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**SUPRANATIONAL ENFORCEMENT/AGENCIFICATION OF THE PIF  
SECTOR: ADDED VALUE OR FURTHER COMPLEXITY? LOST IN THE  
LABYRINTH OR BACK TO BASICS ?**

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**ABSTRACT**

The multilevel system of the protection of the PIF crimes, seems to be ineffective and against the human rights as they are defined by the ECHR and the Charter. Is that true?. The answer to this question is a challenge for the European criminal law and the European values. The basic criteria should be the rule of law and the principles of subsidiarity and proportionality. The protection of the human rights is the safeguard for the fairness of the criminal procedure and it is the significant basis for the assessment of the agencies of the EU. By using the aforementioned criteria we are going to give an answer to the prior question and to find the suitable balance ( if there is ) between the effective protection of the financial interests of the EU and the protection of the fundamental rights including the judicial oversight. In conclusion, all this complexity results in the ineffective protection of the financial interests of the EU. Furthermore the procedural rights, the democratic and judicial oversight are in danger, because of this overextended multilevel structure. In fact all these agencies for the PIF crimes maybe have as a consequence the so called “creep competence” for the EU. The system of protecting PIF crimes, should be more transparent and more centralized. We should give priority to more safeguards for the simplicity of the procedure and to fight this overregulation. Finally, proposals like the previous Corpus Juris, should be adopted.

Keywords: Added value, complexity, EPPO, OLAF, EUROPOL, EUROJUST, Court of Auditors, Manifesto, Corpus Juris, rule of law, proportionality, subsidiarity, creep competence, spill over, forum shoring, judicial-political accountability, rights, safeguards.

## I. Introduction.

The EU has been characterized as a sui generis federal organization<sup>1</sup> and the competence of the EU to intervene in criminal law ( which is indispensable associated with the agencification of the PIF sector ) is a long story since “ the Greek Maize”<sup>2</sup> up to the establishment of the EPPO. It has been expressed that federal interests need federal protection.<sup>3</sup> This perception is connected with the independency, the existence and the prestige of the EU, as the budget of the EU must be protected in order to ensure the functionality and the stability of the EU. The EU as a supranational organization has its own legal entity and its own agencies. The efficient protection of these interests presupposes that the EU has the ability to investigate and prosecute the concerned crimes by the special EU agencies ( Eurojust, OLAF,EPPO etc ). Nowadays the protection of the financial interests of the EU has a multilevel character and due to the so called “supranationalisation -or communautarisation”<sup>4</sup> of the criminal law, there is a numerous legislation ( primary and secondary European law), concerning the agencies protecting the PIF crimes. The creation of the AFSJ, is a field of conflicts because of the diversity of the different legal systems of the MS and the contrary tendencies in the EU, as the integration goes on and the vision of the federal union meets with the resistance of the perception that we should protect the national sovereignty of the MS.<sup>5</sup> The main characteristic of the AFSJ is the strong effort to keep the balance<sup>6</sup> between the different tensions and the contrary powers in the EU. Unfortunately, the establishment and the evolution of the EU and its bodies, are strongly depended on political criteria resulting in compromises and sometimes have as a subsequence quite ambiguous solutions. The supporters of the EU integration, give emphasis to the principles which are fundamental to the federal-supranational dimension of the EU, such as: the effectiveness of the EU law,<sup>7</sup> the supremacy of the EU law,<sup>8</sup> the principle of assimilation<sup>9</sup> and the principle of mutual trust in EU criminal law.<sup>10</sup> On the other hand, the opponents of the power of the EU to intervene in criminal law claim that the use of criminal sanctions belongs exclusively to the Members States, as it is strongly connected with the hard core of the national sovereignty.<sup>11</sup> The aforementioned perception is based on the critique that the protection of the fundamental

<sup>1</sup> Ingeborg Tömmel, ‘The European Union-A Federation Sui Generis?’ in Finn Laursen (ed), *The EU and Federalism Politics and Policies Compared* ( Ashgate 2011), 41 et seq.

<sup>2</sup> Case 68/88 *Commission v Greece* EU:C:1989:339; for further analysis of this case see Fabio Giuffrida, ‘68/88-Commission v Greece Effectiveness, Dissuasiveness, Proportionality of Sanctions and Assimilation Principle:The Long-Lasting Legacy of the Greek Maize Case’, in Valsamis Mitsilegas, Alberto di Martino and Leandro Mancano ( eds), *The Court of Justice and European Criminal Law Leading Cases in a Contextual Analysis* ( Hart 2019).

<sup>3</sup> Viviane Reding Justice Commissioner, press interview, 17-7-2013, <[https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_13\\_644](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_13_644)> accessed 1 April 2022; Carlos Gómez-Jara Diez, *European Federal Criminal Law The Federal Dimension of EU Criminal Law* ( Intersentia, 2015) 237.

<sup>4</sup> Valsamis Mitsilegas, *EU Criminal Law after Lisbon Rights, Trust and the Transformation of Justice in Europe* ( Hart 2016) 4.

<sup>5</sup> Merita Kettunen, *Legitimizing European Criminal Law Justification and Restrictions* (Springer,2020); Maria Fletcher - Robin Lööf – Bill Gilmore, *Eu Criminal Law and Justice* ( Edward Elgar,2008) 5; Renaud Colson and Steward Field, ‘Legal Cultures in Europe: Brakes, Motors and the rise of EU Criminal Justice’, in Renaud Colson and Steward Field (eds), *EU Criminal Justice and the Challenges of Diversity Legal Cultures in the Area of Freedom, Security and Justice* ( Cambridge University Press, 2016) 2; Flora Goudappel, ‘Options for the development of European criminal law under the Treaty of Lisbon’, in Martyn Trybus and Lucs Rubini (eds), *The Treaty of Lisbon and the future of European Law and Policy*( Edward Elgar, 2012) 353.

<sup>6</sup> Chloé Brière and Anne Weyembergh ( eds) *The Needed Balances in EU Criminal Law Past, Present and Future* ( Hart 2018).

<sup>7</sup> Takis Tridimas, *The General Principles of EU Law* ( Oxford EC Law Library, 2<sup>nd</sup> edn, 2005) 418 et seq.

<sup>8</sup> Paul Graig and Graine de Burca, *EU Law Text, Cases, and Materials* ( Oxford University Press, 7<sup>th</sup> edn, 2020) 303 et seq.

<sup>9</sup> André Klip, *European Criminal Law An Integrative Approach* ( Intersentia, 3<sup>rd</sup> edn,2016)75 et seq.

<sup>10</sup> Auke Willems, *The Principle of Mutual Trust in EU Criminal Law* (Hart,2021).

<sup>11</sup> Maria Fletcher, ‘EU criminal justice: beyond Lisbon’, in Christina Eckes and Theodore Konstadinides (eds), *Crime within the Area of Freedom, Security and Justice A European Public order* ( Cambridge University Press, 2011 ) 10-42; Perrine Simon, *La Compétence d’ incrimination de l’ Union européenne* ( Bruylant, 2019) 47; Thomas Elhom-Renaud Colson, The Symbolic Purpose of EU Criminal Law, in Renaud Colson and Steward

rights<sup>12</sup> and the democracy are in danger ( democratic deficit ) because of the intervention ( rather than invasion ) of a supranational organization in the internal national legal order.<sup>13</sup> The most characteristic sample of this perception is the statement has been given by the German Federal Constitutional Court,<sup>14</sup> declaring the Accompanying Act to the Act, approving the Lisbon Treaty unconstitutional.<sup>15</sup>

The establishment of multiple agencies and bodies protecting the Financial Interests of the EU declares the tendency of the so called utilization of the functionality of the criminal law in order to achieve the goals of the EU, subsequently criminal law becomes a mere instrument for the implementation of Union policies ( utilitarian dimension of European criminal law ).<sup>16</sup> The recent activation of the EPPO, as the arsenal of the EU against the fraud has arisen a lot of questions concerning the added value of the EU to intervene in criminal matters, because of the gravity of imposing sanctions when supranational interests are at stake. As concerning the protection of the fundamental rights and the respect of the procedural safeguards the discuss is still open and the challenges are mostly ahead. The most suitable way to assess the whole construction of the EU agencies and the specialized bodies of the EU, which have been established in order to protect the financial interests of the EU, is to rebaptize them in the basic values of the common European legal civilization. The system of protecting the financial interests of the EU should be scrutinized in the light of the basic principles of the EU law, namely the rule of law, the principle of subsidiarity, the principle of proportionality and the basic democratic values, i.e. the judicial and political accountability.

## I. Chapter I THE ACTORS.

The protection of the financial interests of the EU, has been evolved and after Lisbon ( Art. 67,82,83,85,86,88,287,325 TFEU ) the EU has the expressed ability to intervene in criminal matters. A well organized system and a combination of Union bodies and agencies coordinate in order to fight the irregularities against the EU budget. This system consists of OLAF, EUROJUST, EUROPOL, EPPO<sup>17</sup> and the European Court of Auditors ( ECA ). There is no hierarchical relation among these agencies, but their relation is ( mainly ) governed by the principle of complementarity and the principle of sincere cooperation [ ar. 4 TEU, 67 TFEU, 3 par.3,99,100 EPPO Regulation, 4 par.1, 50,54 EUROJUST Regulation, ar. 12c-12g Regulation ( EU, Euratom ) 2020/2223 of the European Parliament and of the Council of 23 December 2020 amending Regulation ( EU, Euratom ) No 883/2013, as regards cooperation with the European Public Prosecutor's Office and the Effectiveness of the European Anti-Fraud Office investigations ]. In more detail:

a). OLAF,<sup>18</sup> is not an independent EU agency but consists a department of the Commission.<sup>19</sup> Its main mission is detecting, investigating and combating fraud to the EU budget ( illegal activity of any kind related to the EU's financial interest ) in all EU Member States and worldwide. Its activities includes: the development of EU anti-fraud policy ( coordination of investigations carried out by national authorities or EU bodies ), conducting

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Field ( eds ), *EU Criminal Justice and the Challenges of Diversity Legal Cultures in the Area of Freedom, Security and Justice* ( Cambridge University Press, 2016 ) 48-49.

<sup>12</sup> Leandro Mancano, *The European Union and Deprivation of Liberty, A Legislative and Judicial Analysis from the Perspective of the Individual* ( Hart, 2019 ) 1-13.

<sup>13</sup> Irene Wiczorek, *The Legitimacy of EU Criminal Law* ( Hart, 2020 ) 14.

<sup>14</sup> Bundesverfassungsgericht, 2be2/08, 5/08, 2 BvR 1010/08, 1022/08, 1259/08, 182/09, Gauweiler, Die Linke v Act of Approval of the Lisbon Treaty, judgement of 30 June 2009.

<sup>15</sup> For a briefly analysis of this judgment see Kai Ambos, *European Criminal Law* ( Cambridge University Press, 2<sup>nd</sup> edn, 2018 ) 11-13.

<sup>16</sup> Irene Wiczorek, *The Legitimacy of EU Criminal Law* ( Hart, 2020 ) 120 et seq; Kai Ambos, *European Criminal Law* ( Cambridge University Press, 2<sup>nd</sup> edn, 2018 ) 322; Valsamis Mitsilegas, *EU Criminal Law after Lisbon Rights, Trust and the Transformation of Justice in Europe* ( Hart 2016 ) 60 et seq.

<sup>17</sup> For a summary of the differences between OLAF, Eurojust and the EPPO see Choé Brière, 'Inter-Agency Cooperation in the Protection of the EU's Financial Interests', in Ivan Sammut and Jelena Agranovska ( eds ), *Implementing and Enforcing EU Criminal Law Theory and Practice* ( Eleven International Publishing, 2020 ) 46-47.

<sup>18</sup> See Jan F.H. Inghelram, *Legal and Institutional Aspects of the European Anti-Fraud Office ( OLAF ) An Analysis with a Look Forward to a European Public Prosecutor's Office* ( Europa Law Publishing, 2011 ).

<sup>19</sup> Valsamis Mitsilegas, *EU Criminal Law* ( Hart, 2009 ) 213.

independent investigations ( internal-external) into fraud, irregularities and corruption and investigating serious misconduct by EU officials or other members of the EU institutions and bodies.

b) EUROJUST,<sup>20</sup> is an independent, collegial judicial institution of the Union, possessing legal personality.<sup>21</sup> According to the TFEU ( Art. 85 ) and the secondary legislation [ Regulation (EU) 2018/1727 of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation ] governing EUROJUST, it deprives of binding powers and it has a clear character of ( pre Lisbon) horizontal instrument of judicial cooperation. Eurojust's mission is supporting and strengthening coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases, on the basis of operations conducted and information supplied by the Member States authorities and by.

c) EUROPOL,<sup>22</sup> as 'European Police Office' institutionalizes police cooperation and provides an operative framework.<sup>23</sup> Europol's tasks<sup>24</sup> is the collection, analysis and exchange of information, the co-ordination, organization and execution of investigations together with the MS or within the framework of joint investigative teams. Europol deprives of the authority to carry out any operational activities but only in liaison and in agreement with the MS. Coercive measures could be taken only by the national authorities.<sup>25</sup> The main focus of Europol's activity is the gathering and analysis of intelligence using an automated information processing system, consisting of the ' Europol Information System'<sup>26</sup> and the 'Analysis work files'. As a consequence, Europol has extensive informational rights and has been compared to a ' mega-search engine'.<sup>27</sup>

d) EPPO,<sup>28</sup> established by Council Regulation ( EU) 2017/1939 of 12 October 2017, is an independent Union body with the authority to investigate and prosecute EU fraud and other crimes affecting the Union's financial interests ( Art. 86 TFEU).The EPPO is a game changer in the PIF sector. Unlike OLAF, which only conducts administrative investigations and unlike Europol and Eurojust, which predominately facilitate coordination and cooperation among competent national authorities, the EPPO is the first body of the EU having the power to carry out its own criminal law investigations and prosecutions.<sup>29</sup> Besides the pioneer federal constitutional value of the EPPO, from the strictly perspective of criminal law we should focus on the abolition of double jeopardy

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<sup>20</sup> See Hans G.Nilsson, in Hermann-Josef Blanke and Stelio Mangiameli ( eds), *Treaty on the Functioning of the European Union-A Commentary Volume I:Preamble, Articles 1-89* ( Springer, 2021) 1609 et seq.

<sup>21</sup> Kai Ambos, *European Criminal Law* ( Cambridge University Press, 2018) 570.

<sup>22</sup> See Sabine Gless, 'Europol', in Valsamis Mitsilegas, Maria Bergström and Theodore Konstadinides ( eds), *Research Handbook on EU Criminal Law* ( Elgar, 2016) 457-479; Kai Ambos, *European Criminal Law* ( Cambridge University Press, 2018) 563-569.

<sup>23</sup> Marcus Kotzur, in Rudolf Geiger, Daniel-Erasmus Khan and Marcus Kotzur ( eds), *European Union Treaties A Commentary* ( C.H.BECK-Hart, 2015) 463.

<sup>24</sup> Art. 88 (2) TFEU and Art. 4 Europol Regulation 2016-Regulation ( EU) of the EP and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation ( Europol) and replacing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA [2016]OJ L1 35/53.

<sup>25</sup> Wolfgang Bogensberger, in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin ( eds), *The EU Treaties and the Charter of Fundamental Rights A Commentary* ( Oxford University Press, 2019) 936.

<sup>26</sup> See Helmut Satzger, *International and European Criminal Law* ( C.H.BECK/HART/NOMOS, 2<sup>nd</sup> edn, 2018) 126-127.

<sup>27</sup> See Kai Ambos, *European Criminal Law* ( Cambridge University Press, 2018) 565-566.

<sup>28</sup> See inter alia Katalin Ligeti ( edr), *Toward a Prosecutor for the European Union Volume I A Comparative Analysis* ( Hart, 2013); Petter Asp ( edr), *The European Public Prosecutor's Office-Legal and Criminal Policy Perspectives* ( Jure, 2015); Katalin Ligeti, Maria João Antunes and Fabio Giuffrida ( eds), *The European Public Prosecutor's Office at Launch Adapting National Systems, Transforming EU Criminal Law* ( Wolters Kluwer CEDAM, 2020); Hans- Holger Herrfeld, Dominik Brodowski and Christoph Burchard ( eds), *European Public Prosecutor's Office Article by Article Commentary* ( HART/BECK/NOMOS, 2021); Hélène Christodoulou, *Le parquet européen: prémices d' une autorité judiciaire de l' Union européenne* ( Dalloz, 2021).

<sup>29</sup> Wolfgang Bogensberger, in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin ( eds), *The EU Treaties and the Charter of Fundamental Rights A Commentary* ( Oxford University Press, 2019) 917.

according to the principle of *ne bis in idem* ( Art.24,39,40,41 and 101 of the EPPO Regulation),<sup>30</sup> the crystallization of the criminal jurisdiction and the special measures against the so called forum shopping ( Art. 35 and 36 of the EPPO Regulation).<sup>31</sup>

e) European Court of Auditors, as the Union's 'financial watchdog', i.e. the independent guardian for its financial interests,<sup>32</sup> is the external audit body of EU finance and plays a crucial role in the accountability framework and its competences and powers are laid down by article 287 TFEU and by the Financial Regulation<sup>33</sup>. The Court of Auditors examines whether all revenue has been received and all expenditure incurred in a lawful and regular manner and whether the financial management has been sound. In doing so, it shall report in particular on any cases or irregularity.<sup>34</sup> The ECA, has signed arrangements with OLAF and EPPO.<sup>35</sup> ECA, is a source of information for OLAF and EPPO.<sup>36</sup>

## II. Chapter II THE ADDED VALUE OF THE EPPO AND THE (IN)EFFECTIVE EFFECT OF THE MULTILEVEL AGENCIFICATION.

As concerning the added value of establishing the EPPO, it is conceived as the consequence of the necessity to efficiently protect by the means of criminal law the EU budget and the EU financial policies ( subsequently the EU common market).<sup>37</sup> The EU started as a financial Union and the financial actor is the core of the EU integration and affects the institutional orientations of the EU. The financial crisis of 2008 has increased the EU legislation and resulted in an intensive effort to protect the EU budget and the money of the tax payers against the PIF crimes. The establishment of the EPPO is the answer to the matter of how to protect the European financial markets from offences that could destabilize the economy of MS and threaten the existence of the eurozone.<sup>38</sup> The other agencies of the EU ( OLAF, EUROJUST, EUROPOL) were not quite efficient in protecting the

<sup>30</sup> Bas van Bockel, *Ne Bis in Idem in EU LAW* ( Cambridge University Press,2016); Valsamis Mitsilegas, *EU Criminal Law after Lisbon Rights, Trust and the Transformation of Justice in Europe* ( Hart,2016) 84-90.

<sup>31</sup> Valsamis Mitsilegas and Fabio Giuffrida, 'Judicial Review of EPPO Acts and Decisions', Katalin Ligeti, Maria João Antunes and Fabio Giuffrida ( eds), *The European Public Prosecutor's Office at Launch Adapting National Systems, Transforming EU Criminal Law* ( Wolters Kluwer CEDAM, 2020)130-136.

<sup>32</sup> See Alex Brenninkmeijer and Emma van Gelder, 'The European Court of Auditors: the guardian of EU finances', in Miroslava Scholten and Michiel Luchtman ( eds), *Law Enforcement by EU Authorities Implications for Political and Judicial Accountability* ( Edward Elgar, 2017) 305-329.

<sup>33</sup> Articles 158-167 of Regulation ( EU, Euratom ) No 966/2012 of the EP and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation ( EC, Euratom) No 1605/2002 [2012]OJ L 298/1.

<sup>34</sup> Irregularity is an act not complying with rules of the EU and having a potentially negative impact on EU financial interests. All irregularities are not fraud or corruption. The criterion to distinguish fraud from irregularity is the element of intention.

<sup>35</sup> Administrative arrangement between the ECA and the European Anti-fraud Office ( signature 22/5/2019); working arrangement between the ECA and the European Public Prosecutor's Office ( signature 3/9/2021).

<sup>36</sup> See Art. 8(1),(2),(3) of Regulation 883/2013 as amended by Regulation 2020/2223 and Art. 24 (1) of EPPO Regulation.

<sup>37</sup> In contradiction to this Herlin-Karnell, claims that there is no obvious connection between criminal law and 'confidence' in the market and this connection leads in an overcriminalization, see Ester Herlin-Karnell, 'The Constitutional Dimension of European Criminal Law' ( Hart,2012) 185-186.

<sup>38</sup> Carlos Gómez - Jara Díez, *European Federal Criminal Law The Federal Dimension of EU Criminal Law* ( Intersentia,2015) 225-241; Ester Herlin-Karnell, 'The Establishment of a European Public Prosecutor's Office: Between 'Better Regulation' and Subsidiarity Concerns', in Willem Geelhoed, Leendert H. Erkelens and Arjen W.H. Meij ( eds), *Shifting Perspectives on the European Public Prosecutor's Office* ( ASSER PRESS and Springer, 2018) 44-50.

financial interests of the EU.<sup>39</sup> Furthermore the legitimation of the EPPO, is based on the added value<sup>40</sup> that the new institution not only is perceived as an empirical-practical choice but also focus on the aims of the EU integration, as they are laid down at the Art. 3 TEU and the Art.67 TFEU. The EPPO has added value for the Union itself, as it aims at the protection of essential interests of the EU and its functioning reinforce the confidence of the EU citizens in the integration process.<sup>41</sup> The other agencies of the EU in the PIF sector ( Eurojust and Olaf ) have diachronically proved their indispensable utility in the fight against fraud and other irregularities. The specialization and the deep experience of the aforementioned agencies still remain a value in the PIF sector and because of this contribution to the fight against fraud, the provisions in the Treaties and the new regulations for OLAF and Eurojust empower the equal and complementary role of these agencies with regard to the EPPO and strengthen their relation in a common basis. All these agencies have not been absorbed by the EPPO, but they are perceived as equal partners of the EPPO and they cooperate with the special prosecutorial new agency in order to achieve the common aim.<sup>42</sup>

On the other hand, the final status of the EPPO is ambiguous. During the process for the adoption of the EPPO regulation<sup>43</sup> the intensive hesitation of the MS to confer more powers to EU in criminal law in the light of protecting their sovereignty, resulted in a compromise. The adoption of the collegial model for the final structure of the EPPO, akin to Eurojust is not compatible with the supranational mission of the EPPO. The initial proposal of the Commission<sup>44</sup> by adopting a more centralized structure of the EPPO, without the intervention of the college was more pure, more efficient and more compatible to the Corpus Juris<sup>45</sup> model ( as revised by the Green Paper), without national obstacles. In contrast to the innovative vision of the Corpus Juris and the initial proposal

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<sup>39</sup> See Commission Staff Working Document Executive Summary of the Impact Assessment, accompanying the draft proposal for the Council Regulation for the establishment of the EPPO, Brussels 17.7.2013, COM ( 2013 534 final, in <http://eur-lex.europa.eu/legal-content/ES/TXT/?uri=CELEX%3A52013SC0275> accessed 1 April 2022.

<sup>40</sup> See Lorena Bachmaier Winter, ‘ The potential contribution of a European Public Prosecutor’s Office at the light of the proposal for a regulation of 17 July 2013’ ( 2015) vol. 23 European Journal of Crime Criminal Law and Criminal Justice 121-144.

<sup>41</sup> See John A.E. Vervaele, ‘The European Public Prosecutor’s Office ( EPPO): Introductory Remarks’, in Willem Geelhoed, Leendert H. Erkelens and Arjen W.H. Meij ( eds), *Shifting Perspectives on the European Public Prosecutor’s Office* ( ASSER PRESS and Springer, 2018) 16-17.

<sup>42</sup> Nicholas Franssen and Anne Weyembergh, ‘The Future Relationship between the European Prosecutor’s Office and Eurojust’, in Constance Chevallier- Govers and Anne Weyembergh (eds), *La creation du Parquet européen Simple evolution ou révolution au sein de l’ espace judiciaire européen ?* ( Bruylant, 2021) 195-210; Christine van de Wyngaert, ‘ Eurojust and the European Public prosecutor in the Corpus Juris Model: Water and fire?’, in Neil Walker ( edr), *Europe’s Area of Freedom Security and Justice* ( Oxford University Press, 2004) 201-239; Jorge A. Espina Ramos, ‘The Relationship between Eurojust and the European Public Prosecutor’s Office’, in Lorena Bachmaier Winter ( edr), *The European Public Prosecutor’s Office The Challenges Ahead* ( Springer, 2018) 87-101; Anne Weyembergh and Chloé Brière, ‘Relations Between the EPPO and Eurojust-Still a Privileged Partnership? ’, in Willem Geelhoed, Leendert H. Erkelens and Arjen W.H.Meij ( eds), *Shifting Perspectives on the European Public Prosecutor’s Office* ( ASSER PRESS and Springer,2018) 171-186; Catherine Deboyser, European Public prosecutor’s Office and Eurojust: Love Match or Arranged Marriage?’, in L.H.Erkelens, A.W.H. Meij and M. Pawlik ( eds), *The European Public Prosecutor’s Office An Extended Arm or a Two-Headed Dragon?* ( ASSER PRESS and Springer, 2015) 79-97; Verane Edjaharian-Kanaa, ‘ Les Relations entre le Parquet Européen et L’Office Européen de Lutte Antifraude ( OLAF): «Tu m’ aimes: un peu, beaucoup, passionnément... pas du tout»?’, in Constance Chevallier- Govers and Anne Weyembergh, *La creation du Parquet européen Simple evolution ou revolution au sein de l’ espace judiciaire européen ?* ( Bruylant, 2021) 211-250.

<sup>43</sup> See Martijn Zwiers, *The European Public Prosecutor’s Office Analysis of a Multilevel Criminal Justice System* ( Intersentia, 2011) 355 et seq.

<sup>44</sup> See Vera Alexandrova, ‘Presentation of the Commission’s Proposal on the Establishment of the European Public Prosecutor’s Office’, in L.H.Erkelens, A.W.H. Meij and M. Pawlik ( eds), *The European Public Prosecutor’s Office An Extended Arm or a Two-Headed Dragon?* ( ASSER PRESS and Springer, 2015) 11-20.

<sup>45</sup> Mireile Delmas Marty and John A.E. Vervaele (eds), *The Implementation of the Corpus Juris in the Member States Volume I* (Intersentia, 2000).

of the Commission for the EPPO Regulation<sup>46</sup> the final adopted collegial structure of the EPPO<sup>47</sup> seems to be complex and dyskinetic.<sup>48</sup> The insertion of intergovernmental and pure national elements in the structure and the function of the EPPO has effected the genuine federal-supranational character of the EPPO. The justification for the added value of the EPPO, was the deficiency and the unwillingness of the national actors to protect efficiently the financial interests of the EU. A posteriori, it seems paradox to rely on the national authorities in order to fulfill the aforementioned tasks. The duty of protecting the supranational interests, should be exclusively autonomous, independent and federal accordingly to the innovative perceptions of the Corpus Juris. In addition to this, the multilevel construction of the agencies in the PIF sector and the multi division of tasks among the EU agencies protecting the EU budget seem to be a little bureaucratic and as a consequence, it causes confusions and delays. All this personnel working at the EU bodies, all this exchange of information (hit/or not hit)<sup>49</sup> need efficient administration, occurs irregularities and bring obstacles to the coordination among the actors. Theoretically the EU agencies should cooperate and due to the principle of mutual trust they have the obligation to do this, but practically in the working field sometimes their relation is quite antagonistic. All the EU bodies draft annual reports for their activities and there is a strict mechanism for accountability for their work and several times there are conflicts of jurisdiction and competence. As a matter of fact, though there is a legal framework for the cooperation among the EU agencies, the most effective way of cooperation is the abolition of disbelief and the honest willingness to strengthen the mutual trust. The key factors for the effective protection of the EU budget is the mutual trust among the MS and inter the EU agencies and the common faith in the EU integration.

### III. Chapter III THE COMPTABILITY WITH THE GENERAL PRINCIPLES OF THE EU LAW ( SUBSIDIARITY, PROPORTIONALITY, RULE OF LAW). .

The establishment and the function of all the EU bodies should be ruled by the fundamental values of the common European civilization, as they have been expressed in the legislation, the legal science and the landmark rulings. On one hand the principles of the EU have a separate existence, on the other hand they are intensively connected with each other and sometimes a specific principle overlaps another principle. The rule of law is the umbrella of all over the general principles. The deficiency of the MS to protect effectively the financial interests of the EU, resulted in proliferation of the EU agencies and the intervention of the EU in criminal law accordingly to the principles: a) of conferral (Art. 5.2 TEU)<sup>50</sup>, b) of subsidiarity ( Art. 5.3 TEU)<sup>51</sup> and c) of proportionality ( Art.

<sup>46</sup> See Katalin Ligeti, 'The European Public prosecutor's Office', in Valsamis Mitsilegas, Maria Bergström and Theodore Konstadinides ( eds), *Research Handbook on EU Criminal Law* ( Edward Elgar, 2016) 480 et seq.

<sup>47</sup> See Marianne L. Wade, 'The European Public Prosecutor: Controversy Expressed in Structural Form ', in Tommaso Rafaraci and Rosanna Belfiore ( eds), *EU Criminal Justice Fundamental Rights, Transnational Proceedings and the European Public Prosecutor's Office* ( Springer, 2018) 165-180.

<sup>48</sup> See Fabio Giufrida, ' The European Public Prosecutor's office: King without kingdom?' CEPS Research Report 2017/03, 14.

<sup>49</sup> See Art.101(5) EPPO Regulation; Chloé Brière, 'Do you have a hit? Exchange of information between EU criminal Justice Bodies and Agencies', in Carolle Billet and Araceli Turmo (eds), *Coopération opérationnelle en droit pénal de L' Union européenne* ( Bruylant,2020) 165-188.

<sup>50</sup> Barbara Guastaferrro, 'The European Union as a Staatenverbund? The endorsement of the principle of conferral in the Treaty of Lisbon', in Martin Trybus and Luca Rubini (eds), *The Treaty of Lisbon and the future of European law and Policy* ( Edward Elgar, 2012) 117-118; Jacob Öberg, *Limits to EU Powers* (Hart,2017) 21 et seq.

<sup>51</sup> Michelle Evans and Augusto Zimmermann ( eds), *Global Perspectives on Subsidiarity* (Springer, 2014); Carlo Panara, *The Sub-national Dimensions of the EU A Legal Study of Multilevel Governance*, (Springer,2015); Irene Wiczorek, 'The Principle of Subsidiarity in EU Criminal Law', in Chloe Briere and Anne Weyembergh ( eds), *The Needed Balances in EU Criminal Law* ( Hart,2018) 73-76; Irene Wiczorek, *The Legitimacy of EU Criminal Law* (Hart,2020); Ester Herlin-Karnell, *The Constitutional Dimension of European Criminal Law* ( Hart,2012) 110-130; Merita Kettunen, *Legitimizing European Criminal Law Justification and Restrictions* ( Springer,2020) 168 et seq; Paul Craig and Gráine de Burca, *EU Law Text, Cases, and Materials* ( Oxford University Press, 7<sup>th</sup> edn, 2020) 125-131.



5.4 TEU)<sup>52</sup>. The protocol No 2 concerns both subsidiarity and proportionality making general prescriptions and setting up specific rules on the ex ante and ex post monitoring of the principle of subsidiarity. The multiple intervention of the EU in the criminal matters and the establishment of EU agencies in the PIF sector is the result of the so called «spill over the power»<sup>53</sup>, besides this argument which is associated with the utilitarian use of criminal law by the EU the legislative competence of the EU in the criminal field should be intensively justified as a genuine added value and without depriving of the so called «deontological approach to criminalization» and the EU criminalization choices in this area require justification even more pressingly than national criminalization choices. In addition to this, the extensively justification of the EU criminal law is a consequence of the fact that EU in PIF crimes introduce new criminal sanctions.<sup>54</sup> After the Lisbon Treaty, the members of the European Criminal Policy Initiative ( ECPI ) published the so called Manifesto on a European Criminal Policy advocating a values-based EU criminalization agenda focusing on Art. 2 TEU.<sup>55</sup> According to the Manifesto, the European Criminal Law and subsequently the EU criminal agencies are bounded by the essential principles of criminal law i.e ultima ratio, the rule of law,<sup>56</sup> n.c.n.p.s.l., n.c.n.p.s.lege parlamentaria, nullum crimen sine lege certa, legal certainty and foreseeability.

All the aforementioned criteria are the spectrum for assess the added value of the proliferation of the EU agencies in the PIF sector and especially of the EPPO. In particular:

- 1) As concerning the principle of proportionality: the human dignity and the fundamental rights are in danger because of the enlargement of the EU agencies in the PIF sector and the ability of the EPPO to impose intensive measures of procedural enforcement ( confiscations, seizures, detentions and so on ). The position of the suspect is rather disanalogous vis-à-vis the large and well organized system of the EU to fight the crimes against the EU budget.
- 2) The whole construction is criticized that it is incoherent and vagueness. The absence of common sanctions and the different applicable law ( procedural and substantive ) result in uncertainty. The material competence of the EPPO derives from the Art. 86 TFEU and needs to be translate into concrete offences to be adopted from the PIF Directive. That's why the Art. 22(1) of the EPPO Regulation is a kind of dynamic blanket criminal law provision, which arises a contradiction to the principle n.c.s.l.<sup>57</sup>
- 3) As concerning the principle of subsidiarity: the MS have transferred criminal competence to the EU but the EU actually has a symbolic competence in this field because of the insertion of so many

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<sup>52</sup> Dan Helenius, ‘ Mutual Recognition in criminal matters and the principle of proportionality, Effective Proportionality or Proportionate Effectiveness?’ ( 2014) Vol 5, *New Journal of European Criminal Law* 352; Takis Tridimas, *The General Principles of EU Law* ( Oxford EC Law Library, 2<sup>nd</sup> edn, 2005) 136 et seq; Ermioni Xanthopoulou, *Fundamental Rights and Mutual Trust in the Area of Freedom, Security and Justice, A Role for Proportionality?* ( Hart 2020) 47-48; Joao Andrade Neto, *Borrowing Justification for Proportionality On the Influence of the Principles in Brazil*, (Springer, 2018) 99-102; David Duarte and Jorge Silva Sampaio ( eds), *Proportionality in Law An Analytical Perspective* ( Springer, 2018); Theocharis Dalakouras, ‘Principle of Proportionality and Means of Procedural Enforcement’, in Angelos Konstantinidis and Theocharis Dalakouras ( eds), *Deeping in Criminal Procedural Law* ( Nomiki Vivliothiki, 2014) 193 et seq; Grant Huscroft, Bradley W. Miller and Gregoire Webber ( eds), *Proportionality and the Rule of Law Rights, Justification, Reasoning* ( Cambridge University Press, 2014).

<sup>53</sup> Maria Fletcher- Robin Löf-Bill Gilmore, *EU Criminal Law and Justice* ( Edward Elgar, 2008) 20-57; Samuli Miettinen, ‘The Evolution of Competence Distribution Between the European Union and the Member States in the Criminal Field’, in Chloé Brière-Anne Weyembergh ( eds), *The Needed Balances in EU Criminal Law* (HART,2018) 41; Thomas Elhom-Renaud Colson, ‘The Symbolic Purpose of EU Criminal Law’, in Renaud Colson and Steward Field ( eds), *EU Criminal Justice and the Challenges of Diversity Legal Cultures in the Area of Freedom, Security and Justice*, ( Cambridge University Press, 2016), 58-59.

<sup>54</sup> See Irene Wiczorek, *The Legitimacy of EU Criminal Law* (HART, 2020) 60-62 especially footnote no 93.

<sup>55</sup> See Nina Persak ( edr), *Legitimacy and Trust in Criminal Law, Policy and Justice Norms, Procedures, Outcomes* ( Routledge,2016); Maria Kaiafia-Gbadi, *European Criminal Law and Treaty of Lisbon Legal framework and the principles of criminalization in a European environment* ( Sakoulas Publications, 2011).

<sup>56</sup> See Theodore Konstadinides, *The Rule of Law in the European Union The Internal Dimension* ( Hart, 2017); Merita Kettunen, *Legitimizing European Criminal Law Justification and Restrictions* (Springer,2020)176-182.

<sup>57</sup> See Kai Ambos, *ibid* p. 575.



intergovernmental and pure national elements in its operation and structure. The applicable procedural law is predominately national law and even the substantive criminal law is associated with the final choices of the national legislator.

- 4) Principle of conferral :the phenomenon of «competence creep» refers to the adoption of EU legislation in areas in which the EU is not considered to have been a specific legislative competence<sup>58</sup>. All this transition of powers from the Member States to the EU and the EU legislation ( including soft law) could lead to irregular intervention or stealth expansion of the competence of the EU. In addition to this, serious legitimacy concerns have been expressed for the ancillary competence of the EPPO ( Art. 22.3 EPPO Regulation).The EPPO's broad material competence is problematic with regard to the principles of subsidiarity and proportionality<sup>59</sup>. Any extension of the EPPO's competence *ratione materiae* meets with the requirement of the foreseeability and the legality of criminal law and penalties<sup>60</sup> ( what constitutes an inextricably linked offence)<sup>61</sup> and extends crucially to determining the protection of the affected individuals under the *ne bis in idem* principle.<sup>62</sup> The *ne bis in idem* principle delimit the cases where two facts are the same and they have to be therefore treated as one offence only, it is unclear how to identify ' inextricably linked' offences, being by definition different offences from PIF offences.<sup>63</sup> The EPPO has been characterized as a Trojan horse for the competence of the EU to intervene in the field of criminal law.
- 5) The main load of the working relies on the EDPO by using the procedural national law and by means of horizontal cooperation. Moreover, in contrast to the view of the Commission for a ' single legal area' the EPPO would use instruments of mutual recognition.<sup>64</sup>

#### IV. Chapter IV THE PROTECTION OF FUNDAMENTAL RIGHTS- LOST IN LABYRINTH ?

This chapter is indispensably associated with the human dignity and the legality of the PIF sector. In the level of the EU « no legitimate approach to criminal law can ignore its dual nature as a means of protecting fundamental interests as well as acting as a yardstick for civil liberties». <sup>65</sup> Generally speaking the epicenter of the critic is the legal uncertainty because of the vague legal framework in the PIF sector,<sup>66</sup> the conflicts of jurisdiction between the EU Agencies, the bureaucracy, the phenomenon of overlapping of the competence of the EU Agencies and the lack of a uniform and undivided procedure. From a defendant's perspective the right of effective defense is

<sup>58</sup> See Sacha Garben, 'Restating the Problem of Competence Creep, Tackling Harmonisation by Stealth and Reinstating the Legislator', in Sacha Garben and Inge Govaere (eds), *The Division of Competences Between the EU and the Member States Reflections on the Past, The Present and the Future* (Hart, 2017) 302; Theodore Konstantinides, *The Rule of Law in the European Union The Internal Dimension* ( Hart,2017)30-33.

<sup>59</sup> See Kai Ambos, *ibid* p. 576; Nikolaos Bitzilekis, 'The Definition of Ancillary Competence according to the Proposal for an EPPO-Regulation', in Petter Asp (edr) *The European Public Prosecutor's Office -Legal and Criminal Policy Perspectives* (Jure,2015) 112-119.

<sup>60</sup> See Art. 49(1) of the EU Charter of Fundamental Rights.

<sup>61</sup> See Eric Sitbon, ' Ancillary Crimes and Ne bis in Idem ', in Willem Geelhoed, Leendert H. Erkelens and Arjen W.H. Meij ( eds), *Shifting Perspectives on the European Public Prosecutor's Office* ( ASSER PRESS and Springer, 2018) 134-135.

<sup>62</sup> Adan Nieto Martin and Marta Munoz de Morales Romero, 'The Office of the European Public prosecutor and Related Offences: Deconstructing the Problem', in Petter Asp (edr) *The European Public Prosecutor's Office - Legal and Criminal Policy Perspectives* (Jure,2015) 123-127.

<sup>63</sup> See Giovanni Grasso, Rosaria Sicurella and Fabio Giuffrida, 'EPPO Material Competence: Analysis of the PIF Directive and Regulation', in Katalin Ligeti, Maria João Antunes and Fabio Giuffrida ( eds) *The European Public Prosecutor's Office at Launch Adapting National Systems, Transforming EU Criminal Law* ( Wolters Kluwer CEDAM,2020) 35-37.

<sup>64</sup> See Valsamis Mitsilegas and Fabio Giuffrida, ' The European Public Prosecutor's Office and Human Rights', in Willem Geelhoed, Leendert H. Erkelens and Arjen W.H. Meij ( eds), *Shifting Perspectives on the European Public Prosecutor's Office* ( ASSER PRESS and Springer, 2018) 87-88.

<sup>65</sup> See Maria kaiifa-Gbadi, ' Approximation of Substantive Criminal Law Provisions in the EU and Fundamental Principles of Criminal Law', in Anne Weyembergh and Francesca Galli ( eds), *Approximation of Substantive Criminal Law in the EU: The Way Forward* (Brussels, Edition de l' Université de Bruxelles, 2013) 27.

<sup>66</sup> See 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, 250.

at stake as a consequence of the legal uniformity, the multiple character of the administrative and criminal investigations, the diversities of the legal framework in the MS, the different applicable law and the complexity of the multiple and proliferated structure and functionality of the PIF sector. In addition to this, obvious concerns could arise from the respect of the principle of equality of arms, as the suspect is vis-à-vis the numerous and powerful EU Agencies, in a strange and unknown supranational forum equipped with strong mechanisms of law enforcement. Furthermore, the enlarged system of data transmission and exchange of information in the EU field could be a serious data breach and infringement of rights.<sup>67</sup>

Especially the establishment of the EPPO, poses multiple challenges for the human rights i.e: the procedural safeguards, the Charter and the rights in cross-border investigations.<sup>68</sup> The EPPO Regulation lays down three levels of protection encompassing the whole arsenal that the legal of the EU could offer<sup>69</sup>. This multiple system of protection is laid down in the Art. 41 of the EPPO Regulation and it is characterized by a comprehensive combination of national and supranational instruments aimed at the most adequate protection. At a first glance this approach seems to be generous for the rights.<sup>70</sup> Firstly, according to the Art. 41.1 the EPPO activities shall be carried out in full compliance with the rights of suspects and accused persons enriched in the Charter of Fundamental Rights.<sup>71</sup> Secondly, according to the Art. 41.2 the persons in the criminal proceedings of the EPPO shall, at a minimum, have the procedural rights provided for in Union law. This provision, is quite importance, as reassures as a minimum protection the standards of the EU common values and it is compatible to the supranational status of the EPPO.<sup>72</sup> Finally, Art. 41.3 claims that the persons involved in EPPO proceedings enjoys all the procedural rights available to them under the applicable national law. The Art. 5 of the EPPO Regulation enriches the protection of the rights, as it mentions the obligation to respect the Charter, the principles of proportionality and the rule of law in all EPPO activities. The Art. 5 of the EPPO Regulation gives emphasis to the impartiality of the EPPO's investigation, as procedural neutrality ( seek all relevant evidence whether inculpatory or exculpatory) and as obligation to conduct investigation without undue delay ( principle of celerity).<sup>73</sup>

On the other hand, the semi-centralized model of the criminal procedure governing the EPPO activities engender risks for a balanced and coherent procedure, as a complex amalgamation of different legal systems.<sup>74</sup> This complexity is being strengthened in the cases with transnational characteristics. The model of complementarity of the Art. 41 based on the system promoting the most favorable treatment could be dysfunctional and ineffective for the individuals, because of its complexity ( mixture of national and EU legislation) and the multitude of applicable national provisions. Furthermore, it results in legal uncertainty and non foreseeability<sup>75</sup> and « allows

<sup>67</sup> See Kai Ambos, *European Criminal Law* ( Cambridge University Press, 2018) 566.

<sup>68</sup> See Valsamis Mitsilegas and Fabio Giuffrida, ' The European Public Prosecutor's Office and Human Rights', in Willem Geelhoed, Leendert H. Erkelens and Arjen W.H. Meij ( eds), *Shifting Perspectives on the European Public Prosecutor's Office* ( ASSER PRESS and Springer, 2018) 59.

<sup>69</sup> See Valsamis Mitsilegas and Fabio Giuffrida, ' Raising the bar? Thoughts on the establishment of the European Public Prosecutor's Office' CEPS Policy Insight No 2017/39 11.

<sup>70</sup> See Maria Kaiafa-Gbandi, ' The Establishment of an EPPO and the Rights of Suspects and Defendants: Reflections upon the Commission's 2013 Proposal and the Councils Amendments', in Petter Asp (edr) *The European Public Prosecutor's Office -Legal and Criminal Policy Perspectives* (Jure,2015) 250.

<sup>71</sup> The EPPO is a EU body so in any case is bound by the Charter ( Art. 51.1 CFR);See Valsamis Mitsilegas and Fabio Giuffrida, ' The European Public Prosecutor's Office and Human Rights', in Willem Geelhoed, Leendert H. Erkelens and Arjen W.H. Meij ( eds), *Shifting Perspectives on the European Public Prosecutor's Office* ( ASSER PRESS and Springer, 2018) 63.

<sup>72</sup> See Maria Kaiafa-Gbandi, ' The Establishment of an EPPO and the Rights of Suspects and Defendants: Reflections upon the Commission's 2013 Proposal and the Councils Amendments', in Petter Asp (edr) *The European Public Prosecutor's Office -Legal and Criminal Policy Perspectives* (Jure,2015) 241.

<sup>73</sup> See Thomas Wahl, ' The European Public Prosecutor's Office and the Fragmentation of Defence Rights', in Katalin Ligeti, Maria João Antunes and Fabio Giuffrida ( eds) *The European Public Prosecutor's Office at Launch Adapting National Systems, Transforming EU Criminal Law* ( Wolters Kluwer CEDAM,2020) 89-90.

<sup>74</sup> See Maria Kaiafa-Gbandi, ' The Establishment of an EPPO and the Rights of Suspects and Defendants: Reflections upon the Commission's 2013 Proposal and the Councils Amendments', in Petter Asp (edr) *The European Public Prosecutor's Office -Legal and Criminal Policy Perspectives* (Jure,2015) 237.

<sup>75</sup> See 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, 254.

the subsistence of different levels of protection within the same criminal procedure, even when it refers to the same right ».<sup>76</sup> Legal uncertainty perceived more pronounced in cases where the EPPO, can act in multiple jurisdictions. The Art. 26 of the EPPO Regulation empowers the EPPO to choose or to switch the national forum on investigation and prosecutions ( under specific conditions). The option for the EPPO to change the forum or to choose the forum ( forum-shopping) is contrary to the principle of foreseeability and constitutes a serious obstacle for an effective defence.<sup>77</sup> Furthermore, the EPPO Regulation does not mention the rights of the ECHR. It has been criticized that, «symbolically, an explicit reference to the ECHR would have been welcome».<sup>78</sup>

## V. Chapter V JUDICIAL AND POLITICAL ACCOUNTABILITY

The added value of the EU agencies strongly depends on the adequate judicial and political accountability. If the labyrinth is the proliferation of the EU agencies, the judicial and political accountability are perceived as the Ariadne's thread. In order to strengthen the transparency and the democratic legitimacy of the EU agencies in the PIF sector, their activity is subject to political accountability. Especially, the rule of Article 88(2) second subparagraph TFEU, giving the European Parliament together with national parliaments, power to scrutinize Europol's activities is a novelty introduced by the Treaty of Lisbon.<sup>79</sup> Article 85 (1) third subparagraph TFEU requires that the future Eurojust Regulation «shall also determine arrangements for involving European Parliament and national parliaments in the evaluation of Eurojust's activities». According to the Article 67 of the Eurojust Regulation, Eurojust shall transmit its annual report to the European Parliament, to the Council and to national parliaments, which may present observations and conclusions. OLAF, is perceived as a Commission service and plays a key role in the Commission's cooperation with the Member States submitting to the European Parliament and to the Council a yearly report on PIF measures -accordingly to the Art. 325(5) TFEU.<sup>80</sup> The Art. 6 (2) of the EPPO Regulation prescribes that the EPPO is accountable to the European Parliament, to the Council and to the Commission for its general activities and that it shall issue annual reports in accordance with Article 7.<sup>81</sup>

As concerning the judicial control of OLAF, the latter constitutes a special section of the Commission and as a consequence, its activities can't be arbitrated to the national courts. In 'mixed inspections', the national courts have the competence to control these inspections because they have national character, as OLAF just assists the

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<sup>76</sup> See Maria Kaiafa-Gbandi, 'The Establishment of an EPPO and the Rights of Suspects and Defendants: Reflections upon the Commission's 2013 Proposal and the Council's Amendments', in Petter Asp (ed) *The European Public Prosecutor's Office -Legal and Criminal Policy Perspectives* (Jure,2015) 245-246.

<sup>77</sup>See 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*, 255-257; Helmut Satzger, *International and European Criminal Law* ( C.H.BECK HART NOMOS, 2<sup>nd</sup> edn, 2018) 134-135.

<sup>78</sup> Valsamis Mitsilegas and Fabio Giuffrida, 'The European Public Prosecutor's Office and Human Rights', in Willem Geelhoed, Leendert H. Erkelens and Arjen W.H. Meij ( eds), *Shifting Perspectives on the European Public Prosecutor's Office* ( ASSER PRESS and Springer, 2018) 66.

<sup>79</sup> Bogensberger *ibid* 936,

<sup>80</sup> See Michel Luchtman and Martin Wasmeier, 'The political and judicial accountability of OLAF', in Miroslava Scholten and Michael Luchtman ( eds), *Law Enforcement by EU Authorities Implications for Political and Judicial Accountability* ( Edward Elgar,2017) 233.

<sup>81</sup> See Cristoph Burchard in Hans- Holger Herrfeld, Dominik Brodowski and Christoph Burchard (eds), *European Public Prosecutor's Office Article by Article Commentary* ( HART/BECK/NOMOS, 2021) 36-40; John 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 Miroslava Scholten and Michiel Luchtman, *Law Enforcement by EU Authorities Implications for Political and Judicial Accountability* ( Edward Elgar, 2017) 247.

national authorities.<sup>82</sup> On the other hand, in the EU level there are two routes for judicial control of investigative actions by OLAF. Firstly, the Art. 268 and 340 of TFEU foresee the action of damages. There have been many cases where OLAF actions were examined in light of the rights of the defence,<sup>83</sup> the right to be heard<sup>84</sup> or the right to have access to files or the final report.<sup>85</sup> Secondly, the Art. 263 of the TFEU provides that the CJEU can review the legality of acts of the Commission that are intended to produce legal effects vis-à-vis third parties. These legal effects should be binding on and capable of affecting the interests of the applicant by bringing about a distinct change in the legal position concerned.<sup>86</sup> Regarding internal investigations, they are perceived as preparatory acts and the relevant findings can later be subjected to review against the final decision, for instance in disciplinary proceedings.<sup>87</sup> This case law has drawn criticism, as it is perceived that it contains a significant loophole.<sup>88</sup> Jan F.H. Inghelram, claims that based on the CJEU's rule of Rendo and others concerning competition law,<sup>89</sup> that in cases where an OLAF act hinders the effective exercise of fundamental rights, an action for annulment should be a possibility.<sup>90</sup> Furthermore, as part of the Commission, OLAF is subject to examination by the Ombudsman, who conducts inquiries on instances of maladministration.<sup>91</sup> Finally, the (new) Art. 9b of the revised OLAF Regulation, foresees a complaints mechanism regarding the OLAF's compliance with the procedural guarantees ( no binding effects ). The effective judicial review of OLAF, is a decisive matter because though OLAF deprives of binding powers, the initiation of administrative investigations effects the reputation of the person under investigation and often results in criminal or disciplinary proceedings.

Regarding the EPPO, because of its intrusive criminal powers the judicial review of its activities is more comprehensive, coherent and adequate. Though the judicial review of the EPPO aims at the effective protection in persons involving in transnational criminal proceedings, it has been subjected to serious criticism because it is perceived as not compatible to the philosophy of the judicial protection as it has been elaborated in the Treaty.<sup>92</sup> The initial Commission proposal excluded the judicial review of the EPPO at EU level. Article 36 of the Commission's draft stated clearly that when adopting procedural measures in the performance of its functions, the EPPO would be considered as a national authority for the purpose of judicial review.<sup>93</sup> Finally, the EPPO Regulation relies on national courts and not on the CJEU for the review of procedural acts of the EPPO that are intended to produce legal effects vis-à-vis third parties in accordance with the requirements and procedures laid down by national law ( Art. 42 of the EPPO Regulation). The European Delegated Prosecutors, enforce predominately national law and as a consequence their activities ought to be arbitrated to national courts, instead to EU courts. When national courts review the legality, they should based on Union Law and on national law. The EPPO Regulation provides a very limited review of EPPO acts by the CJEU.<sup>94</sup> According to Martin Böse this is «a piecemeal approach ..a jurisdiction à la carte.. (which) is not compatible with the treaty system of judicial

<sup>82</sup> See Michel Luchtman and Martin Wasmeier, 'The political and judicial accountability of OLAF', in Miroslava Scholten and Michael Luchtman ( eds), *Law Enforcement by EU Authorities Implications for Political and Judicial Accountability* ( Edward Elgar,2017) 240.

<sup>83</sup> Case T-48/05 *Franchet and Byk* [2008] ECR II-01585, paras 151,15.

<sup>84</sup> Case T-259/03 *Nikolaou* [2007] ECR II-00099, paras 227-234.

<sup>85</sup> Case T-215/02 *Gómez-Reino v Commission* [2003] ECR II-01685, para 65.

<sup>86</sup> Case 60/81 *IBM v Commission* [1981] ECR-2639, para 9.

<sup>87</sup> Case T-215/02 *Gómez-Reino v Commission* [2003] ECR II-01685, para 61-65.

<sup>88</sup> See Jan F.H. Inghelram, *Legal and Institutional Aspects of the European Anti-Fraud Office ( OLAF) An Analysis with a Look Forward to a European Public Prosecutor's Office* ( Europa Law Publishing,2011)189 et seq.

<sup>89</sup> Case T-16/91 *Rendo and others v Commission* [1992] ECR II-2417, para 54.

<sup>90</sup> See Jan F.H. Inghelram, *Legal and Institutional Aspects of the European Anti-Fraud Office ( OLAF) An Analysis with a Look Forward to a European Public Prosecutor's Office* ( Europa Law Publishing,2011) 206-214.

<sup>91</sup> See Art. 228 TFEU.

<sup>92</sup> Valsamis Mitsilegas, *EU Criminal Law after Lisbon Rights, Trust and the Transformation of Justice in Europe* ( Hart,2016) 113-116.

<sup>93</sup> See Valsamis Mitsilegas and Fabio Giuffrida, 'The European Public Prosecutor's Office and Human Rights', in L.H.Erkelen, A.W.H. Meij and M. Pawlik ( eds), *The European Public Prosecutor's Office An Extended Arm or a Two-Headed Dragon?* ( ASSER PRESS and Springer, 2015) 78-87.

<sup>94</sup> Valsamis Mitsilegas and Fabio Giuffrida, ' Judicial Review of EPPO Acts and Decisions', in Katalin Ligeti, Maria Joao Antunes and Fabio Giuffrida ( eds), *The European Public Prosecutor's Office at Launch Adapting National Systems, Transforming EU Criminal Law* ( Wolters Kluwer CEDAM, 2020) 115-136.

control because this system does not allow for a delegation of jurisdiction to national courts that turns the judicial system upside down. Judicial review by Union Courts is the logical consequence of establishing a supranational body vested with investigative and prosecutorial powers and the treaty clearly states that any question of the validity of acts adopted by Union institutions must be brought before the Court of Justice ( Art. 267 TFEU) ». <sup>95</sup> In addition to this, it is questionable whether national courts, have the capacity to provide effective protection in the forum shopping cases. <sup>96</sup> Besides the aforementioned institutional matters, the arbitration of the majority of the EPPO cases to the national courts is conceived to be more efficient and practical. Furthermore, the national judges have deep knowledge of the national procedural law imposed by the European Delegated Prosecutors and the defendants are more familiar with their national judicial system.

## CONCLUSIONS-OUTLOOK

The fruitful agencification in the PIF sector is perceived as a precondition for the existence of the EU itself. As a consequence of the clash among the EU and the national sovereignty, the institutions of the EU are the final project of the tendency to keep the adequate balance and they are strictly connected with various compromises and political choices. The complexity and the multilevel character of the PIF agencification, are perceived to have negative effects as concerning the status of the protection of the fundamental values, the general principles and the procedural safeguards in the EU level. The effective political and judicial accountability plays a key factor in the validity of the agencification in the PIF sector. The legitimacy of the EU bodies is connected to the added value of the activation of the EU and should be governed by the rule of law and the democratic principles. The EPPO has been conceptualized as the most radical and effective institution in the PIF sector, as a consequence of its criminal powers and its autonomous-independent status. The EPPO has supranational-federal character and symbolizes the Europeanization of the criminal matters and it outlines the utilization of the criminal law for the aims of the EU ( with a constitutional- deontological approach). The concept of the EPPO is connected with the prestige of the EU and mirrors the willingness to protect its financial interests by its own flagship. Doubtless, the EPPO has significant constitutional added value, as represents the supremacy of the EU and goes one step forward for the integration and the protection of the money of the citizens of the EU. Its status is based on strongly independency and on comprehensive judicial and political accountability. The added value of the EPPO is associated with the rule of law and the other principles of the EU ( proportionality etc), the protection of the fundamental rights and the procedural safeguards. The PIF agencification and especially the EPPO has been subjected to serious criticism based on functional deficits and constitutional matters, as elaborated above. Focusing on the traditional perspectives of the traditional criminal law, it is perceived that there is a plethora of shortcomings. Nevertheless, we should assess the PIF agencification by using the suitable criteria, which are connected to the *suis generis* federal character of the EU and the goals of EU integration. From a federal perspective all this agencification is necessary to protect the existence of the EU, it has a great symbolic meaning and it is a step ahead of the EU integration focusing on the EU citizenship. The protection of the EU budget is actually the protection of the EU citizenship. This is the core of the added value of the PIF agencification. The hesitation of the MS to confer powers to the EU and the insertion of national and intergovernmental elements are the factors that cause malfunction to the EU Pif agencies. In order to safeguard the added value of the PIF agencification we should adopt more clear and simpler federal models like the previous *Corpus Juris*. Federal budget needs to be protected in a federal way by clear federal means.

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<sup>95</sup> Martin Böse, 'Judicial Control of the European Public Prosecutor's Office ', in Tommaso Rafaraci and Rosanna Belfiore ( eds), *EU Criminal Justice Fundamental Rights, Transnational Proceedings and the European Public Prosecutor's Office* ( Springer, 2019) 201.

<sup>96</sup> 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*, 259-262.

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