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EFFECTIVE JUDICIAL PROTECTION AND THE REGULATION IMPLEMENTING ENHANCED COOPERATION ON THE ESTABLISHMENT OF THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE / Valéria Ružičková

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Abstract: ***Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office contains several ambiguous provisions which spark the interest of European Union law scholars. One of them is the Recital 30 of said regulation, according to which where the national law of a Member State provides for the internal review of certain acts within the structure of the national prosecutor's office, Member States should not be obliged to provide for review by national courts. The article therefore examines the notion of effective judicial protection within the European Union, its expression in the EPPO Regulation, some of the pressing issues relating (although not only) to the wording of the Recital 30 of the Preamble of the EPPO Regulation with regard to the principle of effective judicial protection and contemplates on possible reaction from the Court of Justice of the European Union.***

Key words: ***European Public Prosecutor's Office; Effective Judicial Protection; Judicial Review***

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1. INTRODUCTION

From once an economic union of states, the European Union has emerged as a community of people united in various fields of operation and its impact on quotidian life of individuals has risen significantly. One of its freshest ambition coming to life is the project of the European Public Prosecutor's Office (hereinafter referred to as "the EPPO"), which became operational in June 2021, already initiated several proceedings, and issued convictions.

The idea of the EPPO's creation has its roots in the meeting of the Presidents of the European Criminal Law Associations at Urbino University in Italy in 1995, where the idea of a European legal area for the protection of the financial interests of the European Communities was launched. A group of experts led by Prof. Delmas-Marty was tasked with elaborating guiding principles in relation to the criminal law protection of the Union's financial interests within the framework of a single European legal area. A report called Corpus Juris was delivered by these experts in 1997, including provisions on the EPPO's establishment. Corpus Juris distinguished between criminal law and criminal procedure

and focused on the pre-trial procedure, leaving the later stages of criminal proceedings to the national judiciary. European public prosecutor was intended to be present during the trial stage in order to ensure continuity of the proceedings and equality of treatment among those being tried, in spite of the differences between national systems (De Angelis, 2019).

In 2000, the Corpus Juris 2000 was presented as a follow-up to the 1997 proposal, analysing the feasibility of the Corpus Juris in relation to the legislations of the Member States. Later, in 2001, European Commission published its Green Paper[1] on criminal-law protection of the financial interests of the Community, and the establishment of a European Prosecutor, seeking practical solutions in implementing the EPPO project. Stating that the Corpus Juris proposed a high level of harmonisation of the substantive criminal law, European Commission pointed out that such harmonisation must be proportionate to the specific objective of the criminal protection of the Community's financial interests. The debate was thus restricted to the minimum requirement for the European Public Prosecutor to be able to operate effectively (De Angelis, 2019).

After providing the legal basis for the EPPO's creation in the Lisbon Treaty,[2] the European Commission presented its proposal for a regulation establishing the EPPO in 2013.[3] However, there was a lack of willingness of all EU Member States to participate in this project, leaving it to the intentions of the so called enhanced cooperation.[4] This was established by the Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office[5] (hereinafter referred to as „the EPPO Regulation") which – although still innovative and ambitious – was a compromise and quite distinct from the Commission's proposal (De Angelis, 2019). According to the EPPO Regulation, the EPPO shall be responsible for investigating, prosecuting and bringing to judgment the perpetrators of, and accomplices to, criminal offences affecting the financial interests of the Union, which are provided for in the so called PIF Directive[6] and determined by the EPPO Regulation. In that respect, it shall undertake investigations, and carry out acts of prosecution and exercise the functions of prosecutor in the competent courts of the Member States, until the case has been finally disposed of.[7]

The EPPO operates on the centralised and decentralised level: central level consists of the European Chief Prosecutor and 22 – one for each participating EU Member State – European Prosecutors, while the decentralised level consists of European Delegated Prosecutors. These act on behalf of the EPPO in their respective Member States and have the same powers as national prosecutors in respect of investigations, prosecutions and bringing cases to judgment.[8] Despite the fact that they may also exercise functions as national prosecutors,[9] when investigating and

[1] Green paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, COM_2001_817.
[2] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306, 17.12.2007, pp. 1–271.
[3] Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM(2013) 534.
[4] See Article 20 of the Treaty on European Union.
[5] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), OJ L 283, 31.10.2017, pp. 1–71.
[6] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, OJ L 198, 28.7.2017, pp. 29–41.
[7] Article 4 of the EPPO Regulation.
[8] Articles 8 and 13 of the EPPO Regulation.
[9] Article 13 of the EPPO Regulation.

prosecuting offences within the competence of the EPPO, they should act exclusively on behalf and in the name of the EPPO and should operate with complete independence from their national authorities.[10]

In general, procedural acts of the EPPO that are intended to produce legal effects *vis-à-vis* third parties as well as failures to adopt such acts shall be subject to review by the competent national courts in accordance with the requirements and procedures laid down by national law.[11] Nevertheless, Recital 30 of the EPPO Regulation states that where the national law of a Member State provides for the internal review of certain acts within the structure of the national prosecutor's office, the review of such decisions taken by the European Delegated Prosecutor should fall under the supervision powers of the supervising European Prosecutor in accordance with the internal rules of procedure of the EPPO. In such cases, Member States should not be obliged to provide for review by national courts, without prejudice to Article 19 of the Treaty on the European Union and Article 47 of the Charter of Fundamental Rights of the European Union. Such – might be called inconspicuous – provision may seem as a decent solution to coexistence of various legal orders and different forms of prosecutors' acts scrutiny across EU Member States, nevertheless, it may raise several questions and issues related to the effective judicial protection across the European Union.

Following parts of this article therefore examine the notion of effective judicial protection within the European Union, its expression in the EPPO Regulation, some of the pressing issues relating (although not only) to the above-mentioned wording of the Recital 30 of the Preamble of the EPPO Regulation with regard to the principle of effective judicial protection and contemplates on possible reaction from the Court of Justice of the European Union (hereinafter referred to as "the CJEU").

2. EFFECTIVE JUDICIAL PROTECTION AND ITS EXPRESSION IN THE EPPO REGULATION

At the same time as the legal basis for the creation of the EPPO in the primary law was provided for, the second subparagraph of Article 19(1) TEU was introduced, too. It states that "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law." This provision mentions effective legal protection, nevertheless, it is argued that its purpose was to underline already existing general principle of EU law – principle of effective judicial protection – stemming from the constitutional traditions common to EU Member States (Rydén, 2020, pp. 22-24) and mentioned in the case-law of the Court of Justice of the European Union.[12] General principle of effective judicial protection was – according to the CJEU – reaffirmed by the Article 47 of the Charter of Fundamental Rights of the European Union (hereinafter referred to as "the Charter").[13, 14]

[10] Recital 32 of the Preamble of the EPPO Regulation.
[11] Article 42 of the EPPO Regulation.
[12] See, for example, CJEU, judgment of 15 May 1986, *Johnston*, C-222/84, ECLI:EU:C:1986:206 and CJEU, judgment of 28 March 2017, *Rosneft*, C-72/15, ECLI:EU:C:2017:236.
[13] Charter of Fundamental Rights of the European Union, OJ C 202, 7.6.2016, pp. 389–405. According to the Article 47 of the Charter, „[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."
[14] CJEU, judgment of 13 March 2007, *Unibet*, C-432/05, ECLI:EU:C:2007:163, para. 37.

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Although the Charter refers to an "effective remedy", the Explanations to the Charter[15] state that "in Union law the protection is more extensive since it guarantees the right to an effective remedy before a court. The Court of Justice enshrined that right in its judgment of 15 May 1986 as a general principle of Union law […]. According to the Court, that general principle of Union law also applies to the Member States when they are implementing Union law. […] Article 47 applies to the institutions of the Union and of Member States when they are implementing Union law and does so for all rights guaranteed by Union law." Therefore, despite the wording of the above-mentioned provisions, their purpose and meaning refers to a "judicial protection" or a "judicial review". The CJEU also mentions these terms interchangeably, not quoting the exact wording of the TEU but using the term "effective judicial protection" instead.[16] It is necessary to point out that the principle of effective judicial protection is not static but has been applied and developed by the Court in a flexible fashion, adapting it to various situations in which individuals are attempting to enforce rights derived from EU law (Rydén, 2020, p. 26).

As for the rights of individuals stemming from EU law, national courts are bound by the Charter when they are implementing EU law. Generally, there must be a provision of secondary EU law applicable in a specific case, nevertheless, as was stated by the CJEU in *UNECTEF v. Heylens*,[17] the general principle of effective judicial protection – reaffirmed by the Article 47 of the Charter – was applicable regardless of whether a specific right was codified in secondary EU law.[18] Even without this rule in mind, the Charter and the principles codified therein should be applicable to proceedings within the EPPO's competence, since they are initiated and carried out according to and on the basis on the EPPO Regulation.

The EPPO Regulation itself does not mention effective judicial protection as such. It merely states in its Article 42 – as already mentioned – that procedural acts of the EPPO that are intended to produce legal effects *vis-à-vis* third parties as well as failures to adopt such acts shall be subject to review by the competent national courts in accordance with the requirements and procedures laid down by national law, however, according to the Recital 30 of the Preamble of the EPPO Regulation, where the national law of a Member State provides for the internal review of certain acts within the structure of the national prosecutor's office, Member States should not be obliged to provide for review by national courts. In those cases, the review of such decisions taken by the European Delegated Prosecutor should fall under the supervision powers of the supervising European Prosecutor in accordance with the internal rules of procedure of the EPPO. Nevertheless, said Recital explicitly wraps such situation with the obligation to respect the Article 19 TEU and Article 47 of the Charter.[19]

Bearing in mind the scope and meaning of these articles as described above, they refer to the effective judicial protection, which may seem at odds with not providing for a judicial review of said "certain acts". However, it must be pointed out that Recital 30 might

[15] Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02). According to the Article 52(7) of the Charter, „[t]he explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States."

[16] In case C-619/18 European Commission v. Republic of Poland, the Court stated that „[i]n that regard, as provided for by the second subparagraph of Article 19(1) TEU, Member States are to provide remedies sufficient to ensure effective judicial protection for individuals in the fields covered by EU law. It is, therefore, for the Member States to establish a system of legal remedies and procedures ensuring effective judicial review in those fields." See CJEU, judgment of 24 June 2019, *European Commission v Republic of Poland*, C-619/18, ECLI:EU:C:2019:531, para. 48.

[17] CJEU, judgment of 15 October 1987, *Heylens*, C-222/86, ECLI:EU:C:1987:442.

[18] *Ibid*., para. 14.

[19] These would nonetheless be applicable regardless of their explicit mentioning.

be read also from the point of view other than being contradicting with general principle of EU law. One of its possible meanings is that Articles 19 TEU and 47 of the Charter are to be interpreted more broadly, that is, that they offer effective legal protection rather that narrower judicial protection. This might include also the above-mentioned review by supervising prosecutors. This interpretation is, however, in our opinion very hardly acceptable, since the focus on the judicial protection either by the CJEU or the scholars while interpreting Article 19 TEU and Article 47 of the Charter is significant.

Another possible interpretation of Recital 30 is that it concerns only judicial (non)review during the investigation phase – taking into account the wording of this Recital[20] – and it does not exclude the obligation of participating Member States to respect the general principle of effective judicial protection outside the range of investigation measures or via specific procedures such as constitutional complaint of an individual. The Recital 30 certainly does not apply on all procedural measures taken by the EPPO and intending to produce legal effects *vis-à-vis* third parties, since this term differs from "the investigation measures". The terminology used in Article 42(1) of the EPPO Regulation was the final outcome of discussions in the Council Working Group and the term "procedural acts" was preferred over the term "investigation measures" or "acts of investigation" as paragraph 1 is supposed to apply not only to "investigative measures" as referred in Articles 30 and 31 of the EPPO Regulation (Herrnfeld et al., 2020, p. 409). Therefore, the interpretation that group of certain acts is excluded from the obligation to provide for a judicial review of EPPO's procedural acts is possible taking into account that Recital 30 refers to the stage of investigation and the term "procedural acts" used in the EPPO Regulation is broader than the term "investigation measures".

However, there is also another suggestion, that is, that the Recital 30 reflects a compromise between different views that had been expressed in relation to the question whether it is necessary for Member States to provide for a review by national courts also in situation where in domestic cases the national law provides for internal review mechanisms within the public prosecution system. As a said compromise, the Recital 30 does provide that such mechanism for an internal review may apply, nevertheless, it confirms that Member States are indeed obliged to provide for effective judicial review under Article 42(1) of the EPPO Regulation where so required in the light of Article 19 TEU and Article 47 of the Charter. National law thus can provide that the prior exhaustion of such internal review mechanism constitutes a precondition, but it cannot fully replace the possibility to eventually seek judicial review of procedural acts of the EPPO (Herrnfeld et al., 2020, pp. 422 – 423). Nonetheless, Recital 30 would deserve further clarification by the CJEU.

[20] Whole wording of the Recital 30 is as follows: „The investigations of the EPPO should as a rule be carried out by European Delegated Prosecutors in the Member States. They should do so in accordance with this Regulation and, as regards matters not covered by this Regulation, in accordance with national law. European Delegated Prosecutors should carry out their tasks under the supervision of the supervising European Prosecutor and under the direction and instruction of the competent Permanent Chamber. Where the national law of a Member State provides for the internal review of certain acts within the structure of the national prosecutor's office, the review of such decisions taken by the European Delegated Prosecutor should fall under the supervision powers of the supervising European Prosecutor in accordance with the internal rules of procedure of the EPPO. In such cases, Member States should not be obliged to provide for review by national courts, without prejudice to Article 19 TEU and Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter')."

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3. WHY DOES IT MATTER? SEVERAL IMPLICATIONS OF POSSIBLE ISSUES

Several concerns are present in the debate regarding the judicial review of EPPO's procedural acts – firstly, these concerns are related to the limited jurisdiction of the CJEU with regard to the EPPO's acts. They do not necessarily focus on the issue whether there is judicial review as such in the participating Member States, they mainly address the fact that even if there is such review, it might not be as sufficient as it would be in the case of the CJEU (Mitsilegas, 2021).[21] In this regard, we may encounter even proposals for a court or a tribunal as an European Union body which would decide solely the matters of the EPPO.

In this regard, we should not, in our opinion, forget – although it would be almost impossible taking into account that this argument is overly emphasized in the literature – the hybrid nature of the EPPO and the fact that it relies to a large extent on the national legal orders. Therefore, it would be appropriate to firstly adopt a set of harmonised rules in relation to the prosecutorial activities or, at least, to the EPPO's functioning and leave to the Member States how they adapt their legal orders and processes related to the national prosecution once there are different rules relating to the EPPO's activities. In that case, there would be no doubt as to whether the central EU court or tribunal knows the applicable law to a necessary extent. In this state of affairs, it is hardly imaginable that the EU judicial body could sufficiently assess matters processed according to the national law.

Secondly, some concerns focus on the possible absence of judicial review of certain EPPO's acts in some of the participating Member States. The above-mentioned Recital 30 of the EPPO Regulation overshadows the otherwise clear obligation of Member States to ensure effective judicial protection via providing for a judicial review of EPPO's procedural acts which are intended to produce legal effects *vis-à-vis* third parties. In our earlier work, we also doubted that the EPPO Regulation itself requires participating Member States to do so (Ružičková, 2021). Although there is a convincing argumentation that participating Member States are obliged to provide such judicial review (Herrnfeld et al., 2020, pp. 418 – 420), the sometimes uncertain wording of the EPPO Regulation might cause a confusion among all relevant actors.

This might be seen also in relation to another concern, that is, that a careful reading of Article 42(3) of the EPPO Regulation leads to different interpretations regarding the competent judicial authority to review a decision to dismiss a case.[22] On the one hand, it can be argued that the provision in question excludes a review of the decision not to prosecute before the domestic courts as it focuses this control on the CJEU, provided that the decision to dismiss a case is challenged by referring to Union law. On the other hand, awkward stylization of the above provisions may lead to the conclusion that the decision to dismiss a case can be challenged before the national authorities by referring to the provisions of domestic law on judicial review to dismiss a case if the appellant does not call for breaches of Union law. These interpretations might therefore undermine legal certainty (Novokmet, 2020, p. 145).

Furthermore, the argument relating to the non-equal treatment might be put forward. Some of the individuals whose rights would be infringed in the proceedings conducted by the very same EU body would be subject to a different treatment depending

[21] Mitsilegas (2021) points out that by establishing very limited jurisdiction of the CJEU in reviewing EPPO's acts, the EPPO Regulation presents a significant rule of law deficit in terms of judicial protection.

[22] Article 42(3) of the EPPO Regulation states: „By way of derogation from paragraph 1 of this Article, the decisions of the EPPO to dismiss a case, in so far as they are contested directly on the basis of Union law, shall be subject to review before the Court of Justice in accordance with the fourth paragraph of Article 263 TFEU."

on which national legislation would be applicable. These concerns go hand in hand with the concerns relating to the reviewing of the EPPO's decisions on forum and the consequences for the individuals concerned (Zivic et al., 2022).

4. SEVERAL SCENARIOS OF THE POSSIBLE CJEU'S CASE LAW

The above-mentioned issues lead us to conclusion that further clarification will be needed, as regards judicial review of EPPO's acts. In an ideal scenario, national courts would refer preliminary question to the CJEU, seeking such clarification. Should the CJEU be provided with an opportunity to answer a question whether it is – in the light of interpretation of the EPPO Regulation and related provisions of EU primary law – an obligation rather than a possibility of EU Member States who wish to participate in EPPO's functioning to establish a judicial review of specific EPPO's acts, several scenarios come to one's mind as regard possible CJEU's answer.

Firstly, the CJEU might decide that the obligation to provide for a judicial review within the EPPO's functioning applies – taking into account the intention of EU legislators reflected in the Recital 30 of the EPPO Regulation – only outside the scope of investigation measures. Within their scope, an internal review within the prosecutorial office would suffice. However, if a Member State provides for a judicial review of investigation measures, the EPPO Regulation and EU law in general would not prevent it from doing so. Although being a possible CJEU's answer, we do not consider it to be a probable one. It is true that wording of Recital 30 is rather ambiguous and, one might say, explicitly excludes the obligation of participating EU Member States to provide for judicial review of investigation measures where there is only the possibility of internal review of such acts. Nevertheless, the general principle of effective judicial protection should prevail and apply on these situations as well.

Secondly, the CJEU could interpret the rule in Recital 30 of the EPPO Regulation in an extensive way and decide that where the national law provides for an internal review of prosecution acts and does not provide for judicial review of such acts, a Member State is not obliged to amend its legislation taking into account the circumstances in which the EPPO was established. We do consider this scenario neither probable, nor appropriate and desirable, nevertheless, intentions of EPPO Regulation's authors striving to respect national legal orders to a great extent cannot be overlooked.

Thirdly, the CJEU may come to a conclusion that even though "general" courts of participating EU Member States do not have opportunities for judicial review laid down in national law, it is sufficient for compliance with principle of effective judicial protection to provide for "special" procedures such as constitutional complaint. This would allow to avoid fundamental rights being infringed, yet still without the need to change national legislations dramatically in order to fulfil requirements stemming from EU law. Such answer would reflect a compromise between ensuring judicial protection of an individual and respecting national legal orders. Although we consider this scenario to be the most probable, we have already expressed elsewhere our doubts regarding the extent of effectiveness of such judicial protection. In the Member States with legislation such as, for example, the Slovak Republic, this solution would respect the principle of equivalence, it would, nevertheless, might be questionable whether it would respect the principle of effectiveness (Ružičková, 2021, p. 680).[23]

[23] Situations in which there is no applicable set of harmonised EU procedural rules, are governed by the so-called principle of procedural autonomy of EU Member States that means, in general, that the procedures

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And finally, it might be decided by the CJEU that notwithstanding the rule in the Recital 30 of the EPPO Regulation, participating Member States are obliged to provide for effective judicial protection by general courts, not only by specialized procedures via constitutional complaints. Such conclusion would not exclude the possibility of internal review of prosecution acts, it would merely require additional review provided by national courts. This scenario would, in our opinion, be the most suitable as regards ensuring effective judicial protection and would erase above-mentioned concerns related to the fact that in one Member State, an individual could rely on judicial protection via "standard" procedures before national courts while in another – even if there was an obligation to provide for a judicial review of prosecution acts and thus it would not be possible to review such acts only via internal review and not any other – he/she could only have recourse to the constitutional courts. Nevertheless, this would represent a large interference in national legal orders and require some of the participating Member States to amend their legislation to a large extent which is hardly imaginable and, at this stage of integration, desirable for Member States.

5. CONCLUSION

As already outlined above, the principle of effective judicial protection should be respected also with regard to the EPPO proceedings. As results from the CJEU's case law, although the Article 19 TEU refers to the effective legal protection and Article 47 of the Charter to an effective remedy, these provisions intend to ensure effective *judicial* protection. In this context, the interpretation of the Recital 30 of the EPPO Regulation which would exclude judicial review of national courts should be avoided completely.

From presented possible scenarios of the CJEU's future case law, we consider the last one to be the most appropriate, i.e. that Member States are obliged to provide for effective judicial protection by general courts, not only by specialized procedures via constitutional complaints. However, as already stated, taking into account the special character of the EPPO and its legal framework, more sensitive and probable one is the interpretation according to which the Member States are obliged to provide for a judicial review even when respective national legal order provides for an internal review of prosecution acts, nevertheless, if such legislation provides only for a review via constitutional court, such review would be in accordance with the requirement of effective judicial protection. From the point of criminal law view, European Union may now seem to be „divided in diversity"[24] and any intentions to further unite national legal systems might prove unfortunate.

It remains to be seen what the reaction of the CJEU would be, it could, however, be said with certainty that the wording of the EPPO Regulation offers a room for discussions and contradictory views. It would be therefore appropriate to clarify the meaning of its particular provisions or, ideally, amend them in a way which would not cause as many doubts and concerns as it does now.

which shall be used for ensuring the rights stemming from the EU law are those laid down in the national legal order. The procedural autonomy of EU Member States is, however, limited by the principles of equivalence and effectiveness. The principle of equivalence requires the same remedies and procedural rules to be available to claims based on European Union law as are extended to analogous claims of a purely domestic nature. The principle of effectiveness obliges Member State courts to ensure that national remedies and procedural rules do not render claims based on EU law impossible in practice or excessively difficult to enforce. See, for example, CJEU, judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, C-64/16, ECLI:EU:C:2018:117.

[24] As opposed to the motto of the European Union "United in diversity".

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