

## Editorial: From vision to reality – a prosecution service to protect the EU budget

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This special issue of the NJECL publishes the papers presented at the international conference entitled ‘EPPO One Year in Action: Towards Resolving Complexity and Bringing Added Value’ that was held in Luxembourg on 31 May and 1 June 2022. The conference was organised by the University of Luxembourg in collaboration with the European Public Prosecutor’s Office (‘EPPO’) and the European Criminal Law Academic Network (ECLAN). It offered an opportunity to assess the EPPO’s work in terms of the adequacy of its legal framework, efficiency and added value.

The vision of the European Public Prosecutor’s Office was put forward in 1997 in the ‘*Corpus Juris*’ study by a group of experts led by Professor Delmas-Marty. She started her introduction to the Corpus Juris by proclaiming ‘*eppur si muove*’<sup>1</sup> (i.e., ‘and yet it moves’). Her enthusiasm was for creating a new European judicial body, the European Public Prosecutor, whose work would be based on a harmonised set of EU rules of substantive and procedural criminal law, rendering tangible the concept of an *espace judiciaire européen*.

The vision Delmas-Marty embraced remained just that for almost two decades until, in July 2013, the European Commission finally presented its Proposal to establish the EPPO.<sup>2</sup> After several years of intense negotiations and many compromises, the final text establishing the EPPO was approved on 12 October 2017 with the adoption of EU Regulation 2017/1939 by the Council (‘EPPO Regulation’). It entered into force on 20 November 2017.<sup>3</sup> Currently, with the exception of Denmark, Hungary, Ireland, Poland and Sweden, 22 Member States participate in enhanced co-operation on the EPPO.

The EPPO is the public prosecution office of the European Union, which is responsible for investigating, prosecuting and bringing to judgment perpetrators of crimes affecting the Union’s financial interests set out in Directive (EU) 2017/1371 (‘PIF Directive’).<sup>4</sup> The EPPO Regulation represents a ground-breaking change in developing the EU criminal justice area: instead of relying on cooperation among national judicial authorities, the EPPO Regulation institutes genuine EU powers of investigation and prosecution in the Area of Freedom, Security and Justice (‘AFSJ’).

The EPPO became operational on 1 June 2021; as of this writing, it has almost 4,000 cases on the docket and has opened over 929 investigations involving estimated damages of over €5 billion to the

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1. M. Delmas-Marty in: M. Delmas-Marty – J.A.E. Vervaele (eds.), *The implementation of the Corpus Juris in the Member States*, Volume 1, Intersentia, 2000.
  2. Proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office, COM(2013)534 final (17 July 2013) (‘Commission’s Proposal’).
  3. 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.
  4. 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.

EU budget. Offences under ongoing investigations include, *inter alia*, customs fraud, cross-border VAT fraud and corruption. These preliminary numbers refute prior scepticism as to the need for this new European law-enforcement authority or the number of cases that would come under its competence. It is already safe to say that the EPPO is a success.

Despite that success, the EPPO still faces several challenges that must be resolved. This special issue points out the main complexities stemming from the EPPO's operational framework. Its opening article, by Luca De Matteis, addresses the highly complex question of the interaction of the various sources that make up the legal framework in which the EPPO must exercise its powers (EU law, national law and soft law). Although the EPPO Regulation, itself, establishes the EPPO's legal framework, that regulation – both explicitly and implicitly – relies on, and refers back to, applicable national law thus creating a particularly complicated legal setting. This is due not only to the EPPO's special nature as a Union Body whose legal acts produce effects on the legal systems of the Member States, but also the resistance of the Member States to further vertical integration of criminal justice system. De Matteis highlights the challenges arising from this unique legislative technique and analyses the potential approaches that those interpreting the EPPO Regulation might follow when facing references to national law. Finally, he examines the legal value of soft law when it comes to interpreting the EPPO Regulation's operational provisions.

Expanding on the issues arising out of the complicated legal framework De Matteis describes, Rosaria Sicurella's article discusses further the EPPO's material competence. On the one hand, the EPPO's material competence is determined by reference to the PIF Directive, *as implemented by national law*; on the other hand, the EPPO Regulation establishes shared competence between the Member States and the EPPO. However, the EPPO Regulation relies on vague and ambiguous provisions regarding how that shared competence will operate. Sicurella points out various weaknesses that might arise from this legal setting – including those that result from incorrect transposition of the PIF Directive – which can negatively impact not only the way the EPPO functions, but also the position of the defendant.

The next three articles reflect on the need to strike the right balance between the effectiveness of criminal prosecution and the protection of fundamental rights. First, Dominik Brodowski addresses the nagging question of the admissibility of evidence in EPPO proceedings. The EPPO Regulation has abstained from setting an extensive framework guaranteeing the admissibility of evidence; instead it lets each Member State to apply its national evidentiary rules, which some might consider an obstacle hindering the effective adjudication of a crime after an EPPO investigation is complete. Nevertheless, Brodowski argues that that gap is not particularly worrisome because EU primary law, the Charter of Fundamental Rights as well as potential recourse to the Court of Justice of the European Union ('CJEU') to decide the matter, are likely to contribute to convergence of national laws and practices on (in-)admissibility of evidence in EPPO cases.

On the other end of the spectrum, Vania Costa Ramos examines one of the weaknesses of the EPPO's Regulation from the defence perspective: the equality of arms between the prosecution and the defendant in EPPO cases. Costa Ramos identifies various aspects of the imbalance between the EPPO and the defendant, stressing the negative implications for the defendant arising therefrom, and then advocates for a number of ways to foster equality of arms. In the same vein, Judge François Biltgen tackles judicial review in EPPO proceedings, with a particular focus on whether the CJEU is prepared to take on EPPO cases. He considers whether its existing structure is adequate or if, instead, the CJEU should amend its procedures to adapt to the EPPO needs by establishing, for example, a special criminal chamber.

Beyond the challenges resulting from the implementation of the EPPO Regulation, one should not overlook additional challenges stemming from the (non-)cooperation of the non-participating Member States ('NPMS') with the EPPO. The need for good working relations with the NPMS is paramount if the EPPO is to be effective vis-à-vis crimes falling within its competence that involve one or more NPMS. Nevertheless, establishing such relations is not always straightforward. Fabio Giuffrida describes the difficulties that the EPPO may encounter when faced with such cases and points out various legal avenues that the EPPO may pursue to successfully engage in judicial cooperation with the NPMS. In that regard, Giuffrida emphasizes the key role Eurojust can play in supporting such cooperation.

Finally, in his closing article, John Vervaele comprehensively illustrates the main challenges that the EPPO faces, while simultaneously highlighting the significant value the EPPO has added and is likely to continue to add to the successful enforcement of the EU's financial interests and beyond.

Now that the EPPO has been operational for some time, discussions have shifted towards testing the adequacy, appropriateness, and completeness of its legal framework. The Commission has already started assessing the EPPO Regulation's implementation by the Member States to judge whether to proceed with amending it in light of the findings of the assessment. This special issue is intended to add to the discussions by identifying the main shortcomings and challenges arising from the EPPO's current legal framework and operational work, with the view to inspiring further research and, perhaps, legislative or other political action rectifying such shortcomings and challenges.

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