European Public Prosecutor's Office (EPPO) – too much, too soon, and without legitimacy?

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The intention of this article is to provide a critical assessment of the on-going proposal for establishing a European Public Prosecutor's Office (EPPO) as a new EU judicial body and its extensive interference with national criminal and constitutional law. However, the intended instrument will not be evaluated in isolation but in the broader framework of EU criminal law after the Lisbon Treaty. The text will be divided in the following chapters: – EU criminal law after the Lisbon Treaty and the EPPO proposal, – critical assessment of the proposal.

I. EU criminal law after Lisbon and the EPPO proposal

1. General situation of EU criminal law after the Lisbon Treaty

In the five years after the entry into force of the Lisbon Treaty, there has been an extensive expansion of EU prerogatives in the criminal law field going to the core of national sovereignty and national constitutions/constitutional traditions and the level of protection of fundamental rights. Those actions were based on Title V TFEU (Articles 82-86 TFEU) as regards judicial cooperation in criminal matters. Criminal law is a very sensitive area whose development should be based on evolution rather than revolution, and criminal law changes should be strictly based on objective data and necessity as they are connected with the issue of legitimacy[1] of criminal law and the principle of proportionality (criminal law as *ultima ratio*). However, it is claimed that the acts that were adopted did not always fully take these sensitivities into account.[2] In that regard, a short overview of some measures adopted after Lisbon on material criminal law, mutual recognition, and harmonisation of procedural rights will be provided.

In the area of substantive (material) criminal law, an exercise of re-legislating and expanding the old framework decisions from the former third pillar took place, for example on combating sexual abuse of children[3], trafficking of human

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[1] See N. Peršak (ed.), Legitimacy and Trust in Criminal Law, Policy and Justice: Norms, Procedures, Outcomes, Ashgate, 2014, especially pp. 13-34.

[2] See for example The Manifesto on European Criminal Policy, ZIS 2009, pp. 697-747, updated in EuCLR 2011, pp. 86-103, and The Manifesto on European Criminal Procedure Law, ZIS 2013, pp. 430-446.

[3] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, replacing Council Framework Decision 2004/68/JHA.

beings[4], or attacks against information systems.[5] In addition, new instruments were adopted, such as the directive against market abuse[6], or proposed, such as the proposed directive on protecting financial interests of the EU[7]. Such directives in principle raised the penalty level and introduced new offences. In that regard, for example, Directive 2011/92/EU on combating abuse of children introduced a new offence of on-line grooming[8], and Directive 2013/40/EU specifically criminalized double-use tools and botnets.[9] However, often the definitions of the offences are not very precise in view of legal certainty.

In the area of mutual recognition, Directive 2014/41/EU on the European Investigation Order (EIO) was adopted showing a good understanding of the sensitivities of criminal law, legitimacy, national constitutions, and the issue of primacy of EU law. In that regard, the mentioned Directive took into account the issue of the national legal order of both the issuing and executing state introducing a validation procedure for police authorities in the issuing state and for prosecutorial authorities in the executing state (if the same measure requires a court authorization in the executing state).[10] It provides a reasonable combination between the *lex fori* and *lex locus regit actum* principles in view of reasonable flexibility.[11] It also limited the list of always available measures[12] and introduced special non-recognition grounds based on enumerated offences and for the first time explicitly on fundamental rights as defined in Article 6 TEU (referring to the Charter, ECHR and common constitutional traditions).[13] The Directive was the result of the involvement of the European Parliament as equal co-legislator for the first time in the field of mutual recognition in criminal law, addressing all the past criticism and problems as shown mainly through the use of the European Arrest Warrant (EAW).[14] The Directive in that regard also clearly showed how to deal with EAW questions, such as proportionality, the definition of judicial authority, fundamental rights as a ground for non-recognition, etc.

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[4] Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, replacing Council Framework Decision 2002/629/JHA.

[5] Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems replaced Council Framework Decision 2005/222/JHA.

[6] Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse.

[7] Proposal for a Directive of the European Parliament and of the Council on the fight against fraud against the financial interests of the EU, COM(2013)0363.

[8] Article 6 of Directive 2011/92/EU. On-line grooming in that regard is a special type of offence covering the phase before an attempt, criminalising certain material acts in preparation of a potential offence. Such an offence is a difficult one as regards a differentiation between permitted and not permitted behavior. However, the harmonisation was a limited one as it did not address the issue of the different ages of sexual consent in the Member States, potentially causing anomalies in cross-border cases.

[9] Articles 7 and 9 of Directive 2013/40/EU.

[10] Article 2 of Directive 2014/41/EU.

[11] Article 9 of Directive 2014/41/EU.

[12] Article 10 of Directive 2014/41/EU.

[13] Article 11 of Directive 2014/41/EU.

[14] A. Erbežnik, Mutual Recognition in EU Criminal Law and its Effects on the Role of a National Judge, in N. Persak (ed.), Legitimacy and Trust in criminal Law, 2014, pp. 131-152.

At the same time, three directives on harmonizing procedural rights in criminal procedure were adopted, namely Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, Directive 2012/13/EU on the right to information in criminal proceedings and Directive 2013/48/EU the right of access to a lawyer. The first two directives raised the common level of procedural rights in the EU: Directive 2010/64/EU demands as a principle the translation of certain documents (a stricter standard in comparison with ECtHR's case law)[15], and Directive 2012/13/EU introduced a common "Miranda rights" standard as regards warnings given to a suspect.[16] However, the latter did not solve the issues of admissibility of evidence and the exclusionary rules in case of a violation of such warnings. The third one, Directive 2013/48/EU, is much more problematic as it introduced a broad derogation regarding the denial of access to a lawyer at preliminary/police stages,[17] and at least two Member States in the transposition procedure indicated the possibility to lower their current standards despite the non-regression clause. At the same time, the Court of Justice's *Melloni* judgment,[18] dealing with the relationship between national constitutional standards and EU law as regards the question of primacy of EU law, indicated the Court's understanding that EU harmonization rules preclude higher national constitutional rules as regards protection of fundamental rights.[19] It can be observed clearly in the *Melloni* saga that the CJEU entered on a path whereby EU law lowers the standards of fundamental rights in the Member States, and that it triggered another dispute with national (constitutional) courts on the question of primacy of EU law.[20] In addition, three more harmonization directives were proposed, namely on children in criminal proceedings[21], on legal aid[22], and on the presumption of innocence and *in absentia* judgments[23]. The last one is the most problematic one as the Commission proposal included a wide derogation on the reversal of the burden of proof in criminal proceedings based on very specific and rare ECtHR case-law.[24] In addi-

[15] Article 3 of Directive 2010/64/EU. Compare with ECtHR case-law; for example, *Brozicek v. Italy*, *Kamasinski v. Austria*, *Hermi v. Italy*, *Husain v. Italy*, *X. v. Austria, Luedicke, Belkacem and Koç v. Germany*, etc.

[16] Article 3 of Directive 2012/13/EU.

[17] Article 3(6) of Directive 2013/48/EU stating that in exceptional circumstances and only at the pre-trial stage, Member States may temporarily derogate from the right to a lawyer to the extent justified in the light of the particular circumstances of the case, on the basis of one of the following compelling reasons: (a) where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person; or (b) where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings.

[18] CJEU, case C-399/11.

[19] See para. 35-46.

[20] See the latest decision of the Spanish Constitutional Court adopting the "solange" doctrine – http://www.tribunalconstitucional.es/es/jurisprudencia/restrad/Paginas/JCCJCC262014en.aspx. See also OLG München, 1. Strafsenat, OLG Ausl 31 Ausl A 442/13 (119/13), 15 May 2014.

[21] Proposal for a Directive on procedural safeguards for children suspected or accused in criminal proceedings, COM(2013)0822.

[22] Proposal for a Directive on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings, COM(2013)0824.

[23] Proposal for a Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings, COM(2013)0821.

[24] ECtHR, *Salabiaku v. France*, A. No. 10519/83, and *Telfner v. Austria*, A. No. 33501/96.

tion, the Member States cut down the proposal even further, thus calling into question the absolute value of the right to remain silent and of the privilege against self-incrimination, referring to its use for "corroboration" of other evidence and thereby implementing the ECtHR's questionable *John Murray* decision into EU (federal) law.[25]

The EPPO proposal was made in this environment and has to be seen through the prism of such an environment. Therefore, any potential problems of the EPPO only add to an already problematic legal area as regards questions such as legitimacy, democratic control and oversight, the relationship between national constitutional law and EU law in view of primacy, and the level of protection of fundamental rights.

2. The EPPO proposal

The EPPO idea has a long history covering the 1997[26] and 2000[27] Corpus Juris studies, the 2001 Green Paper of the Commission[28], its integration into Article 86 TFEU, and the 2013 Commission proposal for a Regulation on the establishment of the European Public Prosecutor's Office[29]. The mentioned drafts and studies varied in their ideas as regards the combination of supranational harmonisation and mutual recognition.[30] A brief overview of the finally proposed Regulation will be provided below.[31] The proposal is divided into ten chapters, the more interesting ones being Chapter II on the structure, Chapter III on rules of procedure on investigations, prosecutions and trial proceedings, Chapter IV on procedural safeguards, and Chapter V on judicial review. In that regard, the Commission envisaged the existence of a non-collegial structure with a Prosecutor and his/her four Deputies as well as with Delegated Prosecutors in the Member States with a possible double-hat function.[32] In addition to criminal offences affecting the financial interests of the Union from the proposed PIF

[25] See Council general approach, 16531/2014. The EP strictly opposes such an approach as could be seen from the EP position on the proposal – see the result of vote in the Committee of Civil Liberties, Justice and Home Affairs on 31 March 2015 (http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A8-2015-0133&language=EN). It was also clearly stated in the EP working paper (http://www.europarl.europa.eu/meetdocs/2014_2019/documents/libe/dv/hearing_libe_wd(vii_legislature)_/hearing_libe_wd(vii_legislature)_en.pdf) on the issue that EU standards should be very high standards and not the common lowest denominator as in such case no harmonization is necessary at all. Such harmonization is even dangerous as it triggers a downwards spiral of lowering fundamental rights standards as can be seen clearly from the *Melloni* case and the transposition of Directive on access to a lawyer.

[26] M. Delmas-Marty (ed.), Corpus juris portent dispositions pénales pour la protection des intérêts financiers de l'Unioneuropéenne, Economica, 1997.

[27] M. Delmas-Marty and J. A. E. Vervaele (eds.), The implementation of the Corpus Juris in the Member States, Intersentia, Antwerp 2000.

[28] Green Paper on criminal law protection on the financial interests of the Community and the establishment of a European Prosecutor, COM(2001)0715, 11.12.2001.

[29] COM(2013)0534, 17.7.2013.

[30] See for more details K. Ligeti, The European Public Prosecutor's Office: How Should the Rules Applicable to its Procedure be Determined?, EuCLR 2/2011, pp. 123-148.

[31] For a more extensive analysis of the proposal see P. Asp (ed.), The European Public Prosecutor's Office, Legal and Criminal Policy Perspectives, Jure, 2015.

[32] Article 6 of the EPPO proposal.

directive[33], the EPPO should have also ancillary competences.[34] Prosecution is in principle mandatory and in most cases it will be conducted by Delegated Prosecutors.[35] As regards the applicable law, there is a combination between national law and specific provisions of the regulation. In that regard, the proposal envisages certain measures that shall be available in EPPO cases where it is not fully clear whether national limitations do apply and to what extent.[36] Further, there are specific rules on admissibility of evidence making it obligatory to accept evidence that does not violate the fairness of the proceedings as regards Articles 47 and 48 of the Charter.[37] As regards defence rights, existing EU directives are listed and apply in addition to national rules which results in a double layer of protection.[38] However, it has to be clear that some of the directives contain derogations, meaning that the application in the Member States may vary. At the same time, regarding the right to remain silent[39] a reference to national law is made, again entailing the application of very different standards in the Member States. As regards judicial review, the CJEU is excluded. At the same time, it is not clear whether the decision to open an investigation as such is subject to judicial control in the Member States or whether it depends on the national law of each Member State.[40] The Council provisionally finalized the first 16 articles in the meeting of 15 June 2015 as regards the structure of the EPPO, providing for the introduction of a collegiate structure with permanent chambers in regard to which several Members States expressed reservations.[41]The Parliament issued two intermediate reports on the EPPO, with both highlighting the issue of judicial control and a reference to Article 6 TEU as regards admissibility of evidence as well as to the EIO non-recognition grounds.[42]

[33] Proposal for a Directive on the fight against fraud to the Union's financial interests by means of criminal law, COM(2012)0363, 11.7.2012. Already the scope of the proposed PIF Directive is problematic as the Commission and Parliament want an inclusion of VAT offences, meaning a very extensive definition of offences (see Recital 4 of the proposal) despite the fact that only a small percentage of VAT goes to the EU budget and in that regard VAT is mostly a national tax in its nature. Therefore, only that part of VAT which actually goes to the EU budget could be included. However, this would cause a strange division of VAT offences between a bigger national part and a smaller EPPO part, something non-workable in practice.

[34] Article 13 of the EPPO proposal. Such an ancillary competence should exist in cases of other offences "inextricably linked" to the PIF offences where "their joint investigation and prosecution are in the interest of good administration of justice", under the condition that the PIF offences are "preponderant and the other criminal offences are based on identical facts". A final decision is taken by national judicial authorities in case of disagreement.

[35] Articles 16-18 of the EPPO proposal.

[36] Articles 26 of the EPPO proposal.

[37] Article 30 of the EPPO proposal.

[38] Article 32 of the EPPO proposal.

[39] Article 33 of the EPPO proposal.

[40] Article 36 of the EPPO proposal.

[41] See Council document 9372/15. For more details above the work of the previous Greek and Italian presidencies see under http://free-group.eu/2015/04/11/eppo-european-public-prosecutor-are-the-eu-member-states-slowly-stifling-an-european-project/.

[42] See EP resolutions T7-0141/2014 and T8-0173/2015.

II. Certain problematic issues relating to the EPPO proposal

In this chapter, certain potentially problematic issues as regards the EPPO proposal will be highlighted, such as lack of democratic control, lack of judicial oversight, and the question of availability of measures and admissibility of evidence.

1. Lack of democratic control

The EPPO is a "creature" of the former third pillar, having been adopted in the special legislative procedure by unanimity in the Council, according to which the European Parliament can only give or withhold consent (Article 86 TFEU). In that regard, the Treaties allow the introduction of a highly invasive new judicial institution without any full-fledged and adequate democratic (parliamentary) debate and control. The use of such procedures in the former third pillar led in the past to a very unbalanced situation between efficiency of EU criminal law on one side and the protection of the rights of the suspects or accused persons on the other side, to the detriment of the latter.[43] In principle, the EPPO regulation is adopted like a government decree, being debated and decided only by representatives of national governments (the executive branch) in the framework of the EU Council. This raises serious questions regarding the principle of separation of powers as one of the main features of modern democracies, as basically national parliaments are not substantially involved (taking aside their unsuccessful use of Protocol No. 2 on subsidiarity) and the European Parliament has only the symbolic possibility of giving or withholding consent. In that regard, the features introduced through the special legislative procedures provided in Article 86 TFEU should be highly limited and aspects relating to harmonization and fundamental rights should be dealt with in the normal legislative procedure.[44] In that regard, it has to be pointed out that criminal law, due to its very intrusive character as regards the rights and freedoms of individuals, needs a very high level of legitimacy. For such legitimacy, democratic (parliamentary) control as well as adequate debate and decision-making are essential. The current situation is not satisfactory, as the European Parliament does not participate in Council deliberations and can only try to influence the content by non-binding reports. In consequence, there does not exist any transparency either in the Council as regards the procedure on the technical/working level (whereby basically attachés and national experts from governments of Member States decide on the content which is later formally confirmed by ministers in a public Council session). The transparency issue of Council working groups is a recurrent issue in the European Parliament as regards transparency and access to documents in view

[43] See the former Stockholm programme stating, inter alia, that "*the challenge will be to ensure respect for fundamental rights and freedoms and integrity of the person while guaranteeing security in Europe. It is of paramount importance that law enforcement measures, on the one hand, and measures to safeguard individual rights, the rule of law and international protection rules, on the other, go hand in hand in the same direction and are mutually reinforced*" (1.1. Political priorities).

[44] M. 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 P. Asp (ed.), The European Public Prosecutor's Office, Legal and Criminal Policy Perspectives, Jure, 2015, pp. 237-239.

of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents.[45] In addition, neither was the role of national parliaments duly respected in the procedure regarding subsidiarity[46] as required by Protocol No 2[47], nor was subsidiarity reasonably justified.[48] This raises serious questions concerning democratic (parliamentary) control and consequently the question of the legitimacy of the EPPO as such.

2. Lack of judicial (court) oversight

One of the issues as regards the EPPO is the question of judicial control and remedies. The Commission proposed a new EU body that is not subject to the CJEU – an *argumentum ad absurdum* (Article 36 and Recitals 36-39 of the EPPO proposal). It only foresees national judicial control as regards individual measures. However, clear common judicial control of the initiation of the investigation as such is missing. The problem is not the assessment of the individual measures but the assessment of the initial decision to investigate as such. A potential internal control, for example by chambers in a collegiate structure, does not solve the issue because such a kind of control is not control by courts (judicial review). In that regard, the issue on the question of the nature of prosecution arises. Prosecution by its nature is a creation of the French inquisitorial procedure[49] and a prosecutor, even if he/she should be independent[50], is not impartial but a party to the

[45] See for example EP resolutions T7-0378/2011 and T7-0203/2014, as well as the CJEU Access Info case, C-280/11.

[46] Subsidiarity is a very important federal principle to prevent power-grabbing by the central level transforming the EU from a "federal" to a unitary state. Unfortunately, the evaluation of such a principle became in practice a very formalistic one usually reflected in standardized formulas provided by the Commission and reflected in a standardized recital in legislative texts. See Recital 5 of the EPPO proposal.

[47] See the Commission reply – Communication 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, concluding in accordance with Protocol No 2, COM(2013)0851 that *"in the light of the above, the Commission concludes that its proposal complies with the principle of subsidiarity enshrined in Article 5(3) TEU and that a withdrawal or an amendment of that proposal is not required. The Commission therefore maintains it. During the legislative process the Commission will, however, take due account of the reasoned opinions of the national Parliaments"*. See also S. Drew, How will the European Public Prosecutor's Office be Born?, and H. Sorensen and T. Elholm, The EPPO and the Principle of Subsidiarity, in P. Asp (ed.), The European Public Prosecutor's Office, Legal and Criminal Policy Perspectives, Jure, 2015, pp. 18-19 and 31-50.

[48] Also, the Commission's reasoning from statistical data is questionable as they consider that each reported case should end with a conviction. According to such logic we do not need trials at all if each report by OLAF shall end with a conviction. This is shows a clear misunderstanding of the nature of criminal procedure. In that regard the Commission states: *"From 2006-2011, conviction rates of actions transferred by OLAF to Member States' judicial authorities ranged from 19,2 % to 91,7 % (not including Member States with rates of 0 % and 100 %). Therefore, contrary to the opinions of some national Parliaments (CZ Senát, NL Eerste Kamerand Tweede Kamer, UK House of Commons), which question the data provided by the Commission, there is a solid basis of statistical evidence demonstrating that in general terms the action taken at Member State level in the specific area of Union fraud is insufficient"* (2.3).COM(2013)0851.

[49] R. Mowery Andrews: Law, Magistracy, and Crime in Old Regime Paris, 1735-1789, Vol. 1, The System of Criminal Justice, Cambridge University Press, 1994, pp. 422-424.

[50] See in that regard, the position of some Member States in the Council as regards independence of the prosecution as a constitutional requirement, especially Portugal (see, JHA Council meeting, 15-16 June 2015, Luxembourg). And in this context also the decision of the Slovenian Constitutional Court No. U-I-42/12, 7 February 2013, on the self-dependence of the state prosecution in a systemic manner and on the self-dependence of individual state prosecutors (especially paras. 28 and 31). The term "self-dependence" (in Slovenian "samostojnost") means more than autonomy and less than independence. But it is closer to independence (which is reserved only for the judiciary).

procedure.[51] This can be also clearly seen from the ECtHR's case-law on interpreting Article 5(3) ECHR[52] as regards the definition "*or other officer authorised by law to exercise judicial power"*, in which the court clearly refused to consider a prosecutor as a judicial (court-like) authority in view of the legitimacy of assessment of a deprivation of liberty.[53] However, in some Member States a prosecutor has quasi-court authority, which in the past had created problems in the field of mutual recognition as regards the EAW[54] Framework Decision as well as regards the EIO[55] Directive because a special formula had to be found for an additional court authorization in the executing state if necessary.[56] Not providing for judicial (court) oversight of the EPPO investigation as such could create a direct clash between national (constitutional) requirements in at least some Member States, such as the ones providing for an investigating magistrate[57] as well as the ones with police/prosecutorial investigations with a special court remedy as regards the decision to introduce an investigation as such. For example, the Croatian Constitutional Court annulled substantial parts of the Croatian Criminal Procedure law because, *inter alia*, it did not provide for a special judicial (court) remedy against the introduction of an investigation.[58] In that regard, a court remedy against the introduction of an EPPO investigation could be considered a common constitutional tradition in line with Article 6 TEU.

Yet, such a requirement for a judicial remedy is not a purely technical rule but, as seen above, an inherent part of constitutional law of some Member States. Consequently, an adverse EPPO regulation would cause a direct clash between primacy of EU law and national constitutional law as EU law would then demand the lowering of national standards of fundamental rights protection. Such a situation has to be avoided due to the following:

- EU law must never lower fundamental rights protection in the Member States. The introduction of the legally binding value of the Charter as an "EU Bill of Rights" as well as the whole foundation of the EU as subject to the rule of law is based on the protection of fundamental rights. Such a foundation (and EU legitimacy) would be seriously undermined if EU law were to lower the level of

[51] See, for example, in that regard a very clear analysis of the Slovenian Constitutional Court (No. U-I-42/12) of the role of state prosecutors as part of the executive branch.

[52] Article 5(3) ECHR:Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

[53] See, for example, ECtHR, *Moulin v. France*, Application no. 37104/06, Judgment of 23 November 2010.

[54] See in that regard the Assange case saga – *Julian Assange v Swedish Prosecution Authority*, [2012] UKSC 22, and High Court, *Julian Assange v Swedish Prosecution Authority*, 2011 EWHC 2849 (Admin).

[55] For example, prerogatives of Italian prosecutors to authorize house searches.

[56] Article 2(d) of the EIO Directive defines the executing authority as "*an authority having competence to recognise an EIO and ensure its execution in accordance with this Directive and the procedures applicable in a similar domestic case. Such procedures may require a court authorisation in the executing State where provided by its national law."*

[57] The Slovenian Justice Minister specifically raised this issue at the JHA Council on 15 June 2015.

[58] Decision of the Croatian Constitutional Court in the case U-I-448-2009, 19 July 2012, stating that court (judicial) review is an inherent part of the Croatian Constitution as in that regard the Croatian obligatory legal standards are higher than in other states or as required by the minimum ECHR standards. The same applies to the "new" Austrian criminal procedure.

fundamental rights protection. As seen through the *Melloni* saga as regards the EAW, this is unfortunately already happening;

- primacy of EU law is not a firm principle written in the Treaties but is only case-law based and mentioned only in a Declaration to the Treaties[59] as several constitutional courts never unconditionally accepted primacy but instead are following the "Solange" doctrine.[60] Any direct challenge of this principle based on lowering of fundamental rights protection by EU secondary law could have fatal consequences for the whole legal structure of the Union based on primacy. Therefore, any potential clash has to be avoided.[61]

3. Availability of measures and admissibility of evidence

A similar potential clash between national constitutional law and EU secondary law is possible in connection with the list of measures that have to be available. The EPPO Commission proposal in that regard does not seem careful enough as it could force Member States to have and use measures not permitted in a similar national case.[62] In that regard again, the EIO model should be followed with a very careful list of always available measure plus additional non-recognition grounds guaranteeing that a Member State is never placed in a situation where it is obliged to do something that is not permitted or possible in a similar national case.[63] The Commission proposal is even more problematic as regards admissibility of evidence as the intention is to create a single European area[64] of free circulation of evidence from one system into another in which the national judge is barred from using the normal national rules. The Commission proposal refers in that regard in Article 30 only to "*fairness of the procedure or the rights of the defence as enshrined in Articles 47 and 48 of the Charter*". First, such term of fairness is not clear. Is this an autonomous term or one referring to national law, to ECHR or to the Charter standards? At the same time, not all relevant rights are mentioned, like privacy or data protection.[65] Second, admissibility of evidence and the exclusionary rule are not purely technical issues but refer to basic fundamental constitutional rights, such as privacy, the right to remain silent, etc. They are a very substantive part of national constitutional law

[59] CJEU, *Costa/ENEL*, 6/64, 15 July 1964, and Declaration No. 17 to the Treaties.

[60] See in that regard the decisions of the *Bundesverfassungsgericht* – BVerfGE 37, 271, 29 May 1974 (*Solange I*), BVerfGE 73, 339, 22 October 1986 (*Solange II*), BVergGE 89, 155 (1993), 12 October 1993, and BvE 2/08, 30 June 2009.

[61] In that regard the EIO Directive is a good example, where at least from the European Parliament's side one of the goals was to avoid such a clash. Consequently, the EIO Directive introduced a carefully drafted fundamental rights non-recognition clause referring to Article 6 TEU (see Article 11(1)(f) – *"there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter"*) with three levels of fundamental rights protection – Charter, ECHR and common constitutional traditions.

[62] Article 25 of the EPPO proposal.

[63] See Articles 10 and 11 of the EIO Directive.

[64] Article 25(1) of the EPPO proposal states that *"the territory of the Union's Member States shall be considered a single legal are in which the EPPO may exercise its competence"*.

[65] See in that regard D. Helenius, Admissibility of Evidence and the EPPO, and I. Zerbes, Collecting and using evidence: a patchwork of legal orders, in P. Asp (ed.), The European Public Prosecutor's Office, Legal and Criminal Policy Perspectives, Jure, 2015, pp. 178-233.

as an effective tool in case of a violation of fundamental rights. Consequently, any imposition of less strict EU rules before national courts in comparison with their own national (constitutional) requirements will again create a clash between national constitutional law and EU secondary law. Third, it is not feasible to apply before the same court two sets of different admissibility rules, i. e. one for domestic procedures and another one for EPPO procedures, in view of the principle of equality before the law. Fourth, the European Parliament proposed in its non-binding reports a much more sensitive and clever approach referring to Article 6 TEU based on the EIO model.[66]

As an example, the Miranda warning system and the privilege against self-incrimination and the right to remain silent can be used. Such a warning system was originally developed by the US Supreme Court as a prophylactic rule for the protection of 5th Amendment's privilege against self-incrimination, according to which a mistake in the warning triggers in principle the exclusionary rule of statements and evidence.[67] However, in the original US system several exemptions were developed to such a general rule, such as the public security exception[68], a renewed warning[69], an exception regarding real evidence[70], etc. Here, the US Court followed something that I call the "pendulum doctrine": A fundamental right (like the privilege against self-incrimination) has a basic core layer (being voluntariness of statements so as to establish the privilege against self-incrimination). Around this core, further layers are applied– concentric circles potentially expanding the sphere of a particular fundamental right. Such concentric circles can be added (for example by introducing the Miranda warning system) or taken again away (by creating exceptions to the Miranda system). The system stays legitimate so long as the core of the right is not touched. In EU Member States, the main problem is that not even the core is the same because in some Member States the right to remain silent is an absolute right (on a higher level than ECtHR's *John Murra*y case-law) while in others it is only a relative right.[71] However, problems do not stop here as the additional layers also are not the same.

Directive 2012/13/EU on the right to information in criminal proceedings introduced a common EU Miranda warning system for the suspect without any common sanctions in the case of violation. Only now the proposed Directive on presumption of innocence mentioned above tried to introduce them. However, the

[66] See EP resolutions T7-0141/2014 and T8-0173/2015.
[67] US Supreme Court, Miranda v. Arizona, 384 U. S. 436 (1966).
[68] US Supreme Court, New York v. Quarles, 467 U. S. 649 (1984).
[69] US Supreme Court, Oregon v. Elstad, 470 U. S. 298 (1985).
[70] US Supreme Court, US v. Patane; 542 U. S. 630 (2004).
[71] This can be seen very clearly from the Council general approach (16531/14) on the proposed directive on presumption of innocence mentioned above, where in recital 20 b silence is considered as a possible corroboration of other evidence against the person – the right to remain silent as a relative category: *"Member States should ensure that the exercise of the right not to incriminate oneself or the right to remain silent should not be used against a suspect or accused person at a later stage of the proceedings and should not be considered as evidence that the person concerned has committed the offence concerned. This should be without prejudice to national rules or systems which allow a court or a judge to take account of the silence of the suspect or accused person as an element of corroboration of evidence obtained by other means, provided the rights of the defense are respected."*

Commission proposal in that regard is not an ambitious one and again refers only to "fairness of the proceedings", similar to the EPPO proposal. At the same time, both instruments do not even reflect ECtHR's case law on Article 3 ECHR (prohibition of torture, inhuman and degrading treatment). According to that case law, any use of evidence from a direct violation of Article 3 regardless of the category (torture, inhuman or degrading treatment) renders the procedure unfair. In addition, even indirect evidence stemming from torture cannot be used (even if torture was used against third persons).[72] It is more complicated for indirect violations in case of inhuman and degrading treatment where the evidence can be in the file but must not be used as the main evidence against the accused.[73] However, it is questionable whether some Member States are taking the ECtHR's case law in that regard fully into account (for example, Scandinavian states have a system providing for fully free assessment of evidence by a judge). Consequently, the exclusionary rules in the EU vary substantially from one Member State to another, going from the extreme of no rules at all, to the weighing of the fairness of the procedure, to a full and absolute exclusionary rule. My own Member State, Slovenia, in that regard has one of the strictest systems of exclusionary rules in the EU according to which by law[74] all evidence gathered in violation of fundamental rights as well as evidence gathered through use of such evidence (the fruit of a poisoned tree doctrine) has to be excluded by law, and only in some rare cases the Slovenian Supreme court allowed certain exemptions – it introduced the inevitable discovery doctrine and exceptions for evidence collected by private parties.

In addition, evidence collected in other Member States leads to additional questions because such evidence is not directly usable in national trials if it was collected on the basis of mutual legal assistance/mutual recognition requests. National rules of the requesting/issuing state fully apply. In that regard, the EIO directive did not change anything. Consequently, the EPPO system wants to change this and force on the Member States a new type of exclusionary rules only for EPPO proceedings. Such a proposal is not legally workable in view of equality before the law and not acceptable in view of the role of exclusionary rules as an effective tool to protect certain fundamental constitutional rights of the defendant when "the constable blundered". In Slovenia, the issue was highlighted in a high profile case including a former prime minister charged with corruption. "In Slovenian courts, Finnish evidence was used which had been collected in seizures from a house search in Finland that violated Article 8 ECHR (as did the whole Finnish system of house searches at the time).[75] Slovenian regular courts, including the Supreme Court, did not find the issue problematic and adhered to a bizarre

[72] ECtHR, *Gäfgen v. Germany*, A. no. 22978/05, *Othman (Abu Qatada) v. UK*, 8139/09, and *El Haski v. Belgium*, 648/08.

[73] Such a split between indirect evidence from torture on one side and from inhuman and degrading treatment on the other side has been rightly criticised by a group of judges – see partly dissenting opinions in *Gäfgen*.

[74] Article 18 of the Criminal Procedural Law.

[75] ECtHR, *Harju v. Finland*, 56716/09, and *Heino v. Finland,* 56720/09. See also A. Erbežnik, The Principle of Mutual Recognition as a Utilitarian Solution, and the Way Forward, EuCLR 1/2012.

schizophrenic theory according to which certain constitutional rights bind only Slovenian authorities but are toothless for evidence collected abroad, specifically regarding the issue of a court authorization for a house search.[76] The same schizophrenic theory on admissibility is contained in the EPPO proposal. Personally, I objected to this theory as foreign evidence used in Slovenian courts has to be compared with basic standards of the Slovenian Constitution such as a court authorisation for certain measures like house searches or telecommunication interceptions.[77]

In that regard, I proposed a three layer theory to assess foreign evidence being used in Slovenia:

- Adherence to minimum ECHR standards.
- Adherence to the Charter and EU harmonization rules
- Adherence to basic principles of the Slovenian constitution.[78]

Only evidence fulfilling the requirements of all three layers can be used in Slovenian courts. However, the EPPO proposal would introduce an obligation to admit evidence collected in another Member State as long as it did not violate fairness of the proceedings. On the legal level, such an approach is poorly thought through. Instead, in EPPO cases the same national rules of the court of the trial should be used rather than special rules. In that regard, the European Parliament offered a more interesting proposition by referring to Article 6 TEU which would somehow reflect the three layer theory mentioned above.

III. Conclusions

The intention of the mentioned text was to present the legal environment in which the EPPO proposal arrived, provide a brief overview of the proposal, and at the same time point out some legal problems of the proposal. Based on this, the opinion of the author is that the EPPO proposal is legally a highly problematic proposal that might potentially even endanger the EU area of Freedom, Security and Justice by directly challenging national constitutional orders as regards a higher level of protection of fundamental rights. In that regard, legal deficiencies as regards provisions on admissibility of evidence and lack of judicial remedies have been

[76] The whole procedure recently has been annulled by the Slovenian Constitutional Court due to a violation of the principle of legality as the charges were very undefined – unknown time, unknown place and unknown means of communication. Unfortunately, the Constitutional Court did not decide finally on the question of the admissibility of Finnish evidence.

[77] Such a viewpoint has been confirmed by the Slovenian Constitutional Court in case No. Up-519. This decision "selects" constitutional rights of general privacy (Article 35), home privacy (Article 36) and telecommunication privacy (Article 37) as establishing higher and binding human rights' protection standards than Article 8 ECHR. See also A. Erbežnik, Skupni standardi EU na področju kazenskega prava v primerjavi z nacionalnimi (ustavnopravnimi) standardi – *Solange Reloaded, Pravna praksa 26/2014.*

[78] It is about basic principles and not about technicalities. For example, the Slovenian constitutional rule of two witnesses for a house search cannot be interpreted to prevent the use of foreign house searches where only one witness was present. But it is about the question of non-arbitrariness – the foreign system must also provide safeguards in that regard even with one witness (but who of course cannot be a police officer as practiced in some states).

highlighted. In addition, it is a premature proposal as the EU criminal law area is still in flux and a very heated debate is going on about the level of EU common standards. Should it be the lowest common denominator (based on ECtHR's case law) or a higher level? This can be seen clearly from the debates on the proposed Directive on the presumption of innocence. However, for the moment the political debate on EPPO seems like a self-fulfilling prophecy whereby the main actors in the Council (Member States, experts, and ministers) are not questioning the proposal as such but only its details, although according to the Treaties EPPO is only an option developed from Eurojust and not an obligation. But revolution is known to eat its children, and a postponement of the solutions for the problems to the application stage will seriously haunt Member States later. It is time that deficiencies of the current EPPO debate and proposal are clearly pointed out at legal and political level, stating bluntly that "the Emperor is naked".