Special Issue Article

NJECL

New Journal of European Criminal Law
2023, Vol. 14(1) 100–106


Article reuse guidelines:
sagepub.com/journals-permissions
DOI: 10.1177/20322844231153829
journals.sagepub.com/home/nje
Sage

Closing remarks

John AE Vervaele
Law, Utrecht University, Utrecht, Netherlands

Abstract
highlighting the main outcome of the conference in line with the general title dedicated to the challenges of the EPPO: "towards resolving complexity" and "bringing added value".

Keywords
EPPO, added value, implementation, living instrument, challenges

Prof. Dr. John A.E. Vervaele[1]

The establishment of the EPPO is clearly an important turning point in the history of the European integration of a criminal justice system into the Area of Freedom, Security and Justice (AFSJ). In connection with its establishment, Luxembourg's Minister of Justice, Ms Sam Tanson, rightly noted that '*Nous avons franchi une étape fondamentale et historique*' (i.e., 'we have taken a fundamental and historic step'). Indeed, the fact that the EPPO was established and has been operational for over a year can be considered a small miracle, given that it took over 30 years of discussions and negotiations to come to agreement on both its necessity and the possible insertion of its legal basis in the EU Treaties. The discussions can be traced back to the 1997[2] and 2000[3] versions of the Corpus Juris and the 2001 Commission Green Paper on criminal law protection of the

1. This article is based on the closing remarks made at the Conference titled 'EPPO One Year in Action: Towards Resolving Complexity and Bringing Added Value' which was held in Luxembourg on 31 May 2022, and its original style has been kept. The conference was organized by the University of Luxembourg in collaboration with the European Public Prosecutor's Office and the European Criminal Law Academic Network.
2. M. Delmas-Marty (ed.), Corpus Juris (introducing penal provisions for the purpose of the financial interests of the European Union), Ed. Economica Paris, 1997.
3. M. Delmas-Marty and J.A.E. Vervaele (eds.), The implementation of the Corpus Juris in the Member States, 4 volumes, Intersentia 2000.

Corresponding author:
John AE Vervaele, Law, Utrecht University, Newtondlaan 231, Utrecht 3584BH, Netherlands.
Email: J.A.E.Vervaele@uu.nl

Correction:
The article had significant revisions after its original publication that have been corrected for the online version.

financial interests of the Community and the establishment of a European Public Prosecutor,[4] as well as the 2001 Laeken Declaration on the future of the European Union.[5]

The difficult and intense negotiations on the Commission draft regulation of 2013[6] were not only a genuine adventure, as mentioned by Peter Csonka, but also came with political compromises in relation to the EPPO's institutional design and powers and to the principles under which it would function. The regulation that was finally adopted in 2017 ('the Regulation')[7] is the outcome of a power struggle between, on the one hand, the supranational approach taken by the Commission and the European Parliament and the sovereign approach taken by Member States that wanted to retain as much control as possible in the area of *ius puniendi* (i.e., the right to punish), still considered a '*pouvoir régalien de l'Etat*' (i.e., a sovereign power of every state). The resulting compromise came with a certain price, paid in terms of clarity and efficiency.

1. The EPPO is a living instrument and a living office

The Regulation is, of course, the backbone of the EPPO, but after its first year of operations, we can also clearly conclude that it functions under a broad regulatory patchwork. Paraphrasing the famous wording of the European Court of Human Rights in relation to the European Convention on Human Rights, I would label the EPPO's regulatory framework as a living instrument and the EPPO as a living office, meaning that both are dynamic and autonomous in their development.

This dynamic and autonomous process is reflected in many decisions. The EPPO has put into place its operational structure, both at the central and decentralized level and nearly all the participating Member States have adopted laws to adapt their internal structures and rules in order to embed the EPPO in their domestic criminal justice systems. These national adaptation laws can be de facto qualified as 'implementation laws' as the Regulation contains many references to national law and thus leaves wide discretion (in the form of directives) concerning the way in which the content of the Regulation may be transposed into national policies and laws. It is already surprising to see that, in some Member States, these 'implementation laws' are just one or two pages, while in others they exceed more than fifty. Meanwhile, the European Commission has authorized an assessment study[8] of these 'implementation laws,' with the aim of discovering (i) to what extent have the participating Member States complied with their obligations under the Regulation and the Lisbon Treaties and (ii) to what extent, in their domestic setting, do certain choices undermine the European mission, objectives and efficiency of the EPPO in the AFSJ, given that they limit the substantive scope of the EPPO's competence, by reserving some definitive decisions to national authorities instead of the permanent chamber of the EPPO or by not guaranteeing the full independence of their European Delegated Prosecutor (EDP). This assessment relates not only to formal legislation, but also to internal soft law and judicial practices.

4. COM(2001) 715 final.
5. Laeken Declaration on the future of the European Union (15 December 2001) - CVCE Website.
6. Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM(2013)534 final (17 July 2013).
7. Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') [2017] OJ L 283/1.
8. Commission, 'Call for proposals for action grants to promote judicial cooperation in civil and criminal matters' JUST/2022/PR/JCOO/CRIM/0004.

On the other hand, the EPPO itself has produced an enormous number of internal rules, mostly laid down in decisions by the College.[9] They concern internal procedural rules, working agreements with other European authorities, such as OLAF and Eurojust, but also working agreements with actors of the national enforcement community, such as, for instance, the Italian Antimafia and Counterterrorism Directorate (DNA). Some decisions also contain guidelines on the application of certain articles of the Regulation itself, such as, for instance, the one on Article 31 on cross-border cooperation,[10] in which the College, taking account of the recent case law of the European Court of Justice, reshaped that article. In an unpublished letter to the Member States and to the European Commission, the EPPO's Chief Prosecutor has also flagged a set of problems related to specific articles in the Regulation, especially in relation to the powers and independence of the EDPs and to the system of cross-border cooperation. That unpublished letter contains not only a quick overview of the operational and legal problems caused by the wording of the Regulation and the related 'implementation laws' in the participating Member States, but also asks for a quick fix to the Regulation. The Chief Prosecutor's request will be discussed by the Council of Justice Ministers.

The European Court of Justice (ECJ) also comes into the picture. The European Commission prepared a set of infringement procedures against certain Member States for their failures under national law in relation to the Regulation. And, national judicial authorities are starting to prepare requests for preliminary rulings from the ECJ. The Oberlandesgericht Wien has been a pioneer in this respect, submitting questions to the ECJ on the interpretation of Article 31 (cross-border cooperation) of the Regulation.[11] It is fairly certain that several more requests will follow in the near future; we have already heard at this conference that the EPPO itself is insisting upon the necessity for preliminary rulings in order to achieve clarity and legal certainty.

As we can see, the EPPO regulatory framework and the EPPO itself, as an Office, are very much a living instrument and a living Office and their 'growing pains' will only increase in the near future. We will be facing rapid development through a dynamic and autonomous process of legal interpretation that will produce internal soft law.

2. EPPO and its challenges

First of all, it is important to note that nobody at this conference has raised any doubts as to the need for the EPPO. The expansion of EU policies, for instance, in relation to the Next Generation EU Recovery and Resilience Plan, including, for instance, Green Transition, Digital Transformation, Smart and Inclusive Growth and Health, Economic and Social Resilience, will lead to increased risk of PIF-related expenditure fraud, be it in the area of public procurement or elsewhere. It is also very clear that, from the operational outcome of the EPPO's first year, there are important needs in the area of customs fraud and VAT fraud, which are also related to the revenue side of the European budget.

Second, it is obvious that any new Office of this type. with these powers, will come with a certain degree of complexity, certainly in the relationship between the supranational- and domestic levels.

The first set of challenges, in my opinion, relate to the EPPO's institutional design and framework. At the conference, no one has questioned the complex structure of the central level. What, however, have been flagged as debatable, even problematic, are interpretations leading to

9. Available at the website of the EPPO: https://www.eppo.europa.eu/en/documents.
10. Decision of 26/01/2022 Adopting Guidelines of the College on the Application of the EPPO regulation.
11. Case C-281/22, G.K. and others.

territorial competence (both from the point of view of substantive law and procedural law) and the EDPs' lack of independence in certain jurisdictions. It is, of course, a problem if VAT competence and financial harm thresholds are only assessed at the national level or if the EPPO's competence for tobacco smuggling (customs fraud and VAT fraud) is voided by higher penalties for excise fraud and, thus, converted into a national competence. As to the independence of the EDPs, such problems also include the EDP's authority over the law enforcement authorities, including law enforcement in the customs and tax areas. The EDP must be able to steer the chain of command – from detection – and be able to guarantee a fluid flow of law enforcement information up and down the chain (from central to decentral and from decentral to central).

A second set of challenges is linked to the lack of consistency in the legal framework and the related lack of legal clarity in the applicable law. At the conference, several problems with the interpretation of substantive criminal law and different approaches in particular jurisdictions were highlighted. These challenges are, of course, also triggered by the fact that the substantive law is not laid down in the Regulation, but in the PIF Directive of 2017.[12] It remains fairly surprising that a European Office has to operate with national substantive law. This is not the case for DG Competition, ECB or ESMA when it comes to punitive administrative enforcement[13] and is also not the case in the proposal for the new EU Anti-Money Laundering Authority.[14] The EPPO's capacity to perform and produce added value in the PIF area is, of course, also very important for any potential expansion of its material competence via Article 86(4) TFEU, towards other transnational crime in the AFSJ.

Criminal procedure is another domain in which more clarity and legal certainty is needed. At the conference, there was little to no discussion on the set of investigative powers that can be used by the EDPs under national law. However, the applicable rights of suspects, their procedural safeguards, and the available remedies for a breach thereof are far from clear. An attempt to partially harmonise them in the draft Regulation was deleted, leaving this aspect completely to national law, partially harmonized by the procedural safeguards directives). That means, for instance, that the availability of remedies for suspects and their effectiveness is completely dependent on national law. The ECJ has already ruled, in the case of *Gavanozov II*,[15] that for certain coercive measures taken under the European Investigation Order, Article 47 of the EU Charter on Fundamental Rights imposes an effective remedy in the issuing state. It is now time for the Union legislator to reconsider the gaps in the Regulation and not to leave this matter completely to praetorian harmonization. In that sense, Luxembourg's model rules on EPPO criminal procedure[16] and its harmonization on coercive measures and related safeguards are still valuable guidelines.

12. Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law [2017] OJ L 198/29.
13. See M. Luchtman and J.A.E. Vervaele, Investigatory powers and procedural safeguards: Improving OLAF's legislative framework through a comparison with other EU law enforcement authorities (ECN/ESMA/ECB), file:///C:/Users/verva101/Downloads/Report_Investigatory_powers_and_procedural_safeguards_Utrecht_University_1_.
14. Proposal for a Regulation of the European Parliament and of the Council establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) 1094/2010, (EU) 1095/2010, COM/2021/421 final.
15. Case C-852/19, Ivan Gavanozov II, [2021]. For comments, see Alba Hernandez Weiss, Effective protection of rights as a precondition for mutual recognition : some thoughts on the CJEU's Gavanozov II decision, New Journal of European Criminal Law, 2022, Vol. 0(0) 1–18.
16. Cf. K. Ligeti (ed.), Toward a Prosecutor for the European Union, Volume 1. A comparative analysis, Hart Publishing 2013.

The lack of consistency also leads to asymmetries among the participating Member States, thereby undermining an equal playing field across the AFSJ, which puts into question the coherence of EPPO actions and their added value.

Also related to criminal procedure are the rules for obtaining and using evidence, especially the rules on the (in)admissibility of evidence. Article 37 of the Regulation does not contain any harmonization in this field. So far, the Commission has not yet come up with a draft directive based on Article 82 TFEU, either. The result leaves national courts to deal with this issue using their different national approaches, again resulting in an unequal playing field across the AFSJ, which puts the EPPO's added value at risk. The same may also happen with the choice of jurisdiction, but this topic was not included in the programme of the conference.

One of the most difficult aspects of the EPPO's operational work, relates to cross-border co-operation, as laid down in Article 31 of the Regulation. The sui generis system of cooperation might bring flexibility for the EDPs in assigning acts of cooperation, but it comes with a steep price: lack of clarity and legal certainty n relation to both investigative measures and applicable safeguards and remedies. The fact that the EPPO is a single body is not enough to overcome situations in which the EDPs find themselves acting in distinct national territories and mostly applying national law, without the benefit of operating in a single legal area with harmonized European law. Indeed, on 26 January 2022, the College, in adopting guidelines on the application of Article 31 of the Regulation stated that:

> The practical application of Article 31 cannot be more cumbersome, bureaucratic and more time-consuming than the application of the Union acts giving effect to the principle of mutual recognition,such as the Directive 2014/41 regarding the European Investigation Order ('EIO Directive') or the Regulation 2018/1805 on the mutual recognition of freezing orders and confiscation orders ('Regulation 2018/1805').[17]

Further, the problem is not limited to effectiveness; it even extends to compliance with the EU Charter on Fundamental Rights. The College noted that:

> The gap in respect of legal remedies would represent a serious concern. The EPPO Regulation does not contain specific provisions on legal remedies in the framework of Article 31. However, Article 42(1) of the Regulation fully applies in respect of procedural acts issued or decisions adopted in this context that produce legal effects vis-à-vis third parties. More importantly, Article 47 of the EU Charter of Fundamental Rights applies, and legal remedies must be granted in respect of the substantive reasons of the measure in the Member State of the handling EDP. Therefore, recital 72 of the EPPO Regulation cannot be applied in all situations, because it would be in violation of Article 47 of the EU Charter of Fundamental Rights and of Article 42(1) of the EPPO Regulation.[18]

In other words, it has become clear that the legislative compromise that resulted in Article 31 is problematic from the point of view of both effectiveness and compliance with fundamental rights.

Moreover, when it comes to non-participating Member States and third countries there are still different challenges at stake. For non-participating Member States, they are bound by EU principles

17. Point 2.
18. Points 9 and 10.

and the duties of EU loyalty and sincere cooperation. In the case of non-compliance, the Commission could [and should] trigger infringement procedures.

Relations with third countries is a more complex challenge, as it would be the first time that a supranational judicial authority would become the competent authority under mutual legal assistance (MLA) instruments. Further, recognizing the EPPO as a competent authority in relation to third countries would trigger the application of related fundamental rights issues in the EPPO's external actions.

From the above, it has already clear that the EPPO's added value is not only related to increasing the effectiveness of enforcement, but also in guaranteeing that this enforcement takes place in line with the applicable fundamental rights obligations deriving from Article 52 of the EU Charter of Fundamental Rights and the European Convention on Human Rights (including the case law of the European Court of Human Rights), at a minimum. The EPPO, and certainly the decentralized level of the EPPO, must also comply with the conditionality regime of the rule of law.[19] In that sense, it is important that the EDPs, their national law enforcement partners, and the national judiciary comply with the minimum requirements of the conditionality regime and, thus, with the quality standards and core values of independence and impartiality. All of that is a mandatory requirement for ensuring the EPPO's judicial and political accountability.[20]

3. European Praetor in Action

It is obvious from the interventions at the conference that much is expected from the Court of Justice and that there is also an assumption that the Court of Justice can bring the necessary clarity, legal certainty and cohesion.

However, the Regulation itself incorporates the legislator's deliberate choice to reduce the role of the ECJ. The legislator has done that through the legal presumption that many EPPO decisions, including decisions at the central level, are to be considered national decisions for making use of remedies and review. The legislator has also deliberately limited the competence of national courts to request preliminary rulings from the ECJ.

Nevertheless, the ECJ will play – to the greatest extent possible – an important role in the interpretation of key issues of the Regulation and certainly in relation to the protection of applicable fundamental rights. In line with its ruling in *Gavanazov II*, it is probable that the ECJ will further explore the opportunities to shape the transnational dimension of fair trial rights in the AFSJ.

4. Outlook

In the coming years, the EPPO will remain a goldmine for criminal justice integration in the AFSJ. A great deal will depend on the dynamics of its actors and their willingness to bring added value to the enforcement of the financial interests of the Union. Those actors include, of course, the EU- and national legislators, which will have to reconsider certain aspects of the EPPO's regulatory

19. Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [2020] OJ L 433I/1.
20. JAE Vervaele, 'Judicial and Political Accountability for Criminal Investigations and Prosecutions by a European Public Prosecutor's Office in the EU: The Dissymmetry of Shared Enforcement' in M Scholten and M Luchtman (eds), *Law Enforcement by EU authorities: Implications for Political and Judicial Accountability* (Elgar 2017) 247-270.

framework in order to enable it to fully perform from not only the point of view of effectiveness, but also from the perspective of compliance with the fundamental rights requirement.

The EPPO's potential added value extends, of course, beyond the PIF field and in the near future it will include the discussion on the supranational judicial model for the effective enforcement of transnational crime in the AFSJ.

In that regard, it is probably a good idea to organise an EPPO conference each year in Luxembourg in preparation for the 2025 assessment of the EPPO.

Declaration of conflicting interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

ORCID iD

John AE Vervaele https://orcid.org/0000-0003-2327-5835