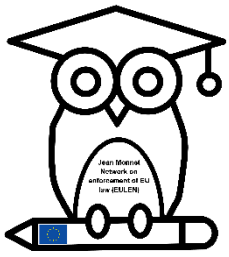

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PIF offences - Who investigates and prosecutes? The scope of competences of EPPO

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Abstract

The paper proposes an interpretation of articles 22, 26 (4), (5) of Regulation 2017/1939 as supplemented by art. 50 of EPPO's Internal Rules of Procedure. It takes into account the Directive 2017/1371 on PIF offences and the organisational structure of EPPO, focusing on the monitoring and supervising competences of the Permanent Chambers and the European Prosecutors. Since both the Directive 2017/1371 and Regulation 2017/1939 are part of the AFSJ, the legal concepts which, according to the Lisbon Treaty, regulate the Area of Freedom, Security and Justice are being used. The paper views these concepts (e.g., the principles of subsidiarity and the rule of law) as mechanisms of managing pluralism in interpreting the criteria for the choice of forum and the reallocation of cases by EPPO.

Keywords

EPPO, legal pluralism, forum choice, reallocation of cases, general interest of justice

I. Introduction

In Regulation 2017/1939 which establishes EPPO as an EU agency already foreseen in TFEU, assigned with the task of combating the crimes affecting the financial interests of the EU and anchored in the Area of Freedom Security and Justice, the interaction between EU and national law is of utmost importance. One of the key points in which this interaction manifests itself is the initiation of the investigation by EPPO and the reallocation of cases within EPPO in cross border cases[1]. The present paper presents an interpretation of the relevant provisions in the Regulation 2017/1939 in relation to those of Directive 2017/1371 based on the concept of legal pluralism as a perspective of the interaction between EU and national law.

The reasons for focusing on these issues lie in the fact that the exercise of competence by EPPO marks the point in which decisions concerning the investigation and the prosecution of a criminal offence are being made by a supranational institution and do not fall under the absolute discretion of national authorities. Although they are the European Delegated Prosecutors in their double capacity, as both European and national prosecutors, who execute the decisions, these are being shaped by multi membered bodies as Permanent Chambers following rules that lie out of the control of national judiciaries. Additionally, the decisions by the Permanent Chambers concerning the reallocation of cases already investigated by EPPO are equally crucial since they determine the national law, which will be applied for the gathering of evidence, the relevant rights of the defendant, the simplified procedures and the dismissal of the case. Both groups of issues set the scene and the conditions under which the criminal procedure in offences against the financial interests of the EU takes place and affects the outcome of each case.

The provisions of Regulation 2017/1939, which come under scrutiny, define the material competence of EPPO in conjunction with Directive 2017/1371 (art. 22), provide for initiating the investigation, and regulate the allocation of competences within EPPO (art. 26), complemented by the Internal Rules of Procedure of EPPO (art. 50).

But before any attempt to draw a picture of how the two levels of EU and national law interact in this field it is necessary to briefly present the perspective from which the relationship between the national and the EU legal order is examined.

II. The conceptual framework – Legal pluralism

1. Legal pluralism

The EU law has been viewed from different perspectives, manifested in the various theories that emerged in political science to explain the process of European integration. Even though these theories do not constitute a normative analytical framework, their influence on the understanding of EU law has been substantial, particularly the distinction between functionalism and intergovernmentalism[2]. This dichotomy has survived during the different phases of EU integration and has evolved to the newest versions of liberal intergovernmentalism/ rational choice institutionalism and neofunctionalism[3].

The EU integration theories contribute to a more profound understanding of the forces driving the European integration by tracing each one from its own point of view the justification for the content of EU law provisions and the consequences of each legislative proposal or act on the allocation of power between the national and supranational actors. In this sense, they provide useful insight into various elements in EU law. For example, decision-making rules in the Council of Ministers may be regarded in the view of the rational choice

[1] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), art. 26 (4), (5).

[2] On this generally Paul Craig and Grainne de Burca, *EU Law: Text, Cases, and Materials* (5th edn, OUP 2011) 2-3. Also, Jacob Oeberg, 'EU agencies in transnational criminal enforcement: From a coordinated approach to an integrated EU criminal justice' (2021) 28(2) Maastricht journal of European and comparative law 155, 157-158.

[3] On liberal intergovernmentalism Andrew Moravcsik, 'Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach' (1993) 31 Journal of common market studies 473, Andrew Moravcsik, *The choice for Europe: social purpose and state power from Messina to Maastricht* (Routledge 1998).

institutionalist analysis[4], which considers states as primal and central actors in EU integration and assumes that they behave as utility-maximizing rational ones[5] .

Although each EU integration theory highlights from its perspective various aspects of EU norms it is still not a legal tool for interpretation. When a legal analysis starts from an intergovernmental or a functionalist perspective, it is bound to follow the respective line of reasoning and as a result, perpetuates the dichotomy. Not ignoring the different perspectives of the theories on EU integration, it would be rather more fruitful to focus on the approaches to the relationship between the national and the supranational legal order, as these have evolved in the conceptual framework of constitutional pluralism[6].

This framework emerged in the aftermath of the Maastricht decision of the German Federal Constitutional Court and was based on pluralist legal theory, according to which the relationship between legal systems is pluralistic and interactive[7]. Overtime under the same, in nominal terms, framework, very different concepts have gradually been elaborated[8]. This paper adopts the approach based on the distinction between legal order and legal system [9]. In this scheme, legal system consists of law and institutionally framed legal practices, such as law-making, adjudication in courts and legal scholarship, whereas legal order refers to the law itself. We may have a pluralism of legal orders when more than one legal order claims authority in the same legal space. That is exactly the concept in which EU law and national law are operating. EU and national legal orders are autonomous but they form part of the same European legal system[10]. In each Member State, two legal orders claim authority, the national and the EU. Their relation is interactive, meaning first that each legal order recognises the plurality of equally legitimate claims of authority made by the other legal orders and adjusts these competing claims in accordance with a minimal set of discourse principles, the most important of which is the engagement in the coherent construction of the common legal system[11]. The dialogue between the legal orders requires that each one distances itself from its exclusive perspectivism and moves to the interperspectivism resting on a shared common deep culture, which in our case is the European "legal deep culture" as manifested in the values shared by all national European legal orders [12].

It is in this pluralistic approach that various provisions in the Treaties particularly in AFSJ are being interpreted as mechanisms of managing pluralism[13]. By this we mean they describe procedures, institutions, and practices, which may be considered in their function as means or mechanisms to manage conflicts and generally to define the interaction between the different legal orders who claim authority in the same legal space[14]. Acknowledging this function does not furnish concrete answers to conflicts of laws but allows space and provides criteria by which these may be managed. The quality of these criteria relates to the extent to which this space is provided and if it facilitates the discourse among the legal orders[15].

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[4] Mark Pollack, 'Institutionalism and European integration' in Antje Wiener, Tanja Börzel, and Thomas Risse (eds), *European Integration Theory* (3rd edn, OUP 2019) 8, Available at SSRN: https://ssrn.com/abstract=3212298.

[5] Mark Pollack, 'Realist, Intergovernmentalist, and Institutionalist Approaches' in Erik Jones, Anand Menon, and Stephen Weatherill (eds), *The Oxford Handbook of the European Union* (OUP 2012) 4.

[6] On constitutional pluralism Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (OUP 1999) 117, Neil Walker, 'Constitutional Pluralism Revisited' (2016) 22 European law journal 333, 338-341.

[7] Neil MacCormick, 'The Maastricht-Urteil: Sovereignty Now' (1995) 1(3) European Law Journal 259. See also MacCormick (n 6) 1-15.

[8] Interesting categorisation in Matej Avbelj and Jan Komárek, *Constitutional Pluralism in the European Union and Beyond* (Hart Pub 2012) 5-7.

[9] Kaarlo Tuori, 'From pluralism to perspectivism' in Gareth Davies and Matej Avbelj (eds), *Research Handbook on Legal Pluralism and EU Law* (Elgar Publishing 2018) 41.

[10] Miguel Poiares Maduro, 'Three Claims of Constitutional Pluralism' in Avbelj and Komárek (n 8) 70.

[11] Miguel Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in Neil Walker (ed), *Sovereignty in Transition* (Hart Pub 2003) 527.

[12] Tuori (n 9) 55.

[13] About the mechanisms of managing pluralism Paul Schiff Berman, *Global legal pluralism: a jurisprudence of law beyond border* (Cambridge University Press 2012) 152 ff. In the EU context Mireille Delmas-Marty, *Ordering pluralism a conceptual framework for understanding the transnational legal world* (translated by Naomi Norberg, Hart Pub 2009) 156 ff.

[14] Berman (n 13) 152.

[15] Berman (n 13) 188.

The next step is to identify and present the EU norms in their function as mechanisms of managing pluralism in AFSJ and to assess their value as interpretive tools. Since a thorough analysis of all mechanisms would exceed the scope of this paper, only a few of them are presented, mainly due to their significance for the competence issues of EPPO.

2. Legal pluralism in AFSJ

The first normative level on which the interperspective dialogue between the national and the EU legal order is based, is the common deep legal culture expressed in the rule of law and the protection of fundamental rights as well as human dignity, freedom, democracy and equality as foundations of the EU legal order[16]. The AFSJ on a descriptive level is established to facilitate the free movement of persons while ensuring the safety and security of people in MS. Security is ensured by measures concerning external border controls, asylum, immigration, and safety by preventing and combating crime[17]. EU competence for the policies in this field is governed in particular also by respect for the fundamental rights as set out in the Charter of Fundamental Rights, which has the same legal value as the Treaties, and as they result from the constitutional traditions common to the Member States[18], and by the different legal systems and traditions of the Member States[19].

The second normative level is the mechanisms of managing pluralism themselves. These are various concepts established in the EU treaties and apply in AFSJ, such as the concept of shared competence complemented with the principle of subsidiarity, the principle of sincere cooperation and the directives as forms of legal acts, which may be viewed not only as legislative options concerning the institutions and the functioning of the EU legal order but also as means to regulate the interaction between the different legal orders. Other mechanisms lie in the EU decision-making process, namely the ordinary legislative procedure by which directives are adopted in the policy areas of AFSJ[20], including the emergency brake and the composition of decision-making bodies. The representatives of all MS participate in these bodies.

The interperspective point of view of legal pluralism of the concepts of jurisdiction, subsidiarity, the principle of sincere cooperation, directives as a type of legislative acts, the composition of decision-making bodies, and the emergency brake procedure will be shortly presented to gain a more substantial and overall picture of them, which in turn is fruitful for their interpretation. Starting from the notion of jurisdiction, if seen from a pluralist point of view it is "*a meaning producing cultural product which reflects and constructs social conception of space, symbolizes community membership and opens space for norms that challenge sovereign power"*[21].

The subsidiarity principle in its traditional meaning seeks to push authority for decision making down to the smallest unit of governance that is feasible. However, as a pluralism concept, it aims to ensure dialogue among multiple legal communities leading to increased acceptance by each [22].

The principle of loyalty or sincere cooperation entails that EU and MS assist each other in carrying out the tasks flowing from the Treaties, that MS ensure obligations arising from Treaties and refrain from any measure that would jeopardize the attainment of the Union objectives[23]. In its pluralist conception, it provides a more general

[16] Consolidated Version of the Treaty on European Union [2012] OJ C 326 ('TEU'), Art. 2. Kaarlo Tuori, *European Constitutionalism* (Cambridge University Press 2015) 105-106, François-Xavier Millet, 'Constitutional pluralism beyond monism and dualism' in Davies and Avbelj (n 9) 131. On the rule of law Communication from the Commission to the European Parliament and the Council – A new EU Framework to strengthen the Rule of Law [2014] COM (2014) 158 final, 4, Valsamis Mitsilegas, 'Rule of Law - Theorizing EU Internal Security Cooperation from a Legal Perspective' in Raphael Bossong and Mark Rhinard (eds), *Theorizing Internal Security in the European Union* (OUP 2016).

[17] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2016] OJ C202/1 ('TFEU'), preamble 3(2).

[18] TEU, Art. 6 (1), (3). In so far as the fundamental rights of the Charter correspond to rights guaranteed by the ECHR, their meaning and scope shall be the same as those laid down by ECHR. If fundamental rights are guaranteed as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with the tradition, Charter of Fundamental Rights of the European Union [2012] OJ C 326 ('Charter'), Art. 52 (3), (4).

[19] TFEU, art. 67 (1).

[20] TFEU, 82 (1), (2), 83 (1).

[21] Berman (n 13) 196.

[22] Berman (n 13) 170-171.

[23] Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin, *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (OUP 2019) 46 ff.

discursive mechanism for managing conflicts in various areas, such as shared competence, or transposition of EU law in national legal order.

Directives, as contrasted to Regulations, are, in a legal pluralist conception, forms of law that create different legal objects upon the same social objects as the national forms of law[24]. As a result, different legal orders operating on different scales translate the same social objects into different legal objects. Since they operate simultaneously in the European legal system, they relate to each other. This relation may be described as "interlegality", and is being manifested in the transposition of Directives into the national legal order, which uses a different scale, projection and symbolization for the same legal objects[25]. The understanding of this relation contributes not only to the correct transposition but also to the interpretation of both national and EU law.

These mechanisms are particularly important in AFSJ, as jurisdictional rules ascribing competence to the EU function as alternatives challenging the sovereign power of MS even if the EU has no enforcement power, i.e. no power to perform material acts of enforcement, because, in reality, EU has immaterial enforcement powers.[26] Thus, when the EU exercises its competences in AFSJ, it affirms the fact that the policy field it regulates belongs to the supranational level and the way it is regulated should not be left at the discretion of each MS, and as result in its own authority.

The conditions under which this competence is exercised in the shared competence scheme include primarily the principle of subsidiarity which creates a discursive tool for all legal orders to accept the exercise of competence and ultimately contribute to its essential acceptance. This tool is reinforced on a procedural level by the participation of national Parliaments in the control of the subsidiarity principle and by their power to oblige the organ from which the draft legislative act originated to review the draft and justify its final decision[27].

Whereas the directives are concerned, the concept of symbolic chartography of law which contains the notions of scale, projection and symbolization may be used to clarify the extent of the margin of discretion left to national law, and thus provide criteria for assessing the quality of implementation in the national legal order.

The decision-making bodies also constitute a discursive place, because their decisions – legislative acts incorporate all national legal orders' perspectives, as all MS are being represented. The emergency brake procedure[28] as an alternative path of legislative procedure is also a particular mechanism of managing pluralism in AFSJ that aims to ensure that fundamental aspects of each national criminal justice system have been taken into account when adopting a directive in the AFSJ.

In the next part of the paper, the impact of the previous analysis on the interpretation of EPPO Regulation will be presented focusing on specific issues, such as the consequences of defining the offences for which EPPO is competent in the Directive 2017/1371, on selecting the EDP initially and when reallocating in cross border cases and on the role of Permanent Chambers.

III. The scope of competence of EPPO – offences against the financial interests of the EU in cross border cases

1. The role of Directive 2017/1371

Deciding how to combat fraud against the EU financial interests on the EU legal order relates to two issues: the first one, following the principle of conferral, is the legal basis on which the EU exercises its competence when

[24] Boaventura de Sousa Santos, *Toward a New Legal Common Sense - Law, Globalization, and Emancipation* (3rd edn, Cambridge University Press 2020) 506.
[25] Santos (n 24) 520 and 505 ff on the meaning of scale, projection and symbolization.
[26] On this distinction between material and immaterial enforcement powers Constance Chevallier-Govers, 'La reconnaissance d'un pouvoir de contrainte au Parquet européen, premier pouvoir opérationnel européen?' in Constance Chevallier-Govers and Anne Weyembergh, *La création du Parquet européen* (Bruylant 2021) 80.
[27] The power of this tool ("yellow card" procedure) was manifested in the reasoned opinions submitted by fourteen national parliaments on the Commission's Proposal on the establishment of EPPO in Communication from the Commission to the European Parliament, the Council and the National Parliaments on the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office with regard to the principle of subsidiarity, in accordance with Protocol No 2 [2013] COM(2013) 851 final.
[28] TFEU, Art. 82 (3), 83 (2).

punishing such conducts. This in turn will determine the type of EU norm (directive, regulation) in which the conducts will be defined. The second one arises in case a directive is chosen as a legislative tool and refers to the specific legal basis of such a directive. Concerning the first dimension, the alternative opinion[29] that the legal basis for EU intervention in this field should have been art. 86 (2) TFEU, and therefore the Regulation itself should have defined the offences for which the EPPO would be competent is supported by the wording of Art 86 (2) TFEU[30] and by the need for EPPO's effective functioning, especially in cross border cases. Instead of that, the EU legislator decided otherwise by not choosing 86 (2) TFEU as the legal basis of the EU competence, and consequently by rejecting the option of these offences to be defined in a Regulation[31]. The legal basis of the directive defining them in the Commission's proposal was art. 325 (4) TFEU[32], but the final choice made by the Council and EP, following the opinion of the Council Legal service[33], was art. 83(2) TFEU[34].

The consequences of the combination of the above mentioned legislative choices under a pluralist perspective are the following:

a)The adoption of a Directive defining offences against the EU financial interests, which under 83 (2) TFEU establishes only minimum rules, leaves room for discretion in national law when defining the relevant offences. Taking into account that Directive 2017/1371 defines not only fraud but also other offences against the financial interests of EU, the margin of discretion of national law applies to those as well[35]. This discretion extends also to the threatened penalties, since Directive 2017/1371 adopts the maximum-minimum system[36], contrary to the initial proposal by the Commission[37]. It also includes the limitation period. More specifically, the minimum limitation period for the offences involving serious damage or advantage, that exceeds the amount of 100,000 Euro is at least five years[38], leaving MS the option of /setting a maximum period very differently.

As in the scope of competence of EPPO defined in art. 22 of the Regulation 2017/1939 falls not only fraud but also other offences against the financial interests of EPPO (money laundering, bribery, misappropriation of funds), the choice of the directive as a legislative instrument led to compliance issues in the national law of several Member States[39]. This is an anticipated situation, since following the pluralist approach the different national legal orders operating on different scales translate the same social objects into different legal objects. In our case, the social objects, which are the conducts in their factual dimension, have to be translated into national criminal provisions. The quality of this translation – transposition, which is an essential condition for interlegality,

[29]Katalin Ligeti, 'Approximation of substantive criminal law and the establishment of the European Public Prosecutor's Office' in Francesca Galli and Anne Weyembergh, *Approximation of substantive criminal law in the EU the way forward* (Université de Bruxelles 2013) 81-82.

[30] TFEU, art. 86(2) "*as determined by the regulation provided for in paragraph 1*" Art. 86(2).

[31] Petter Asp, *The Substantive Criminal Law Competence of the EU* (Jure Förlag 2012) 150 providing as justification that art. 86 (2) TFEU is merely a procedural provision while substantive criminal law provisions are based on art. 83 TFEU.

[32] See Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law [2012] COM (2012) 363 final, 6-7 with the reasons justifying this choice.

[33] Opinion of the Legal Service of 22 October 2012 (Council document: 15309/12).

[34] On this choice John Vervaele, 'The Material Scope of Competence of the European Public Prosecutor's Office: Lex uncerta and unpraevia?' in Chloé Brière and Anne Weyembergh (eds), *The Needed Balances in EU Criminal Law* (Hart Pub 2018) 420.

[35] Directive (EU) 2017/1371 of the European Parliament and 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, Art. 3, 4.

[36] Dir 2017/1371, Art. 7 (2), (3) 'the criminal offences referred to in Articles 3 and 4 are punishable by a maximum penalty of at least four years of imprisonment when they involve considerable damage or advantage. The damage or advantage resulting from the criminal offences referred to in points (a), (b) and (c) of Article 3(2) and in Article 4 shall be presumed to be considerable where the damage or advantage involves more than EUR 100 000'.

[37] Proposal for a Directive (n 32), art. 8.

[38] Dir 2017/1371, Art 12 (2) but also in para 3 a limitation period may be shorter than five years, but not shorter than three years, provided that the period may be interrupted or suspended in the event of specified acts.

[39] Report from the Commission to the European Parliament and the Council on the implementation of 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 Report on the implementation of Directive (EU) 2017/1371 [2021] COM (2021) 536 final. These issues refer to the definition of fraud affecting the Union's financial interests (Article 3) in about half of the Member States; the definition of aspects of Article 4(1) (money laundering), Article 4(2) (corruption) and Article 4(3) (misappropriation) in several Member States; the definition of 'public official' (Article 4(4)) in about a half of the Member States; and incitement, aiding and abetting of any of the offences referred to in Articles 3 and 4; and the attempt to commit those offences referred to in Articles 3 and 4(3) (Article 5) in a few Member States.

depends upon various factors in each national legal order. The way it affects the EPPO competence in cross border cases will be examined in the following.

When EPPO exercises its right of evocation or initiates an investigation and two or more MS have jurisdiction for a particular case, which is a horizontal division of competence between EDPs of different MS[40], the criteria for the Permanent Chamber to decide in which MS the investigation will be conducted are: where the focus of criminal activity is or, if several connected offences within the competences of EPPO have been committed, where the bulk of offences has been committed (art. 26 (4) Regulation). A deviation from that rule is justified when the Permanent Chamber takes into account, in order of priority, the place of the suspect's or accused person's habitual residence, the nationality of the suspect or accused person, and the place where the main financial damage has occurred[41].

The use of criteria such as "focus of criminal activity" or "bulk of offences" for selecting a national legal order implies that it should punish all conducts and consequently has fully transposed the Directive. So if acts have taken place in different legal orders and are not punished in all of them to the same extent, the EDP of the MS which punishes all the acts will be instructed to initiate investigations. The threatened penalties or the period of limitation do not play any substantial role at this stage. If the Permanent Chamber decides to deviate from that rule it is obvious that it has to weigh the national law of the MS where the bulk of offences has been committed and its conformity with the Directive 2017/1371 against the national law of the MS either of suspect's or accused person's habitual residence/ nationality, or where the main financial damage has occurred.

In case inextricably linked offences to the offences against the financial interests of the EU have been committed, these are not part of the Directive 2017/1371 (e.g. forgery and ML of proceeds of EU fraud). Since EPPO has competence for these as well, under the conditions set out in Art. 25 par.3 a of Regulation, the scope of national provisions defining them should also be taken into account by the Permanent Chamber to select the EDP.

The national law which implements the Directive 2017/1371 affects EPPO's decision to reallocate a case to an EDP in a different MS during the investigation phase and before the EPPO decides to prosecute the case (art. 26 (5) Regulation). In this case, it must be in the general interest of justice[42]. The criteria for assessing the general interest of justice are not mentioned in the Regulation, as this term describes the interlegality, namely the interaction between the different legal orders that have jurisdiction in each particular case. To define the "interlegality", our starting point is the legal basis of EPPO (art. 86) TFEU, anchored in AFSJ, and the core principles in the pluralist perspective are the rule of law and the protection of fundamental rights, together with guaranteeing the internal security by combating crime. That means that the decision should take into account not only the national law concerning limitation by time and threatened penalties but also the fundamental rights of the suspect by assessing the effect it would cause on them and by weighing it against the compensation mechanisms that are in place in the national procedural law of the MS involved[43]. Moreover, the criteria of art. 26 (4) of Regulation should also be considered, regarding the residence and the nationality of suspects or accused and the place where the financial damage has occurred. The procedure under which this decision will be made in the Permanent Chamber is being described in art. 50 of the Internal Rules of Procedure.

In all the aforementioned cases, the criteria set in the art. 26 (4) and, in the case of reallocation, in art. 26 (5) of the Regulation may be considered as managing mechanisms of the plurality of legal orders, because they take into account the differences arising from the extent of legal orders' conformity with Directive 2017/1371. That means that the EU legislator is aware of these differences and that is the reason why he has introduced these criteria. The general interest of justice in particular is to be interpreted as an autonomous concept by recursion to

[40] The same applies of course in case 'several connected offences within the competence of EPPO have been committed'. For the meaning see Reg 2017/1939, Recital 67 and Christoph Burchard, Dominik Brodowski and Hans-Holger Herrnfeld, *European Public Prosecutor's Office: article-by-article commentary* (Nomos 2021) 221.

[41] Hernnfeld, Brodowski and Burchard (n 40) 219.

[42] Critisicm on this criterion due to lack of legal certainty Valsamis Mitsilegas, 'European prosecution between cooperation and integration: The European Public Prosecutor's Office and the rule of law' (2021) 28 (2) Maastricht journal of European and comparative law 245, 257.

[43] Pedro Caeiro and Joana Amaral Rodrigues, 'A European Contraption: The relationship between the competence of the EPPO and the scope of Member State's jurisdiction over criminal matters' in Katalin Ligeti, Maria João Antunes and Fabio Giuffrida (eds), *The European public prosecutor's office at launch* (Cedam 2020) 78.

the first normative level of interperspective dialogue between national and EU legal order, that is the values expressing the deep legal culture in the AFSJ[44].

2. The role of Permanent chambers

The next step is to examine the procedural aspect of the above EPPO's decisions from a pluralistic perspective. When EPPO decides to initiate an investigation and two or more MS have jurisdiction, it is the Permanent Chamber that instructs the EDP in one of the MS by following the above-mentioned criteria in art. 25 par. 4 of the Regulation. Since Permanent Chambers are decision making bodies, in which European Prosecutors from different MS are participating, they constitute, in pluralistic terms, a discursive space, in which the perspectives of all legal orders having jurisdiction may be taken into account. The same applies also in reallocating a case, where the decision is also taken by the Permanent Chamber, following the procedure in art. 50 of EPPO's Internal Rules of Procedure, which sets the conditions for the dialogue between the different legal orders. The handling EDP, the supervising EP, or any permanent member of the monitoring Permanent Chamber may initiate the procedure of reallocation of a case to an EDP in another MS. Before the decision, the EDP from the MS where the case is proposed to be reallocated may participate in the meeting and the EDPs concerned may submit opinions also in written form. The decision is taken by simple majority, but it may not be taken by written procedure.

This provision may be regarded as the procedural aspect of plurality since it creates a discursive forum for the different legal orders through EPs or EDPs, who will take into account the differences between the national laws and on the basis of the above-elaborated criteria and will make a decision to which legal order the case will be reallocated.

The form of the decision in art. 50 of EPPO's Internal Rules of Procedure is the point in which the substantive and the procedural aspect meet. Since this decision may not be taken by written procedure, the reasoning of the decision, and consequently the criteria by which the decision is taken, will not be documented. It would be more consistent with rule of law requirements, such as transparency, if, except for emergency cases, at least a short justification of the decision is produced.

IV. Concluding remarks

The goal of the previous analysis of art. 26 (4) and (5) of Regulation 2017/1939 on EPPO, based on the concept of legal pluralism, was to highlight their function as mechanisms of managing pluralism. In this sense, they constitute a discursive space in which all relevant national legal orders are being taken into account. The interpretation of the criteria they state takes into consideration the different extent of national laws' conformity with Directive 2017/1731. These differences, due to the choice of Directive as a legislative tool for defining the offences for which EPPO shares competence with national authorities, are part of the interaction between the EU legal order and the domestic provisions of each national legal order. The provisions of the Regulation refer to criteria and institute procedures in a way so as under the legal pluralist approach, they can be applied and manage conflicts between the national provisions and EU ones efficiently in the European legal system to which both belong.

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[44] On judicial review of forum choice decisions see Michiel Luchtman, 'Forum Choice and Judicial Review Under the EPPO's Legislative Framework' in Willem Geelhoed, Leendert Erkelens, Arjen Meijeds (eds), *Shifting Perspectives on the European Public Prosecutor's Office* (Springer 2018) 155 ff.

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