused person; (c) the place where the main financial damage has occurred. Here, too, it is not quite clear what precisely is meant. Does this wording imply a mandatory ranking order, i.e. does it mean that the European Delegated Prosecutor of the state of the place of residence of the suspect always has priority above the other two? Or does 'taking into account' also leave room for deviations? Are other criteria no longer allowed? The answer to these questions would have to be determined by the legal interests involved, and by their relative weight. In my opinion, the place of residence as such does not always reflect an unambiguous interest. It may protect many different interests, yet also hopelessly fail to protect many others. Why, then, should it be the first in line? For the sake of clarity? But what purpose does it serve, if the results are not considered to be in the interest of justice? In fact, what are the legitimate interests involved? The proposal is silent on this.

It thus becomes clear that the proposed system will need time and practice to develop a workable policy. It also needs a clear structure to deal with the many potential conflicts. This is done through another provision in Article 22(5), stipulating that until a decision to bring a case to trial is taken, the competent Permanent Chamber may, in cases concerning the jurisdiction of more than one Member State and after consultation with the European Prosecutors and/or European Delegated Prosecutors concerned, decide to: (a) reallocate a case to a European Delegated Prosecutor in another Member State; (b) merge or split cases and for each case choose the European Delegated Prosecutor handling it. According to the proposal such decisions must be in the general interest of justice, which is not defined any further, and be taken in accordance with the aforementioned criteria for choosing the European Delegated Prosecutor handling the case.

The provisions here referred to are relevant for the determination of the applicable legal regime in the initial stages of the investigation. They determine where the investigations will be initiated and conducted, without excluding that certain specific acts of investigation may be needed in other Member States or third states.[5]

[5] Provisions for that purpose are found in Articles 26–28 of the proposal.

The proposal goes on in Articles 29 and 30 with rules on the determination of the applicable legal regime for the stages of prosecution and trial. Article 29 provides that when the European Delegated Prosecutor handling the case considers the investigation to be completed, he shall submit a report to the supervising European Prosecutor, containing a summary of the case and a draft decision whether to prosecute before a particular national court. Where applicable, the report of the European Delegated Prosecutor must also provide sufficient reasoning for bringing the case to judgment either at a court of the Member State where he is located, or, in accordance with the aforementioned rules of Article 22(4) at a court of a different Member State which has jurisdiction over the case.

The final decision on the matter is in the hands of the Permanent Chamber. Where more than one Member State has jurisdiction over the case, the Permanent Chamber shall in principle decide to bring the case to prosecution in the Member State of the European Delegated Prosecutor (already) handling the case. However, it may decide to bring the case to prosecution in a different Member State, if there are sufficiently justified grounds to do so, taking into account the aforementioned criteria. It may also, before deciding to bring a case to judgment, decide to join several cases, where investigations have been conducted by different European Delegated Prosecutors against the same person(s) with a view to prosecution of these cases at the court of one Member State which, in accordance with its law, has jurisdiction for each of these cases (Article 30(2/3) of the proposal).

Quite astonishingly, the position of national courts in this framework is rather unclear.[6] In particular, the proposal leaves doubt as to the scope of the judicial powers in the trial stage to assess the forum choices by the Permanent Chamber. This question is relevant because in most national jurisdictions courts will only assess jurisdiction under national law, not the reasonableness of a forum choice. To that extent, therefore, the EPPO structure is certainly a novelty in transnational law enforcement. But what, then, are the practical consequences of it for the courts? Moreover, there is the issue of whether national courts can assess the actions of an EU body. These pertinent issues have been discussed in the framework of judicial review.

10.3 Judicial Review of the Choice of Forum in the EPPO Proposal

10.3.1 The Provisions of the EPPO Proposal

Article 36 of the proposed EPPO regulation has been substantially amended a few times during the course of the negotiations. One element that has been consistent throughout the negotiating process is that the EPPO's legal basis in Article 86(3)

[6] Cf. Weyembergh and Brière 2016, p. 38.

TFEU seems to have been used to turn the EU system of court organization more or less upside down. Meij has already demonstrated that this system is based on a division of labour between the EU and national courts.[7] As it is a body of the EU, judicial review of the legality of EPPO actions would normally fall to the Court of Justice.[8] Yet the EPPO proposal explicitly puts this responsibility at the national level, on the basis of two main arguments. First of all, the EPPO is a body of criminal justice. Its task is to prepare the case for, in principle, a trial before the national courts: 'The [EPPO] is (…) a Union body whose action will mainly be relevant in the national legal orders. It is therefore appropriate to consider the European Public Prosecutor's Office as a national authority for the purpose of the judicial review of its acts of investigation and prosecution.'[9] Second, it is said that the current approach is necessary in order to avoid the Court of Justice becoming even more overburdened than it already is and to prevent national criminal courts having to wait for a long time for an answer to their preliminary references.

As a consequence, the current version of Article 36(1) now reads: 'Procedural acts of the European Public Prosecutor's Office which are intended to produce legal effects vis-à-vis third parties shall be subject to review by the competent national courts in accordance with the requirements and procedures laid down by national law.' A new recital 78 clarifies the goals of the article further: 'This should ensure that the procedural acts of the European Public Prosecutor's Office adopted before the indictment and intended to produce legal effects vis-à-vis third parties (a category which includes the suspect, the victim, and other interested persons whose rights may be adversely affected by such acts) are subject to judicial review by national courts. Procedural acts relating to the choice of the Member State whose courts will be competent to hear the prosecution, which is to be determined on the basis of the criteria laid down in this Regulation, are intended to produce legal effects vis-à-vis third parties and should therefore be subject to judicial review before national courts at the latest at the trial stage.' Forum choices therefore come within the scope of judicial review.

As we have seen already, the system is not intended to be exclusive, nor does it comprise a harmonization of national remedies. In fact, even if remedies have to be available for the acts referred to in Article 36(1), much depends on the specific arrangements of national law. Some guidance is however offered by the Preamble, stating that 'the national procedural rules governing actions for the protection of individual rights granted by Union law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Union law (principle of effectiveness).'[10] These are the well-known Rewe requirements.[11]

[7] Meij 2014. See also Inghelram 2014, pp. 132–133.

[8] See Inghelram 2011, p. 225 *et seq*.

[9] Cf. COM(2013) 534, p. 7.

[10] Preamble, recital 79.

[11] Case 33/76 *Rewe*, ECLI:EU:C:1976:188.

Moreover, although the EU system of judicial organization has been turned almost upside down, the system of preliminary references (section 2) and direct action before the EU courts (section 3) are taken aboard in the proposal explicitly, but in a rather limited way.[12] Following section 2, *inter alia*, the Court of Justice of the European Union shall have jurisdiction, in accordance with Article 267 TFEU, to give preliminary rulings concerning the validity of procedural acts of the European Public Prosecutor's Office, in so far as such a question of validity is raised before a court or tribunal of a Member State directly on the basis of Union law. The same goes for the interpretation or the validity of provisions of Union law, including the EPPO regulation, which are relevant for the judicial review by the competent national courts of the acts of the EPPO referred to in Article 36(1). The recitals, however, indicate that, although national courts apply a mixture of EU law and national law, they may not refer to the court 'questions on the validity of the procedural acts of the European Public Prosecutor's Office with regard to national procedural law or to national measures transposing Directives, *even if this Regulation refers to them* [my italics].' Finally, direct actions against forum choices are not open to individuals on the basis of section 3. They may, on the contrary, be open to Member States, European Parliament, Council and Commission under the conditions of the relevant provisions of the Articles 263 and 265 TFEU.

10.3.2 Procedural Acts Intended to Produce Legal Effects Vis-À-Vis Third Parties

Key to the proposed Article 36 are the words 'procedural acts intended to produce legal effects vis-à-vis third parties'. Because of the similarity in wording with Article 263 TFEU (actions for annulment), it is informative to consider what we can learn from the CJEU's case law in this regard. Would forum choices come under the scope of Article 263 TFEU? What arguments would play a role here? What can we learn from this with respect to the interpretation of Article 36? What is of particular interest to this chapter are those types of cases where legal proceedings are transferred from one jurisdiction to another, or cases relating to proceedings that have started under one set of rules and are continued under another. In the absence of specific case law on forum choices,[13] these types of cases come closest to the situation at hand.

Already since *IBM/Commission*,[14] the Court of Justice has been quite consistent in its interpretation of Article 263 TFEU and its predecessors. According to its first

[12] Cf. Meij 2014, pp. 112–113.

[13] The issue of choice of forum was explicitly raised, however too late, in Case T-339/04, *France Télecom SA/Commission* and Case T-340/04, *France Télecom SA/Commission*, both dated 8 March 2007, discussed by Rizzuto 2008, pp. 286–297.

[14] Case 60/81, *IBM v. Commission*, [981] ECR 2639, ECLI:EU:C:1981:264.

paragraph, the Court shall review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties. The Court has developed a twofold, cumulative criterion for this admissibility condition.[15] Actions for annulment are open against 'any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position.' A binding legal nature and a distinct change in the legal position of the party concerned are therefore key.

From the case law with respect to OLAF it is apparent that decisions by OLAF to forward information or the case report to national authorities are not considered to be binding in nature and therefore do not produce such effects on the legal position of the party concerned. National authorities are not obliged to commence criminal proceedings or to give other types of follow-up on OLAF reports,[16] even if they are increasingly held to report back on the actions taken on the basis of the OLAF report.[17]

In the specific OLAF setting, decisions to refer a case for further action to national authorities therefore do not open the way to an action for annulment. Under the EPPO regime, however, a referral to the national courts does have binding effects (cf. Article 30(1) proposal). Nonetheless, the availability of an action for annulment under Article 263 TFEU in such cases may still be considered doubtful. Indeed, in the light of the case law of the Court of Justice, there is reason for doubt whether such a referral brings about a distinct change in one's legal position. In *Philip Morris et al.,* an alleged cigarette smuggling scheme with the involvement of a number of tobacco companies, led the Commission to start civil actions, seeking compensation for the financial losses (customs, VAT).[18] Those proceedings were however not instituted before the Community courts, but before a federal US court. Before the General Court of the EU, the applicants sought to annul the Commission decision to bring the case before the US court. After all, can the Commission unilaterally take an affair outside the EU system of court control? No doubt that these decisions come very close to a forum choice as defined in this chapter.

The Court of First Instance nonetheless declared the action inadmissible. It held that '[t]he commencement of legal proceedings is not without legal effects, but those effects concern principally the procedure before the court seised of the case. The commencement of proceedings constitutes an indispensable step for the purpose of obtaining a binding judgment but does not per se determine definitively the obligations of the parties to the case. That determination can result only from the judgment of the court. The decision to commence legal proceedings does not, therefore, in itself alter the legal position in question (…). When it decides to

[15] Schonard 2012 argues that the former criterion is in fact a specification of the latter.

[16] Case T-193/04, *Tillack v. Commission*, [2006] ECR II-3995, ECLI:EU:T:2006:292, paras 69–70.

[17] See, for instance, Article 11 of Regulation 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF), *OJ* EU [2013] L 248/1.

[18] Joined Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01, *Philip Morris International et al. v. Commission* [2003] E.C.R. II-1, ECLI:EU:T:2003:6.

commence proceedings, the Commission does not intend (itself) to change the legal position in question, but merely opens a procedure whose purpose is to achieve a change in that position through a judgment. In principle, therefore, such a decision by the institution cannot be considered to be a decision which is open to challenge.'[19] From this case, one may derive that it is doubtful that a decision to seize a national court in a setting like that of the EPPO would be a reviewable act under Article 263 TFEU.[20] In fact, from this perspective, the decentralized EPPO system may not even be in contradiction with the present EU system of court organization —as far as Article 263 TFEU is concerned—as long as national courts have the unconditional power (duty) to refer to the ECJ where the validity of EPPO acts is concerned.[21]

But there is more. The Court's case law also leaves room for a different approach. Illustrative is *Rendo v. Commission*.[22] The main difference of that case with *Philip Morris et al.* is, in my view that in *Rendo* proceedings had already commenced. The case concerned competition law and also involved certain import and export restrictions, in which the Commission decided to *suspend* competition law proceedings under (then) Article 85 EEC with respect to certain import restrictions and to proceed under Article 169 EEC (infringement proceedings) against the Member State in question. However, this also meant that the procedural rights of the applicants under the Article 85 proceedings were (temporarily) no longer available to the applicants under the infringement proceedings. In the latter type of proceedings, such private applicants have no standing. In light of this, the General Court held: 'Since the Commission's deferral has the effect of interrupting the procedure initiated under [competition law] for a considerable period, consideration of some of the issues raised by the applicants in their complaint (…) has been taken out of that procedure, in which the applicants have specific procedural rights, and left to proceedings under Article 169 of the Treaty in which the applicants have no such rights. Whilst the procedure under Regulation No 17 is held over, the complainants will be deprived of the effective exercise of their procedural rights.'[23] The General Court consequently declared the application admissible.

Rendo presents evidence for that fact that where the parties lose their status as parties to the proceedings, even if temporarily, a remedy at EU level ought to be open. The question is whether this also applies to cases where, like in the EPPO setting, there is no such loss, but 'merely' a change in the parties' position under substantive and procedural law. In my opinion, it does, because the differences

[19] Joined Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01, *Philip Morris International et al. v. Commission* [2003] E.C.R. II-1, ECLI:EU:T:2003:6, para 79.

[20] Cf. Wasmeier 2014, p. 155.

[21] As seen, that is not the case under the present proposal. It makes a distinction along the lines of the origin of the legal source (national or EU).

[22] Case T-16/91, *Rendo a.o. v. Commission*, [1992] ECR Jur. II-2417, ECLI:EU:T:1992:109.

[23] Case T-16/91, *Rendo a.o. v. Commission*, [1992] ECR Jur. II-2417, ECLI:EU:T:1992:109, paras 53–54.

between the Member States' legal systems are still considerable in the EPPO-setting. Such a change is brought about particularly by forum choices that deviate from the envisaged statutory system of allocation.

The foregoing cases present two different types of arguments for why choices of forum must come within the scope of Article 263 TFEU. The first line of reasoning is that it is the seizing of the national criminal court that is binding in nature and will bring about a distinct change in legal position *per se*, regardless of the trial state that was eventually chosen. This line was rejected in *Philip Morris*, but the setting of a criminal trial and its impact on the defendant are of course completely different than the facts of that case. This is also why I am not unsympathetic to this line of reasoning. But there is also a clear disadvantage. Why would only the transfer from the stages of investigation and prosecution to the trial stage bring about such a distinct change? The position of the individual, it seems to me, is already affected much earlier. Many of the defendant's rights, for instance, become applicable in the stages of the investigation; that stage will certainly affect the individual, too.[24] Are those situations then also covered? If not, the cogency of this argument is in my opinion flawed; but if it would include also the earlier stages of the investigation, it would certainly require a mechanism to prevent judicial review from becoming over-inclusive.[25]

The *Rendo*-line of reasoning does not connect to the stages of the proceedings (the seizing of the national court), but to the choice of the applicable substantive and procedural legal regime. If interpreted in a wide fashion, every determination of the applicable legal regime would bring about a distinct change in legal position, precisely because of the differences within the decentralized EPPO-structure. Yet in a more restrictive way, it would entail that only deviations from the statutory rules in the EPPO proposal bring about such a change.[26] In my opinion, the restrictive line needs to be accepted at any rate and, personally, I am of the opinion that much is to be said for also embracing the wider interpretation, at the least from the stage of prosecution. It would be contrary to fundamental principles of criminal justice, in particular the principle of equality of arms, to accept that one party in the criminal proceedings should be awarded uncontrolled and therefore unfettered discretion to

[24] One only needs to think of the applicability of the procedural safeguards of the Charter that are connected to the presence of a criminal charge (particularly Articles 47 and 48 CFR), for instance the right of access to a lawyer or the privilege against self-incrimination. Those rights start to apply once, in the words of the European Court of Human Rights, a person is 'substantially affected'.

[25] In my opinion, judicial review in the early stages of investigation could be useful in specific cases, for instance to avoid a clear *bis in idem* situation (Article 50 CFR).

[26] Cf. for instance the clarifications to a previous version of Article 36, Council document 11350/1/16 REV 1 of 28 July 2016, providing that (only) '[d]ecisions of the European Public Prosecutor's Office to *reallocate* the case to a European Delegated Prosecutor in another Member State and decisions of the European Public Prosecutor's Office to bring the case to prosecution in *a different Member State* may be subject to judicial review before the national courts, by way of an action or a plea in objection [my italics, ML].'

choose by which set of rules, out of—say—25, it wishes to conduct the proceedings.[27] Therefore, it is a significant improvement that it is now explicitly clarified in the aforementioned Recital 78 that forum choices do come under the scope of Article 36, implying that remedies must be available at the national level.

I assume that this clarification is also of importance for the future interpretation of Article 36. The notion of 'procedural acts intended to produce legal effects vis-à-vis third parties' appears to be an autonomous concept of EU law, despite the references to national law in the following text. After all, though there are some references to national law, none of those references concerns 'the notion of procedural acts intended to produce legal effects vis-à-vis third parties.' It then follows from the need for a uniform application of EU law, and from the principle of equality, that that notion is an autonomous concepts of EU law and to be interpreted uniformly throughout the territory of the European Union.[28] Therefore, the EPPO would apply directly applicable EU law, thus conferring on the CJEU not only the power to interpret the relevant provisions, but also to assess the validity of a forum choice, when interrogated on such issues by a national court.

However, the clarification does not solve all issues. A pertinent question is, for example, whether, in line with *Rendo*, the 'choice of the Member State' only constitutes a reviewable act where the determination of the handling Delegated Prosecutor and hence the relevant legal order deviates from the 'default position' determined by the focus of the criminal activity or the bulk of the offences,[29] or whether it also includes the determination of the 'default forum'. Furthermore, are the remedies available only in the stages of prosecution and trial, or should forum choices in the stages of investigation also be subjected to review? The latter situations are not covered by Recital 78. Furthermore, does review mean that it is limited to review upon request of the parties involved in the proceedings or does it also include an *ex officio* review? What happens when a national court rejects a forum choice? Are only the courts where proceedings are brought competent, or is any court competent if it is capable of exercising jurisdiction according to the law of the Member State in question? How can contradictory decisions by different national courts be prevented (for instance when cases are split as meant in Article 22(5) of the proposal)? These questions still need an answer which the current proposal does not provide. It refers back to national law and national procedural law. The outcome can be no other than that national courts will develop their own approaches to these problems, even if preliminary references are possible.

[27] See Luchtman and Vervaele 2014.

[28] Support for this approach may be found in CJEU 24 May 2016, Case C 108/16 PPU, *Paweł Dworzecki*, ECLI:EU:C:2016:346, paras 28–30.

[29] See *supra* Sect. 10.3.1.

10.3.3 Appraisal of the Proposal and Provisional Findings

Though it is a great improvement that (some) forum choices now explicitly come under the scope of Article 36, many issues remain open. I believe that the current set-up of the judicial control of the EPPO structure still constitutes a substantial risk, as long as there are no additional guidelines that guide the interaction between the EU and national courts involved. As said, the existing system of EU Court organization is turned upside down. This is done on the basis of Article 86(3) TFEU, which provides that the EPPO regulations shall determine the general rules applicable to the European Public Prosecutor's Office, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions. We have seen the reasons for this.[30] However, doubt remains as to whether these reasons constitute a satisfactory explanation to justify such a marked departure from the system provided for by the Treaties. The EPPO structure will produce, by its very definition, decisions that cannot always be attributed to a single legal order. Forum choices are clearly within this category, particularly because the proposed system does not exclude contradictory national decisions. Examples of such cases may arise where cases against a single (or multiple) defendant(s) are split, and trials take place in different Member States. It is also unclear to which extent remedies are open, e.g. for victims, in legal orders other than the actual trial state. Moreover, the consequences of a decision by a national court that decides that it is not the proper forum in light of the EPPO criteria, are left untouched. Therefore, forum choices being decisions of an EU body, it is unclear why —contrary to *Foto Frost* and the arguments put forward in it—judicial review of those types of decisions is put in the hands of the national courts or, alternatively, why the EPPO system does not include a system of mutual recognition of such decisions and an enhanced system of preliminary references. The proposed system appears to be almost a guarantee for forum shopping and contradictory judicial decisions.

But also regardless of whether legal review is to be offered directly by the EU courts, or by the national courts under European guidance, it is clear that the proposal needs much more clarification on many issues. It will for instance be necessary to reflect further on the consequences of national judicial decisions in the transnational EPPO setting, e.g. through mutual recognition.[31] And we need clear and workable criteria and those criteria need to be clearly linked to legitimate interests. The proposed system works with the rebuttable presumptions of Article 22(1) of the proposal ('focus of the criminal activity', resp. 'bulk of the offences'). Both of these presumptions, and the criteria for deviating from it, are vague or do not identify which interests they protect. This is why it is interesting to refer to the

[30] *Supra* Sect. 10.3.1.

[31] Such provisions are for instance included in the project of the University of Luxembourg on the Model Rules for the Procedure of the EPPO, particularly Rule 7 (dealing with judicial authorizations rather than review), http://www.eppo-project.eu/ Last accessed 25 August 2016.

Swiss system of intercantonal forum choices (*Gerichtsstandbestimmung*) a source of inspiration.

10.4 A Different Perspective: The Swiss Experience[32]

Like in the European Union, the Swiss territory is viewed as a single area, where law enforcement is the responsibility of authorities which, in principle, are bound by the territory of their component canton. Intercantonal cases therefore require a lot of mutual coordination. The Swiss scheme of *Gerichtsstandbestimmung* assumes a statutory assignment of cases across the cantons, which—within the federal framework—can themselves organise their cantonal legal systems. The scheme is binding on the police, the public prosecutor and the judiciary.[33] Although the situation in the EU is similar to the one in Switzerland, it is also much more complex. While substantive and, more recently, procedural federal criminal law have been harmonised in Switzerland, such harmonisation has only been achieved to a limited extent in the European Union. At first sight, this fundamental difference in the substantive and procedural law framework hampers a comparison between the two legal orders. However, as until recently procedural criminal law was not harmonized in Switzerland, inter-cantonal differences in criminal procedure used to be a factor of relevance in case allocation. Moreover, the relatively autonomous position of the Swiss cantons in relation to the administration of criminal justice forced the federal legislator to provide for a framework that would avoid positive and negative conflicts of jurisdiction.[34]

With respect to the 'inter-cantonal forum choice', Swiss law therefore includes statutory choice of forum rules which pertain to a variety of situations.[35] They cover the relatively simple situation in which there is one suspect and one offence,[36] the situation in which there is one offence and multiple suspects,[37] the situation in which one suspect has committed multiple offences[38] and, finally, the situation in which multiple suspects have committed multiple offences.[39] The legal system is

[32] This section is to a large extent an update of Luchtman 2011, pp. 99–100.

[33] Articles 340–345 of the Swiss Penal Code (*Strafgesetzbuch*/CH-StGB). Once the Federal Code of Criminal Procedure of 5 October 2007 (*Schweizerische Strafprozessordnung*/CH-StPO, *BBl*. 2007, 6977) enters into force, these articles shall be replaced by Articles 29–41 CH-StPO.

[34] It is remarkable that the relevant rules, until recently, were laid down in the federal Penal Code (*Strafgesetzbuch*/CH-StGB). As such, the issue is more a matter for procedural law. This is explained by the fact that a system of case allocation was considered to be essential for the implementation of substantive federal criminal law; see Schweri and Bänziger 2004, p. 2.

[35] See also Schweri and Bänziger 2004.

[36] Articles 340–342 CH-StGB, replaced by Articles 31–32 CH-StPO.

[37] Article 343 StGB, replaced by Article 33 CH-StPO.

[38] Article 344 StGB, replaced by Article 34 CH-StPO.

[39] In those situations, both Articles 33–34 StPO may be used, see further Waiblinger 1943, p. 81.

designed for related criminal cases preferably to be tried before a single court, even if multiple courts from different cantons would have jurisdiction.[40]

As it would be virtually impossible to cover all possible scenarios regarding the choice of forum by legislation, the legal system explicitly allows for deviations.[41] This is not considered to be in violation of the constitution, i.e. the concept of the *verfassungmässige Richter*, nor is it considered to violate Article 6 ECHR. On the contrary, in situations like these, the right to the *verfassungmässige Richter* protects suspects against arbitrary application of the law.[42] In the very abundant case law and practical experience, which are now codified in the federal *Strafprozessordnung*, it is clear that such deviations from the statutory scheme are subject to strict limitations and are reviewable by the courts, specifically the federal *Bundesstrafgericht*. One obvious limitation is that the authorities (courts and prosecutors) cannot themselves establish their territorial jurisdiction; they must already have jurisdiction under the law.[43] Moreover, deviations from the statutory scheme are only possible if there are compelling reasons (*triftige Gründe*) which 'automatically come into play' (*gebieterisch aufdrängen*).[44] This power to deviate from the statutory rules may therefore only be exercised if a strict application of the statutory rules would be contrary to the purpose of that law.[45] The *Bundesstrafgericht* held that it is not enough to only take considerations of prosecutorial efficiency into account,[46] and that deviations from the statutory rules must always take account of:

1. the interests of the place where most of the damaging effects of criminal conduct were felt;
2. those of the courts, which must be put in the position to obtain, as far as possible, a complete overview of both the person of the accused and his actions;
3. those of the suspect (and his counsel) to effectively defend himself; and we may possibly add the victim to this list;
4. and those of a speedy and efficient administration of justice.[47]

---

[40] In Swiss legal doctrine and case law, this is called the *Vereinigungsprinzip*; cf. BGE 95 IV 32 (35); Article 29 CH-StPO; Schweri and Bänziger 2004, p. 6.

[41] See for instance Articles 262 and 263 of the *Bundesgesetz über die Strafrechtspflege*/BStP, meanwhile replaced by Article 38 CH-StPO.

[42] Standard case law, cf. BGE 105 Ia 172 (175) and BGE 119 IV 102.

[43] Standard case law, cf. BGE 120 IV 280 and BGE 119 IV 250 (252–253).

[44] Standard case law, cf. Bundestrafgericht 30 March 2009, BG.2008.22 and BGE 119 IV 250. See also Article 38 CH-StPO.

[45] Standard case law, cf. Bundesstrafgericht 8 January 2009, no. BG.2008.26 and BGE 123 IV 23 (25–26).

[46] See also Schweri and Bänziger 2004, p. 148; Guidon and Bänziger 2007.

[47] Cf. Bundesstrafgericht, 13 January 2015, no. BG.2014.34; Bundestrafgericht 9 October 2013, BG.2013.20; Bundesstrafgericht, 21 October 2004, no. BK_G 127/04. Literally: 'Wird vom gesetzlichen Gerichtsstand abgewichen, sollten jedoch folgende Bedingungen erfüllt sein: Die Tat sollte dort verfolgt werden, wo das Rechtsgut verletzt wurde; der Richter sollte sich ein möglichst vollständiges Bild von Tat und Tater machen können; der Beschuldigte sollte sich am Ort der Verfolgung leicht verteidigen können; das Verfahren sollte wirtschaftlich sein.'.

The system of statutory assumptions—which are, admittedly, much more refined than in the EU setting—and the room for deviations under which the prosecution has to demonstrate, also before the courts, that their forum choice is well-balanced in light of the clearly defined interests at stake, also offers inspiration to the EU. In this system, the role of the judiciary is not to 'second guess' the decisions of the prosecutors, but to check for their reasonableness. Obviously, the interests that are defined often point in completely different directions. But they do force the prosecution authorities to issue a reasoned opinion on which the forum state is, in their minds, the best placed for prosecution and trial.

10.5 Conclusions

This chapter provides an analysis and appraisal of the proposed provisions on choice of forum, including judicial review, in the proposal to set up an EPPO. The draft provisions on these issues have been changed many times during the negotiations. My starting point was that legislation on and judicial control of forum choices are a matter of procedural fairness. The EPPO structure is unique to the extent that we are dealing with a single authority with the competence to operate under potentially 25 different sets of criminal law and criminal procedure. In that setting, statutory rules and judicial control on forum choices are an issue of the utmost importance. It is good that forum choices—after initial lack of clarity on the matter—are now taken within the scope of Article 36. As the concept of 'procedural acts intended to produce legal effects vis-à-vis third parties' is laid down in directly applicable Union law, the Court of Justice will have full interpretative powers on this concept and I assume it will also have the power to assess the validity of these decisions through preliminary references. Certainly, this will have important organizational consequences for that court in order to guarantee trials at the national level within a reasonable time.

Nonetheless, I conclude that the proposed system leaves much to be desired for, not only because the criteria are vague and seem to cover divergent interests, but also because comprehensive judicial review is still not guaranteed under the proposal. The proposal introduces a significant deviation from the existing EU court system without apparently paying attention to the reasons justifying that system, including the wish to avoid contradictory rulings by national courts and forum shopping. It is inevitable in the EPPO setting, that judicial oversight has both a vertical and a horizontal dimension. Comprehensive judicial oversight implies that the tasks and responsibilities of national courts are clearly demarcated *vis-à-vis* their foreign colleagues, as well as between the national and EU courts. It also needs to deal with the consequences of the decisions by one court for another. A failure to do so can only result in forum shopping, unnecessary duplication of work or even contradictory decisions on the same case.

Above, I presented the Swiss system as a source of inspiration. In my opinion, there are three lessons to be learned from it, even though the AFSJ does not even

come close to the level of harmonization achieved by the Swiss federal legislator. First of all, it turns out that even one of the most advanced European systems of forum choices recognizes that a full statutory system is a utopia. The EPPO legislator rightly reached the same conclusion. Second, I consider it wise to refine the system of statutory assumptions and to develop different default positions for different types of cases (one offender, one offence; one offender, multiple offences; multiple offenders, one offence; multiple offenders, multiple offences).[48] Finally, and most importantly, forum choices that deviate from the statutory assumptions should be possible only when it can be demonstrated by the EPPO that such deviations serve a number of clearly defined legitimate interests better than the statutory system does. The onus is on the prosecution. The task of the courts—national and/or European—is to assess the reasonableness of that decision, *ex officio* or upon request of the defendant.

References

Guidon P, Bänziger F (2007) Die aktuelle Rechtsprechung des Bundesstrafgerichts zum interkantonalen Gerichtsstand in Strafsachen. Jusletter May 2007

Inghelram JFH (2011) Legal and institutional aspects of the European Anti-Fraud Office (OLAF). Europa Law Publishers, Groningen

Inghelram JFH (2014) Search and seizure measures and their review. In: Erkelens LH, Meij AWH, Pawlik M (eds) The European Public Prosecutor's Office: An Extended Arm or a Two-Headed Dragon? TMC Asser Press, The Hague

Luchtman MJJP (2011) Choice of Forum in an Area of Freedom, Security and Justice. Utrecht Law Review, pp 74–101

Luchtman M, Vervaele J (2014) European Agencies for Criminal Justice and Shared Enforcement (Eurojust and the European Public Prosecutor's Office). Utrecht Law Review, pp 132–150

Meij AWH (2014) Some explorations into the EPPO's administrative structure and judicial review. In: Erkelens LH, Meij AWH, Pawlik M (eds) The European Public Prosecutor's Office: An Extended Arm or a Two-Headed Dragon? TMC Asser Press, The Hague

Rizzuto F (2008) Parallel Competence and the Power of the EC Commission under Regulation 1/2003 According to the Court of First Instance. European Competition Law Review, pp 286–297

Schonard P (2012) Judicial Review of EU Acts Affecting Criminal Proceedings. European Criminal Law Review, pp 62–77

Schweri E, Bänziger F (2004) Interkantonale Gerichtsstandsbestimmung in Strafsachen. Stämpfli Verlag, Bern

Waiblinger M (1943) Die Bestimmung des Gerichtsstandes bei Mehrheit von strafbaren Handlungen oder von Beteiligten. ZStr 57

Wasmeier M (2014) The Choice of Forum by the European Public Prosecutor. In: Erkelens LH, Meij AWH, Pawlik M (eds) The European Public Prosecutor's Office: An Extended Arm or a Two-Headed Dragon? TMC Asser Press, The Hague

Weyembergh A, Brière C (2016) Towards a European Public Prosecutor's Office – Study for the LIBE Committee. European Parliament, Brussels

[48] *Supra* Sect. 10.4. To a certain extent the EPPO proposal already does this (albeit in a very modest way), introducing the criterion of the 'bulk of the offences'.