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THE EPPO AND JUDICIAL REVIEW OF A DECISION NOT TO PROSECUTE: A SLIPPERY AREA OR A FINAL ARRANGEMENT?**

This paper examines the issue of judicial review of the decision to dismiss a case as envisaged in the Regulation on implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office. In this respect, the institutional framework of the EPPO and the procedure for judicial review of a decision not to prosecute is examined through comparative analyses of the Commission's proposal of 2013 and the finally adopted text in the Regulation considering both theoretical and practical implications. Then, attention is drawn to the new mandate for the Permanent Chamber to dismiss a case, analysing the justification for lifting that decision at the EU level and considering the legal consequences that result from it. Finally, the real potential for the CJEU to review a decision to dismiss a case is scrutinised through an in-depth examination of the current normative framework of the Regulation and the TFEU, offering possible solutions to simplify and accelerate the proceedings before the CJEU.

Keywords: European Public Prosecutor's Office, pre-trial proceedings, decision not to prosecute, Permanent Chamber, judicial review, Court of Justice of the European Union

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1. INTRODUCTION

With the entry into force of Regulation 2017/1939/EU (hereinafter: the Regulation) implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (hereinafter: EPPO), the long-standing saga of the establishment of the EPPO was completed.[1] Although the Regulation was not accepted by the acclamation of the EU Member States,[2] the adoption of the Regulation on enhanced cooperation among the participating Member States created a basis for the final implementation of the EPPO in the European judicial area.[3] Be all this as it may, this important step has nevertheless led to a consensus, and after almost five years of the original proposal of the Commission[4] (hereinafter: Proposal) and the numerous discussions on the relation of the Commission-Parliament-Council, the key burning issues[5] were answered in order to ensure the preconditions for the day-to-day functioning of the EPPO.[6]

One of the extremely problematic issues that the Regulation was supposed to resolve was the issue of judicial review over the work of the EPPO[7] regarding the taking of certain actions and measures that can be designated as procedural acts affecting the rights and freedoms of a person (i.e., investigative measures)[8] and in terms of reviewing the decision of whether to prosecute (i.e.,

[1] The Regulation was adopted on 12 October 2017 and entered into force on 20 November 2017. Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (EPPO), SL L 283, 31 October 2017.

[2] Denmark, Hungary, Ireland, Poland, Sweden, and the United Kingdom do not participate in the EPPO. On 1 and 7 August 2018, the Commission gave its approval for the Netherlands (Commission Decision (EU) 2018/1094 of 1 August 2018) and Malta (Commission Decision (EU) 2018/1103 of 7 August 2018) to join the EPPO Regulation, so, to date, 22 Member States are involved in EPPO enhanced cooperation.

[3] The EPPO shall be an indivisible Union body operating as one single office with a decentralised structure (Art. 8(1) of the Regulation).

[4] Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, 17 July 2013, COM (2013) 534 final.

[5] For more detail, see V. Mitsilegas, *EU Criminal Law After Lisbon, Rights, Trust and the Transformation of Justice in Europe* (Hart Publishing, 2016) pp 104-119.

[6] For a different proposal following the initial Commission Proposal, see A. Damaskou, "The European Public Prosecutor's Office: A Ground-Breaking New Institution of the EU Legal Order" (2015) 6(1) *New Journal of European Criminal Law*, pp 143–152.

[7] See Z. Đurđević, 'Judicial Control in Pre-Trial Criminal Procedure Conducted by the European Public Prosecutor's Office' in K. Ligeti (ed), *Towards a Prosecutor for the European Union* (Hart Publishing, 2013) pp 986–1010.

[8] Interestingly, the Regulation deals only with the procedural measures of the EPPO, which implies the taking of certain coercive actions and measures (Art. 30 of the Regulation) for which judicial review is prescribed (Art. 42(1) of the Regulation). On the other hand, many

to bring a case to judgment or to dismiss a case).[9] The issue of judicial review of a positive decision (i.e., to initiate criminal prosecution and undertake certain coercive acts and measures) as far it has been clarified since the Regulation, after minor changes, maintained the idea that this review would be conducted by national courts, since procedural acts of the EPPO that are intended to produce legal effects vis-à-vis third parties shall be subject to review by the competent national courts in accordance with the requirements and procedures laid down by national law (Art. 42(1)).[10] However, the issue of the waiver of prosecution and the review of these decisions were significantly amended before the last ruling was made.[11] Therefore, the Regulation provides that the

are losing sight of the fact that the initiation of an investigation (Art. 26(1) of the Regulation), as a formal stage of criminal proceedings in which such actions are taken, really constitutes a breach of the individual's rights and freedoms, which must also be subject to judicial review. Some EU Member States are aware of this problem and, in their codes of criminal procedure, prescribe judicial review of the decision to initiate investigation for the purpose of verifying its compliance with the principle of mandatory prosecution. For this reason, the issue of legal certainty is raised once the EPPO begins to conduct investigations in countries that do not know such judicial review. A. Novokmet, 'The European Public Prosecutor's Office and the Judicial Review of Criminal Prosecution' (2017) 8(3) *New Journal of European Criminal Law*, pp 374–402.

[9] Even before the Commission's proposal, Inghelram remarkably emphasised that "the answer to the question of whether judicial review of acts of the EPPO will be exercised by national courts or by EU courts cannot be given in terms of 'either the one or the other', but will undoubtedly be 'both the one and the other'". See J.F.H. Inghelram, "Fundamental Rights, the European Anti-Fraud Office (OLAF) and a European Public Prosecutor's Office (EPPO): Some Selected Issues" (2012) 95(1) *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft*, p 81.

[10] Herrnfeld points out that Art. 42(1) of the Regulation "should not be interpreted as merely giving Member States the competence to allow their courts to exercise judicial review of the EPPO's procedural acts in spite of the fact that the EPPO is established as a Union body. Instead, when interpreted in light of Art. 47 of the Charter – and Art. 19(1) TEU – an appropriate implementation of Art. 42(1) by the Member States may require them to amend national legislation in order to ensure that national courts will, indeed, be empowered to exercise judicial review in all situations where natural or legal persons could seek judicial review by the CJEU under Art. 263 TFEU if Art. 42(1) were not intended to exclude such direct action in respect of procedural acts of the EPPO". See H.-H. Herrnfeld, "The EPPO's Hybrid Structure and Legal Framework Issues of Implementation – A Perspective from Germany" (2018) 2 *eucrim*, p 120.

[11] In its Resolution on 29 April 2015, the European Parliament stressed that the right to a judicial remedy should be upheld at all times in respect of the EPPO's activity, pointing out that any decision taken by the EPPO should be subject to judicial review before the competent court. Therefore, it takes a stand that the decisions taken by the Chambers, such as the choice of jurisdiction for prosecution, the dismissal or reallocation of a case or a transaction, should be subject to judicial review before the Union courts. See Resolution of 29 April 2015 on the proposal for a Council regulation on the establishment of the European Public Prosecutor's Office, 2013/0255(APP).

decision to dismiss a case shall be passed by the Permanent Chamber, while possible judicial review of the decision to waive criminal prosecution may only be achieved at the EU level, stipulating as follows: "By way of derogation from paragraph 1 of this Article, the decisions of the EPPO to dismiss a case, insofar 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" (Art. 42(3) of the Regulation).

It follows from the above that the current solution in the Regulation is quite divergent. In order to review the procedural acts of the EPPO that are intended to produce legal effects vis-à-vis third parties, there is a legal fiction that the EPPO is considered a national body of criminal prosecution, and judicial review is exercised by the national courts (Art. 42(1) of the Regulation). Such review may be *ex ante* or *ex post*, and it is expected that national courts will conduct it each time the European Delegated Prosecutor (hereinafter: EDP) decides to take some coercive action or measure for which judicial review is mandatory.[12] On the other hand, the EDP cannot make the decision to dismiss a case independently, but, according to the explicit provision of the Regulation, the draft of such a decision is submitted for the final decision of the Permanent Chamber (Art. 39(1) of the Regulation). It follows that the decision to dismiss a case has been fully transposed to the EU level so that national legal regulations on the review of withdrawal from prosecution are not applicable.

Therefore, this paper first presents the institutional structure of the EPPO at the central and decentralised level in order to explain the *ratio* for the implementation of the Permanent Chamber's exclusive authority to decide to dismiss a case. The procedure for rendering the decision to dismiss a case is then considered with an analytical examination of the consequences of such a solution regarding the institutional and procedural position of the EPPO. Then, the role of the Court of Justice of the European Union (hereinafter: CJEU) in exercising judicial review over the Permanent Chamber's decision to dismiss a case is discussed through analyses of the Regulation and the Treaty on the Functioning of the European Union (hereinafter: TFEU). Finally, the real possibility of

This standpoint was reiterated in the European Parliament Resolution on 5 October 2016, stating that in order to ensure the effectiveness of judicial review in line with Article 47 of the Charter of Fundamental Rights of the European Union and with the Treaties, any operational decision affecting third parties taken by the EPPO should be subject to judicial review before a competent national court. Also, the European Parliament suggested that direct judicial review by the European Court of Justice should be possible. See European Parliament resolution of 5 October 2016 on the European Public Prosecutor's Office and Eurojust (2016/2750(RSP)).

[12] On the concept of judicial control in cooperation in criminal matters, see A. Weyembergh, "Transverse Report on Judicial Control in Cooperation in Criminal Matters: The Evolution from Traditional Judicial Cooperation to Mutual Recognition" in K. Ligeti (ed), *Towards a Prosecutor for the European Union* (Hart Publishing, 2013) pp 946–952.

the CJEU to achieve effective control over the Permanent Chamber's decision to dismiss a case is addressed, proposing concrete solutions to simplify the process of judicial review over the EPPO's decision to dismiss a case.

2. INSTITUTIONAL FRAMEWORK OF THE EPPO AND THE REVIEW OF A DECISION NOT TO PROSECUTE

2.1. The Commission's proposal of 2013 – shortfall of an idea

When referring to the EPPO's decision not to prosecute and the judicial review of this decision, it should be noted that the initial Proposal of 2013 and the final text of the Regulation are completely different.[13] The reason for such dissimilitude is the significantly different fundamentals for the establishment of the EPPO proposed in the Commission's original Proposal[14] and the Council Regulation, which was later issued as the genuine text.[15]

2.1.1. Structure and organisation of the EPPO

In the 2013 Proposal, the EPPO was conceived as a body of the Union with a decentralised structure (Art. 3(1) of the Proposal). The structure of the EPPO was supposed to be comprised of a European Public Prosecutor (hereinafter: EPP) who needed to have a certain number of deputies (central level) and European delegated prosecutors in the Member States (decentralised level).[16] Such an organisational structure of the EPPO was to provide a strict hierarchy, typical of the public prosecutor's office in continental European countries, where there are subordinate affiliations of lower public prosecutors to those at

[13] See K. Ligeti, A. Marletta, "The European Public Prosecutor's Office: What Role for OLAF in the Future?" in Z. Đurđević, E. Ivičević Karas (eds), *European Criminal Procedure Law in Service of Protection of European Union Financial Interests: State of Play and Challenges* (Croatian Association of European Criminal Law, 2015) pp 55–60.

[14] See S. White, "Towards a Decentralised European Public Prosecutor's Office?" (2013) 4(1-2) *New Journal of European Criminal Law*, pp 22–39.

[15] See in detail: H.-H. Herrnfeld, "The Draft Regulation on the Establishment of the European Public Prosecutor's Office: Issues of Balance Between the Prosecution and the Defence" in C. Brière, A. Weyembergh (eds), *The Needed Balances in EU Criminal Law* (Hart Publishing, 2018) pp 383–412.

[16] In the literature, this model is commonly known as an "integrated" model. See K. Ligeti, M. Simonato, 'The European Public Prosecutor's Office: Towards a Truly European Prosecution Service?' (2013) 4(1-2) *New Journal of European Criminal Law*, pp 12–17.

higher levels.[17] This is evident from Art. 6(4) of the Proposal, which stipulated that investigations and prosecutions of the EPPO shall be carried out by the EDP under the direction and supervision of the EPP. Where deemed necessary in the interest of the investigation or prosecution, the EPP may also exercise his/her authority directly.[18] Although the Proposal clearly stated that the EPPO should be a decentralised body, it really outlined the relations of a strict hierarchical structure.[19]

2.1.2. Dismissal of the case

Regarding the decision not to prosecute, the Proposal explicitly prescribed the preconditions for the dismissal of the case in Art. 28 in respect of the principle of legality of criminal prosecution: a) the very existence of procedural obstacles (Art. 28(1) a-e); and/or b) the lack of relevant evidence (Art. 28(2) of the Proposal). The decision to dismiss a case could only be brought by the EPPO, and, if it had made such a decision, it could refer those cases to OLAF or to the competent national administrative or judicial authorities for recovery, other administrative follow-up, or monitoring, and it should also notify the injured party if the investigation was initiated on the basis of information provided by the injured party (Art 28(3) and (4) of the Proposal).[20] Besides, the EPPO's decision to dismiss a case could have been justified by some kind of settlement with the defendant in the form of transactions.[21] But this settlement

[17] See, for example, the organisational structure of a public prosecutor's office in Germany: S.M. Boyne, *The German Prosecution Service* (Springer, 2014) pp 35–38.

[18] Even then, Coninsx warned that the Proposal did not clearly elaborate how the relations between EDP would take place and whether the EPPO and EDP would meet in a common structure to make decisions. M. Coninsx, "The European Commission's Legislative Proposal: An Overview of Its Main Characteristics" in L.H. Erkelens, A.W.H. Meij, M. Pawlik (eds), *The European Public Prosecutor's Office: An Extended Arm or a Two-Headed Dragon?* (Asser Press/Springer, 2015) p 32.

[19] Ligeti explains it as a "close-knit steering structure at the supra-national level and a decentralized network of EDP in Member States". K. Ligeti, 'The European Public Prosecutor's Office' in V. Mitsilegas, M. Bergström, T. Konstadinides (eds), *Research Handbook on EU Criminal Law* (Edward Elgar Publishing, 2016) p 488.

[20] Pawlik and Klip rightly point out that individuals' rights and freedoms can also be seriously compromised even when the EPPO, after the investigation is completed, makes a decision to dismiss a case. Hence, they proposed to create a normative framework for resolving the accusations of human rights abuses in case of a decision not to prosecute. M. Pawlik, A. Klip, "A Disappointing First Draft for a 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/Springer, 2015) p 190.

[21] A. Damaskou (n 6) p 139.

is marked by the typical principle of opportunity (expediency) as a kind of EPPO discretion (…it would serve the purpose of proper administration of justice…(Art. 29(1)) to render a decision to dismiss a case if the suspected person paid a lump-sum fine which, once paid, would entail the final dismissal of the case (transaction). However, as the decision to dismiss a case was based on a discretionary assessment formalised through a sort of agreement with the defendant, the possibility of judicial review was explicitly excluded (Article 29(4) of the Proposal).

2.1.3. Judicial review of a decision to dismiss a case

When it comes to the judicial review of a decision to dismiss a case, it should be noted that the Proposal provided a very broadly prescribed general provision on judicial review: "When adopting procedural measures in the performance of its functions, the European Public Prosecutor's Office shall be considered as a national authority for the purpose of judicial review" (Art. 36(1) of the Proposal). Thus, regardless of whether the EPPO rendered a decision to prosecute or to dismiss a case, it was a legal fiction that EPPO was considered a national body in terms of carrying out judicial review.[22] This was substantiated with the assertion that acts undertaken by the EPPO in the course of its investigations are closely related to the prosecution, which may result therefrom and have effects in the legal order of the Member States. In addition, these investigative actions were supposed to be carried out by national law enforcement authorities acting under the instructions of the EPPO. Therefore, it was interpreted that the EPPO should be considered a national authority for the purpose of the judicial review of its acts of investigation and prosecution (Recital 37). This specifically meant that the judicial review of the EPPO's acts and measures was entirely entrusted to the national courts, and, in consequence, the CJEU should not be directly competent with regard to those acts pursuant to Arts. 263, 265, and 268 TFEU.[23]

However, the aforementioned solution was not sustainable. Even if the possibility of judicial review at the national level is accepted, a Pandora's box with a series of problematic situations opens up to which it is not easy to give answers. Various EU Member States have completely different systems of

[22] See also M. Böse, 'Judicial Control of European Public Prosecutor's Office' in T. Rafaraci, R. Belfiore (eds), *EU Criminal Justice, Fundamental Rights, Transnational Proceedings and the European Public Prosecutor's Office* (Springer, 2018) p 194.

[23] Such a position of the Commission, in theory, has been criticised as *argumentum ad absurdum*. A. Erbežnik, "European Public Prosecutor's Office (EPPO) – Too Much, Too Soon, and Without Legitimacy?" (2015) 5(2) *European Criminal Law Review*, p 215.

judicial control of a decision to dismiss a case, and some do not have them at all, which is largely dependent on the institutional and organisational position of the public prosecutor's office in the legal systems across the EU.[24] Even those countries that knew a certain system of review of a decision to dismiss a case differ significantly in the forms of that review (in Italy, *ex officio* judicial review;[25] in Germany and Austria, judicial review at the request of a victim;[26] in Croatia, the victim acts as a subsidiary prosecutor[27]). In addition, one should not forget that the idea of the EPPO was created as a result of a reaction to the national states' lack of interest in defending the financial interests of the EU through their system of criminal prosecution.[28] Therefore, when the European system of criminal prosecution is created at the EU level, it seems unrealistic to expect that national states could find a true promoter of the idea of prosecuting perpetrators at the expense of EU financial interests in cases where the EPPO itself does not. Likewise, it does not seem right either to attempt to harmonise the minimum rules regarding the review of a decision to dismiss a case by invoking Art. 82(2)d TFEU because such an action would require the harmonisation of national criminal justice systems in all cases of withdrawal from criminal prosecution and the creation of a uniform reviewing framework, which is nearly impossible to achieve. In order to do something like this, the necessary first step would be to harmonise the institutional and organisation scheme of the public prosecutor's office in all Member States, which is a difficult and practically unattainable task.

Therefore, it is to be concluded that the greatest shortcoming of the proposed system of reviewing a decision to dismiss a case, as provided for in the Proposal, is the fact that it was entrusted to national courts.[29] Due to the above-mentioned legal problems and concerns, it is clear that such a system of review would not have adequately come to life in the European context, which

[24] For a comparative overview, see G. Gwladys, *Public Prosecutors in the United States and Europe, A Comparative Analysis with Special Focus on Switzerland, France and Germany* (Springer, 2014).

[25] F. Ruggieri, S. Marcolini, "Italy" in K. Ligeti (ed), *Toward a Prosecutor for the European Union* (Hart Publishing, 2013) pp 392–393.

[26] C. Roxin, B. Schünemann, *Strafverfahrensrecht* (C.H. Beck, 2017) pp 333–338; C. Bertel, A. Venier, *Strafprozessrecht* (Manz, 2018) pp 50–53.

[27] A. Novokmet, 'Sudska kontrola nepokretanja kaznenog postupka-institucionalni i procesni aspekt', [Judicial Review in the Event of a Decision Not to Prosecute: Institutional and Procedural Aspects] (2014) 21(2) *Hrvatski ljetopis za kazneno pravo i praksu*, pp 645–678.

[28] See Commission Impact Assessment Accompanying the Proposal for a Council Regulation on the Establishment of the European Public Prosecutor's Office, SWD (2013) 274 final, 17 July 2013, pp 6-7. https://ec.europa.eu/info/sites/info/files/eppo_impact_assessment_en.pdf

[29] See K. Ligeti, A. Weyembergh, "The European Public Prosecutor's Office: Certain Constitutional Issues" in L.H. Erkelens, A.W.H. Meij, M. Pawlik (eds), *The European Public Prosecutor's Office: An Extended Arm or a Two-Headed Dragon?* (Asser Press/Springer, 2015) p 69.

would result in a breach of legal certainty.[30] It should not be forgotten that the EPPO was conceived as a body of criminal prosecution, authorised and obliged to prosecute perpetrators of criminal offences against EU financial interests. For this reason, it has great powers to dispose of the function of criminal prosecution in the public interest. Such powerful authority must have its correlation in some objective system of checks and balances to prevent the EPPO from becoming arbitrary, which consequently could paralyse the EU repressive system. This is why there is a need for effective and efficient control over its work in order to make it accountable for the proper determination of the statutory preconditions for the initiation of criminal prosecution, acting solely in accordance with the rules of the profession and not with daily political needs.[31]

2.2. Council regulation on enhanced cooperation – EU reality or inequality?

2.2.1. Structure and organisation of the EPPO

With the entry into force of the Regulation, the EPPO's institutional arrangements have taken on completely new contours that have significantly affected the current regulation of the judicial review of a decision to dismiss a case. The EPPO is established as an indivisible Union body operating as a single Office with a decentralised structure (Art. 8(1) of the Regulation). However, it should be noted that the structure of the EPPO has significantly changed in relation to the Commission's Proposal. Namely, the Regulation departed from the concept of a hierarchically organised central structure and instead implemented a much more intergovernmental model.[32] This is clearly visible from the new EPPO structure in which the central part is composed of the European Chief Prosecutor, the College of Prosecutors and Permanent Chambers. The central office is to be led by the European Chief Prosecutor and his Deputies. The decentralised part remains the same, and it pertains to Euro-

[30] See in detail M. Luchtman, J. Vervaele, "European Agencies for Criminal Justice and Shared Enforcement (Eurojust and the European Public Prosecutor's Office)" (2014) 10(5) *Utrecht Law Review*, p 145.

[31] Vervaele rightly points out that "there is a clear risk that the functioning of the EPPO at the central level will be jeopardized by a lack of functional independence and by the steering of cases under the political guidance of Member States' interests". J. 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 M. Scholten, M. Luchtman (eds), *Law Enforcement by EU Authorities Implications for Political and Judicial Accountability* (Edward Elgar Publishing, 2017) p 254.

[32] Ligeti and Marletta (n 13) p 58.

pean Delegated Prosecutors. It should be noted that the implementation of the College, which will be made up of one European prosecutor per participating country, created a peculiar structure of the EPPO that can be denoted as a hybrid model – a mix between the decentralised and the College model.[33]

In the so-established central part of the EPPO, it can be clearly noticed that the organisation is divided into strategic and operational sectors. The strategic part is composed of the European Chief Prosecutor and the College, who perform the tasks of organising the work and decision-making on strategic issues to ensure coherence, consistency, and efficiency within and between cases. The operating part includes Permanent Chambers, conceived of as a body responsible for operational decision-making on initiating and withdrawing from criminal prosecution as well as monitoring and directing the investigations.[34]

2.2.2. Dismissal of the case

Following the new organisational structure of the EPPO at the centralised level, the Regulation envisaged the Permanent Chamber as the operational component of the EPPO which would *de facto* make key decisions pertaining to the initiation and withdrawal of criminal prosecution (Art. 10(3) of the Regulation).[35] It follows that all decisions relevant for the initiation of criminal prosecution and the outcome of criminal proceedings will be made at the central EU level.[36] Therefore, the legal consequences of those that will result from such decisions will be relevant at the EU level.

One of the important decisions that the Permanent Chamber will make in its day-to-day work is the decision to dismiss a case. Preconditions for the withdrawal of prosecution are still prescribed in the Regulation following the typical characteristics of the principle of the legality of criminal prosecution.[37] In other words, the Permanent Chamber may decide to dismiss a case only if, on

[33] A. Met-Domestici, "The Hybrid Architecture of the EPPO: From the Commission's Proposal to the Final Act" (2017) 3 *eucrim*, p 144.

[34] See: P. Csonka, A. Juszczak, E. Sason, 'The Establishment of the European Public Prosecutor's Office: The Road from Vision to Reality' (2017) 3 *eucrim*, pp 126–127.

[35] The Permanent Chambers should exercise their decision-making power at specific steps of the proceedings of the EPPO with a view to ensuring a common investigation and prosecution policy. Recital 36 of the Regulation.

[36] This is substantiated by the Regulation itself: "to ensure consistency in its action and thus an equivalent protection of the Union's financial interests, the organisational structure and the internal decision-making process of the EPPO should enable the Central Office to monitor, direct and supervise all investigations and prosecutions undertaken by European Delegated Prosecutors". Recital 22 of the Regulation.

[37] See A. Klip, *European Criminal Law* (Intersentia, 2016) pp 516–517.

the basis of a report submitted by the Delegated European Prosecutor, it finds that the statutory preconditions to initiate criminal prosecution have not been fulfilled. The prerequisites for the initiation of criminal persecution are defined positively and negatively. The positive assumption is the existence of reasonable grounds to believe that an offence within the competence of the EPPO is being or has been committed (Art. 26(1) of the Regulation), while the negative assumptions are certain procedural obstacles that prevent the initiation and conduct of criminal proceedings, such as the death, insanity, or winding up of a suspect or accused legal person; amnesty granted to the suspect or accused person; immunity granted to the suspect or accused person, unless it has been lifted; expiry of the national statutory limitation to prosecute; the suspect or accused person's case having been finally disposed of in relation to the same acts (Art. 39(1)(a-f) of the Regulation).[38] Accordingly, the Permanent Chamber may decide to dismiss a case only if, acting on the basis of the report of the Delegated European Prosecutor, it finds there are procedural obstacles in Art. 39(1)(a-f) of the Regulation and/or that the relevant evidence for criminal prosecution was not collected during the investigation (Article 39(1)(g) of the Regulation).[39] This is also evident from Recital 66, which states, "In order to ensure legal certainty and to effectively combat offences affecting the Union's financial interests, the investigation and prosecution activities of the EPPO should be guided by the legality principle, whereby the EPPO applies strictly the rules laid down in this Regulation relating in particular to competence and its exercise, the initiation of investigations, the termination of investigations, the referral of a case, the dismissal of the case and simplified prosecution procedures".

Nevertheless, it should be emphasised that although the actual decision to dismiss a case is going to bring the Permanent Chamber and thus take upon itself the burden of responsibility for the proper assessment of the very existence of the preconditions for the initiation of criminal prosecution, it should not be forgotten that, in making its decisions, the Permanent Chamber greatly depends on the EDP in the field.[40] In this respect, the Regulation emphasises in several places that the Pretrial Chamber will make a decision on the basis of a draft decision proposed by the handling EDP (Recital 36). Therefore, the

[38] See also M. Caianiello, "The Decision to Drop the Case: Res iudicata or Transfer of Competence" in L. Bachmaier Winter (ed), *The European Public Prosecutor's Office*: *The Challenges Ahead* (Springer, 2018) p 109.

[39] The EPPO will exercise its jurisdiction for crimes affecting EU funds over EUR 10 000 and cross-border VAT fraud of over EUR 10 million. Exceptionally, the EPPO shall be competent to investigate for damages to the Union's financial interests of less than EUR 10 000 if: (a) the case has repercussions at Union level which require an investigation to be conducted by the EPPO; or (b) officials or other servants of the Union, or members of the institutions of the Union could be suspected of having committed the offence (Art. 25(2) of the Regulation).

[40] Vervaele (n 31) p 255.

validity of the decisions rendered by the Pretrial Chamber will largely depend on the legality and objectivity of the EDP's proper prior assessment of the fulfilment of the legal requirements for the dismissal of the case.[41]

2.2.3. Judicial review of a decision to dismiss a case

One of the most important novelties implemented by the Regulation is certainly judicial review to dismiss a case. Unlike the judicial review of certain coercive actions and measures that are still entrusted to national courts, judicial review of a decision to dismiss a case took on a completely new solution after being conferred to the CJEU.

It is necessary to focus on certain important aspects that justify the new form of judicial review of a decision to dismiss a case. First of all, it should be noted that the Regulation finally gained the impression that the EPPO is indeed an EU body of criminal prosecution.[42] Therefore, any decision concerning the initiation or withdrawal of criminal prosecution may be brought only by the Permanent Chamber.[43] This ensures a coherent and consistent approach in each situation where it deems it necessary to dismiss a case. At the same time, it burdens the Permanent Chamber to make its decision on objective and verifiable criteria laid down in Art. 39 of the Regulation. On the other hand, by prescribing the competence of the Permanent Chamber to render a decision not to prosecute, the Regulation abandoned the legal fiction that the EPPO is a national body for the purposes of judicial review, which consequently led to the implementation of judicial review at the EU level.[44]

Starting from the nature and importance of the EPPO and the mighty powers at its disposal to protect the EU's financial interests while maintaining awareness of the necessity to respect the legality of criminal prosecution – i.e., that every perpetrator be prosecuted in every concrete case when the statutory preconditions are fulfilled for the initiation of criminal prosecution – it was necessary to resolve the issue of judicial review in a clear and certain way. The Regulation addresses this issue in a rather simple manner by conferring judi-

[41] This is particularly true in highly sensitive simplified prosecution procedures where the Permanent Chamber's supervisory role will consist of the hierarchical control of agreements proposed by the EDP. See in detail A. Zárate Conde, M. de Prada Rodríguez, "Transactions and 'Simplified Procedures' in the Framework of the European Public Prosecutor's Office. A National Perspective" in L. Bachmaier Winter (ed), *The European Public Prosecutor's Office: The Challenges Ahead* (Springer, 2018) pp 172-173.

[42] Mitsilegas (n 5) p 107.

[43] Ibid.

[44] See in particular F. Giuffrida, "The European Public Prosecutor's Office: King Without Kingdom?" CEPS, Research Report, No 2017/03, February 2017, p 33.

cial scrutiny over the decision to dismiss a case to the CJEU, stipulating, "By way of derogation from paragraph 1 of this Article, the decisions of the EPPO to dismiss a case, insofar 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 Art 263 TFEU" (Art 42(3) of the Regulation).[45]

Considering the text of the Regulation and the structure and organisation of the EPPO, it is clear the EPPO is an EU body of criminal prosecution regardless of whether its work is observed at a centralised or decentralised level.[46] Likewise, decisions that will be made by the Permanent Chamber will have the EU's sign-off, and since it is about the decision of whether or not to initiate criminal prosecution, the EU check is inevitable. However, a careful reading of Art. 42(3) of the Regulation leads to different interpretations regarding the competent judicial authority to review a decision to dismiss a case. 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.[47] 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.[48] It is apparent that these interpretations undermine legal certainty. Consequently, it is necessary to edit the text of the Regulation in a coherent way and to clearly exclude different interpretations that can lead to a series of problems in everyday operations. The answer to this problem is in fact very simple and lies in abandoning the legal fiction that EPPO is a domestic body of criminal prosecution.[49] The EPPO is an EU body of prosecution that was established as such with the Treaty of Lisbon when Member States declared their will to transfer their sovereign powers of criminal justice to the EU level.[50] In this sense, it is necessary to make a clear turn and accept

[45] See A. Weyembergh, C. Briere, *Towards a European Public Prosecutor's Office (EPPO). Study for the LIBE Committee* (European Parliament, 2016) p 38.

[46] See Luchtman and Vervaele (n 30) p 144.

[47] V. Mitsilegas, F. Giuffrida, "The European Public Prosecutor's Office and Human Rights" in W. Geelhoed, L.H. Erkelens, A.W.H. Meij (eds), *Shifting Perspectives on the European Public Prosecutor's Office* (TMC Asser Press, 2018) p 83.

[48] Ibid.

[49] Mitsilegas and Giuffrida point out that the final text of the Regulation still envisages a very limited role for the CJEU, since the judicial review of the acts of the EPPO will be mostly carried out at national level. V. Mitsilegas, F. Giuffrida, 'Raising the Bar? Thoughts on the Establishment of the European Public Prosecutor's Office', CEPS, No 2017/39, 30 November 2017, p 13.

[50] See in particular A. Weyembergh, "History of the Cooperation" in R.E. Kostoris (ed), *Handbook of European Criminal Procedure* (Springer, 2018) pp 188-197.

that the EPPO is a body whose decisions during pre-trial proceedings are made at the EU level, and so it is quite logical that these decisions are reviewed at the EU level. In addition, it can be noticed that the Regulation has created an odd framework in which the fundamental decisions to be made by the Permanent Chamber – i.e., to bring a case to judgment or to dismiss a case – envisage different schemes of judicial scrutiny. In the first case, review is entrusted to the national courts, while in the second case the review should, as a rule, be at the EU level.[51] This solution is quite divergent and can potentially create confusion in daily operation. Therefore, it would be advisable to harmonise the system of judicial scrutiny over the EPPO, clearly appreciating that it is a multi-level body, so that the decisions that are obviously made at the EU level are reviewed by a competent judicial authority.

3. PERMANENT CHAMBER – RUBBER STAMP OR THOROUGH HIERARCHICAL SCRUTINY?

As the Regulation established exclusive authority of the Permanent Chamber to initiate criminal prosecution or to dismiss a case, it is necessary to consider the implications of the new solutions in the context of coherent hierarchical scrutiny over the EDP to guarantee the lawfulness of decisions made as well to strengthen the personal responsibility of the Permanent Chamber.

The Regulation depicts a very peculiar way of deciding to dismiss a case that is determined by the new position and tasks of the Permanent Chamber.[52] In several places in the Regulation, it is emphasised that the EPPO's – and thus the EDP's – investigation and prosecution activities should be guided by the principle of legality of criminal prosecution (Recital 66). Therefore, in order for the Permanent Chamber to make a decision to dismiss a case, it must first establish that the statutory prerequisites for initiating and prosecuting criminal proceedings are not fulfilled. That is, there must be a lack of relevant evidence (Art. 39(1)(g) of the Regulation) or procedural obstacles that prevent the initiation of criminal prosecution despite the existence of relevant evidence (Art. 39(1)(a-f) of the Regulation).

[51] Meij doubts that such a division is an ideal solution. A. Meij, "Some Explorations into the EPPO's Administrative Structure and Judicial Review" 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/Springer, 2015) p 116.

[52] Wade rightly points out that the Permanent Chamber is the "working heart" of the EPPO. M.L. Wade, "The European Public Prosecutor: Controversy Expressed in Structural Form" in T. Rafaraci, R. Belfiore (eds), *EU Criminal Justice. Fundamental Rights, Transnational Proceedings and the European Public Prosecutor's Office* (Springer, 2018) p 173.

The EDP can initiate an investigation on its own after it has determined, in accordance with the applicable national law, that there are reasonable grounds to believe that an offence within the competence of the EPPO is being or has been committed. It can also take investigative actions and measures and collect evidence during an investigation. However, the EDP is still not allowed to render a decision to dismiss a case. Therefore, when the handling EDP believes that prosecution has become impossible, he shall submit a report containing a summary of the case and a draft decision to dismiss a case to the supervising European Prosecutor, who shall forward it to the Permanent Chamber to review the report and make a decision (Arts. 35(1), 39(1) of the Regulation). In this way, strict hierarchical control within the EPPO is provided. The usefulness of hierarchical oversight is evident from the circumstance that three prosecutors in the Permanent Chamber decide on the final dismissal of prosecution, thus providing a guarantee for making the right decision and the personal responsibility of the competent prosecutor seated in the Permanent Chamber.[53] This ensures real and strict control over the work of the EDP, and it provides a guarantee that the decision to drop the case is based on objective criteria simply because three prosecutors will be able to more prudently and conscientiously consider passing such an important and sensitive decision than could be done by an individual prosecutor.[54] In doing so, the Permanent Chamber, in accordance with its position as a body which directs and oversees the investigation, retains full right to make a final decision on whether to accept the draft decision made by the EDP, and, if not, it may still order the EDP to conduct further investigations (Article 35(2) of the Regulation). This solution is much better than the original proposal in which the decision to dismiss a case should be made by the EDP, and the EPPO would just validate it (Art. 28 of the Proposal).[55]

Considering the above, it should be emphasised that the Permanent Chamber, when making its decision, should observe that the investigations of the EPPO should, as a rule, lead to prosecution in the competent national courts in cases where there is sufficient evidence and where no legal ground bars prosecution or in which no simplified prosecution procedure has been applied (Recital 81). Therefore, the meaning of the provision of Art. 36(1) of the Regulation is not clear; thus, the Permanent Chamber cannot decide to dismiss the case if a draft decision proposes to bring a case to judgment as a sort of *favor actionis*.[56] The text of the Regulation provides that only the Permanent Cham-

[53] See also: Caiannielo (n 38) pp 109–110.

[54] Nevertheless, Wade warns that Permanent Chambers are dominated by prosecutors appointed as representatives of their Member States who can practically outvote the European Chief Prosecutor. Wade (52) p 174.

[55] Caiannielo (n 38) p 109.

[56] T. Rafaraci, "Brief Notes on the European Public Prosecutor's Office: Ideas, Project and

ber is authorised to make a decision to prosecute or to dismiss a case where applicable after reviewing a draft decision proposed by the handling EDP (Art. 10(3) of the Regulation). In addition, the internal composition of the Permanent Chamber, consisting of two permanent members chaired by the European Chief Prosecutor or one of the Deputy European Chief Prosecutors, reflects the significance and importance of the functions and powers guaranteed to the Permanent Chamber under the EPPO structure.[57] Therefore, Art. 36(1) is quite opposite to the institutional arrangement and procedural authority of the Permanent Chamber and even more so to the structure of the EPPO as a vertical, hierarchical organisation in which there are relations of the subordination of the prosecutors to their superiors. A much better solution for resolving dissent between the Permanent Chamber and the EDP in this particular situation would be to bring the disputed situation to the College of the EPPO, which should then implement hierarchical control and suggest binding the final disposition of the case. Otherwise, an unpleasant phenomenon can occur: the EPPO emerges from the position of a body that is bound by the principles of rule of law and proportionality in all its activities (Art. 5(2) of the Regulation) and that conducts its investigations in an impartial manner and seeks all relevant evidence, whether inculpatory or exculpatory (Art. 5(4) Regulation). Therefore, it can be concluded that the institutional framework and procedural status of the Permanent Chamber provides a credible guarantee of making the right decisions. The provision of Art. 36(1) of the Regulation is inconsistent with the fundamental tasks and duties of the Permanent Chamber, and it may potentially lead to unlawful criminal prosecutions as, despite the lack of legal preconditions for criminal prosecution, the EDP has a chance to bring an indictment before the court without the prior authorisation of his superiors. This problem is even more pronounced because the procedure for judicial review of an indictment is not harmonised, and Member States differ significantly on the level of court protection provided to the citizens in order to prevent unlawful and unjustified accusations before the court.[58]

Fulfilment" in T. Rafaraci, R. Belfiore (eds), *EU Criminal Justice. Fundamental Rights, Transnational Proceedings and the European Public Prosecutor's Office* (Springer, 2018) p 161.

[57] Ligety and Marletta warn that such a complex relationship between the Permanent Chamber, the European Prosecutor, and the EDP risks becoming dysfunctional and raises questions about accountability for decision-making. Ligeti and Marletta (n 13) p 60.

[58] For a comparative overview of the judicial review of indictments in Austria, Germany, the Netherlands, and Croatia, see A. Novokmet, "Sudska kontrola optužbe" [Judicial Review of Accusation] (2015) *Hrvatsko udruženje za kaznene znanosti i praksu, Ministarstvo unutarnjih poslova Republike Hrvatske, Sveučilište Josipa Jurja Strossmayera u Osijeku, Pravni fakultet Osijek, Zagreb*, pp 252–262, 281–290, 315–323, 474–521.

4. JUDICIAL REVIEW OF A DECISION TO DISMISS A CASE

4.1. Rationale of judicial review at the EU level

Taking into account the significance of the Permanent Chamber's power to dismiss a case, as well as implemented judicial review at the EU level, it should be noted that such an approach to the issue of judicial review of a decision not to prosecute is an acceptable option. The purpose of judicial review of a decision to dismiss a case is to prevent the arbitrary and discriminatory closure of a case and to guarantee effective and equal prosecution when the preconditions for the initiation of criminal prosecution are fulfilled. This setting is a generally accepted concept for the existence of such control.[59]

As far as the EPPO is concerned, it is clear that the new institutional organisation of the EPPO, as a collegiate body with a strong, centralised structure, envisages the authority of the Permanent Chamber to decide to dismiss a case.[60] In this regard, the Permanent Chamber will be the first and practically only instance to make a *de facto* final decision on whether or not to prosecute, which will directly affect the issue of the protection of EU financial interests, and which is why the EPPO has been established after all. Although the EPPO and thus the Permanent Chamber enjoys institutional guarantees of autonomy and independence[61] in order to objectively and impartially assess the legal preconditions for initiating criminal proceedings, there is still an understandable possibility of a wrong opinion or conclusion about the existence of the facts that constitute a criminal offence and the defendant's guilt, which consequently generates the decision to dismiss a case. Furthermore, the Permanent Chamber's decision will typically be based on the draft report that will be submitted to it by the EDP, and even though the hierarchical insight into the report and the case file will form its final decision in this way, there is always the latent danger of misinterpretation and, therefore, of making the wrong decision.[62]

[59] Vervaele considers judicial review as one of the checks and balances in the separation of powers doctrine. Vervaele (n 31) p 255.

[60] Ruggieri points out that the system of hierarchical scrutiny by the Permanent Chamber does not represent a review of an independent body, while the existing mechanism for oversight of the EPPO through annual reports that mostly refer to the "general activities" of the EPPO do not provide the safety of arbitrary treatment. S. Ruggieri, "Criminal Investigations, Interference with Fundamental Rights and Fair Trial Safeguards in the Proceedings of the European Public Prosecutor's Office. A Human Rights Law Perspective" in L. Bachmaier Winter (ed), *The European Public Prosecutor's Office: The Challenges Ahead* (Springer, 2018) p 223.

[61] See in particular A. Martínez Santos, "The Status of Independence of the European Public Prosecutor's Office and Its Guarantees" in L. Bachmaier Winter (ed), *The European Public Prosecutor's Office: The Challenges* Ahead (Springer, 2018) pp 1–25.

[62] Ruggieri doubts whether internal oversight by the Permanent Chamber is enough to avoid the risk of uncontrolled inaction by the EPPO. Ruggieri (n 60) p 221.

As the Permanent Chamber's decision to dismiss a case would practically be the final decision of the EPPO, it is necessary to provide some external control system to prevent the harmful effects of any misjudged decision. However, such a system of review should at the same time have institutional guarantees of autonomy and independence for an objective and impartial review of the specific case. As only a judicial authority undoubtedly enjoys these qualities, it is logical to entrust that review to the competent court. This ensures there is a system of checks and balances that will act, on the one hand, proactively and make it possible to eliminate the occurrence of adverse effects due to an erroneous decision of the Permanent Chamber, and, on the other hand, preventively, through its very existence, prompt the EPPO to carefully consider all the circumstances of the case before deciding to finally dismiss it. Such a system will have a stimulating effect on the EPPO's accountability because, already having in mind that there is an independent system of review, it would make additional efforts to make a lawful decision.

But the very existence of judicial review, regardless of whether it is at the national or EU level, will not be useful if it is not accessible, fast, and efficient. Therefore, these features will be considered below in the context of judicial review as prescribed by the Regulation in order to identify potential problems that may occur *pro futuro*.

4.2. *Ius standi* before the CJEU

The decision to dismiss a case, along with the decision to bring a case to judgment, is a fundamental decision to be made by the EPPO. It is even more important as it will not lead to the prosecution of the perpetrators of crime. In order to remedy the adverse consequences of such a decision, judicial review must be accessible. This means that a simple legal path must be provided to activate the supervisory powers of the court to ensure that review is indeed carried out. However, the existing system of triggering that review does not entail the confidence that it will be accessible.

Although it is clearly prescribed that the EPPO, when a case is dismissed, shall officially notify *inter alia* – where appropriate under national law – the crime victims (Art. 39(4) of the Regulation), there is a significant practical problem of which natural or legal persons would have *jus standi* before the CJEU.[63] As it follows from the provision in question, the Regulation continues to rely on Member States when determining who is considered a victim of the

[63] See K. Ligeti, A. Marletta, "EU Criminal Justice Actors: Accountability and Judicial Review vis a vis the EU Citizen" (2016) 7(2) *New Journal of European Criminal Law*, pp 175–189.

crime, whereas the decision to dismiss a case should be subject to judicial review in accordance with Art. 263(4) TFEU insofar as it is contested directly on the basis of Union law (Art. 42(3) of the Regulation). According to Art. 263(4) TFEU, "Any natural or legal person may… institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures". The above provision is rather broadly defined and does not provide a clear insight into who would be legitimate to initiate a review as a natural or legal person.[64] Further, it leaves a very narrow framework for contesting the decision to dismiss a case, and only when it represents a violation of the general principles of the EU, fundamental rights, the Treaties, or the Regulation.[65] Göhler offers a potential response to this question, suggesting that such a status should be given to EU citizens with "identifiable status" in a particular case and to "defined groups with a recognizable status".[66] In order to assign an "identifiable status" to a certain person, two prerequisites must be met: a) that EU citizen at any time before the closure decision is made, on their own initiative or upon citation by the EPPO, pressed charges or reported facts to the EPPO on the conduct that might constitute an offence within its competence; b) the potential claimant should demonstrate at least some indication of the unlawfulness of the dismissal decision.[67] Still, starting from the assumption that individual citizens will sometimes have no desire or opportunity to question the decision to dismiss a case, as well as that in some cases they will not be able to prove the "identifiable status", Göhler suggests that "recognized status" should be given to pressure groups established by EU citizens.[68] Göhler further explains these should be groups established by EU citizens to promote and defend the public interest in the EU, and they should be institutionally independent, non-governmental, and non-profit-making.[69] If they meet these criteria, their "recognized status" should be guaranteed regardless of their earlier engagement during the pre-trial procedure but should still point to indicative evidence of the unlawfulness of the dismissal decision to protect the EPPO from malicious claims.[70] Nevertheless, it still remains an open question as to which direction the CJEU will interpret

[64] For certain cases in which the CJEU ruled on the right to a stand before the ECtHR, see D. Chalmers, G. Davies, G. Monti, *European Union Law: Text and Materials* (Cambridge University Press, 2014) pp 444-455.

[65] Mitsilegas and Giuffrida (n 47) p 82.

[66] J. Göhler, "To Continue or Not: Who Shall Be in Control of the European Public Prosecutor's Dismissal Decision? (2015) 6(1) *New Journal of European Criminal Law*, p 122.

[67] Ibid.

[68] Ibid., p 124.

[69] Ibid.

[70] Ibid.

the term "natural" or "legal persons"[71] and how it will build stable practice on the issue at stake taking into account the importance of the very existence of judicial review over the decision to dismiss a case, the external perception of the functioning of the judiciary in prosecuting that financially susceptible set of criminal offences, and the real public perception of the effectiveness of the prosecution of those criminal offences if the CJEU slowly and very narrowly defines the concept of a person authorised to institute judicial review.[72]

It is undoubtedly a fact that the EU legislator entrusted the review of the decision to dismiss a case directly to the CJEU, whereby the mechanism for implementing that review is prescribed by the TFEU.[73] However, it should be noted that this review is only optional, which means that it is primarily dependent on whether a certain "natural person" or "legal person" is really interested in instituting proceedings before the CJEU against an act addressed to that person or which is of direct and individual concern to them.[74] Therefore, if such persons are not present, or if they do not express such interest in initiating proceedings before the CJEU – which is not an unrealistic option, especially if we consider the corpus of criminal offences closely related to the EPPO – then the provisions on judicial review would remain unenforced. Starting from the goal and purpose as well as the enormity of the idea of setting up the EPPO, the EU should not allow itself the luxury that the interest of prosecution of such serious criminal offences, because of the erroneous judgments of the EPPO, would be jeopardised by conferring the initiation of judicial review to a natural or legal person on the additional condition that that decision is of direct and individual concern to them,[75] especially because there is always a latent danger that even the aforementioned persons with an identifiable and recognisable status can simply miscarry and not react at all. Finally, it is noted that the text of the Regulation does not foresee the possibility for such categories of persons to be informed of the dismissal decision unless they are victims of a criminal offence. Therefore, there is a real danger that they will not even know that the EPPO dismissed a case, due to which they will not be able to

[71] For CJEU rulings on *ius standi* with regard to the OLAF investigation, see Inghelram (n 9) pp 77-80.

[72] In that context, see Vervaele (n 31) p 267.

[73] See Böse (n 22) p 196.

[74] Mitsilegas warns that past experiences with OLAF in the recognition of *ius standi* may not be the main guideline since investigative acts of the EPPO are qualitatively different from the acts of OLAF. Starting from the circumstance that the EPPO is a body of criminal prosecution, then it is to be expected that its acts would really have the effect of bringing a distinct change in the legal position of affected individuals. Mitsilegas (n 5) p 118.

[75] Luchtman and Vervaele rightly point out that waiting for what the CJEU may possibly decide in the future with respect to the EPPO's activities may not be the wisest course of action. Luchtman and Vervaele (n 30) p 146.

demonstrate the existence of their legitimate interest in enforcing judicial review to dismiss a case.

4.3. Speedy decision-making process

One of the qualities every system of judicial review needs in making a decision to dismiss a case is a quick remedial procedure. Prescribing too many formal preconditions, the prior determination of *ius standi* for a particular person, and the excessive length of the proceedings in which it decides on such an important issue as the lawfulness of the decision not to prosecute does not go along with the goal and purpose of the mere existence of that institution.[76] National criminal procedures that are familiar with these proceedings provide very short deadlines for authorised persons to initiate procedures before the court, as well as short deadlines for the court to decide on their request.[77] One may justify such a complex review in proceedings before the CJEU, referring to the complexity of criminal offences under the jurisdiction of the EPPO. But practically speaking, why should the EPPO's work be treated as "more complicated" than prosecution conducted by national prosecutors who face daily crimes against life, body, and property (homicides, rape, robbery, corruption, economic crimes, etc.)? The criterion of the gravity of the criminal offence and the complexity of the case certainly should not be justification for the excessive length of remedial procedures against a decision to dismiss a case.

In the literature, it is stressed that the CJEU may be overwhelmed by many requests concerning a review over the dismissal decision, and, therefore, relevant studies have shown that the acquisition of the status of a person authorised to initiate proceedings against the EPPO's decision to dismiss a case should be limited to identifiable natural persons and recognisable legal persons.[78] However, restricting the circle of persons authorised to initiate judicial review of

[76] Mitsilegas and Giuffrida point out that waiting too long for a decision has negative consequences both on the investigations of the EPPO and on the rights of suspects or accused persons. Mitsilegas and Giuffrida (n 47) p 86.

[77] For example, in Croatia, a victim of crime should, within eight days of receiving notification of the decision to dismiss a case, submit a motion to the court to take over the criminal prosecution as a subsidiary prosecutor (Article 55(2) ZKP). In Germany, the injured party is entitled to lodge a complaint against the notification to the public prosecutor within two weeks after the receipt of such notification (§ 172 (1) StPO). In Austria, the subsidiary prosecutor could file a motion for judicial review within one month of the day that the prosecutor withdrew from the criminal prosecution (§ 72 (3) StPO). In the Netherlands, the complaint must, as a rule, be made within three months of the date on which the person directly concerned became aware of it (Article 12k Sv).

[78] See Göhler (n 66) p 121.

the decision to dismiss a case simultaneously creates the negative effect of narrowing the possibilities for democratic control over the legality of criminal prosecution, which consequently could lead to legal uncertainty and loss of trust in EU institutions and the rule of law.

Consequently, one should consider strengthening the capacity of the CJEU in order to allow for a quick and easy decision-making procedure. The basis for such an intervention exists in Union law. Art. 257 TFEU stipulates that the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish specialised courts attached to the General Court to hear and determine, at first instance, certain classes of action or proceedings brought in specific areas. The EU is undoubtedly aware of the importance and complexity of the EPPO, and, hence, a number of legal consequences when it has decided to create a supranational body of criminal prosecution that should protect its interests throughout the EU. Therefore, it is quite understandable to express the necessity to create a clear and consistent system of checks and balances awarded to the institution at the same EU level, which will have at least equal or greater authority than the EPPO itself, and only the court may innately have such a position. It is quite clear that the Member States will not be able to cover all the challenges of judicial review of the work of the EPPO[79] through its legislation, and, obviously, there is a need for a specialised court that will have strict competence within the work and activities of the EPPO and the decisions that it brings at the EU level.[80] A second, simpler and more realistic option may be proposed on the basis of Chapter 16, Title III of the Rules of Procedure of the General Court, which provides for the possibility of establishing special chambers within the General Court.[81] The establishment of such a chamber is much simpler than the establishment of a completely new court, and this special chamber could have targeted competence to conduct specific procedures in a particularly narrow set of cases.[82] There is no doubt that the procedure for reviewing the decision to dismiss a case is of the same nature, and that the EPPO's structure should include such a judicial mechanism that will implement fast-track procedures of review over a decision not to prosecute.

[79] For the complex issues of the implementation of judicial review of the EPPO's decision to dismiss a case in Member States based on the principle of opportunity (expediency) of criminal prosecution, see W. Geelhoed, "Embedding the European Public Prosecutor's Office in Jurisdictions with a Wide Scope of Prosecutorial Discretion: The Dutch Example" in C. Nowak (ed), *The European Public Prosecutor's Office and National Authorities* (Wolters Kluwer, 2016) pp 87-102.

[80] See Mitsilegas and Giuffrida (n 47) p 86.

[81] Ibid.

[82] Ibid.

4.4. A possible shift towards ex officio judicial review of a decision not to prosecute

Reliance on an individual citizen (victim of a criminal offence) when the public prosecutor has failed in his duty to prosecute perpetrators of criminal offences is more than a century-old characteristic of many continental European countries with a hierarchical model of authority.[83] It is not surprising, therefore, that the EU legislator has decided to rely on citizens (victims in Art. 39(4) of the Regulation and natural and legal persons with a direct interest in Art. 263(4) TFEU) in an effort to provide supervision over the EPPO. However, the enormity of the idea and vision on the EPPO, as well as the specific range of offences for which the EPPO will be competent to perform the function of criminal prosecution, simply goes beyond the seminal reason whereby national criminal procedures, even today, rely on the citizen to control the public prosecutor's monopoly of criminal prosecution. This seminal reason is the fact that the citizen on which the state wants to rely really feels like a victim of a criminal offence.[84] It is not realistic to expect such a scenario in cases where the EPPO is competent to prosecute. There will be very few or no citizens at all who will even have the willingness to prove the existence of their *ius standi* according to Art. 263(4) TFEU. The reason for this is that the victims of these criminal offences generally lack interest in the perpetrator being punished and in feeling through the criminal justice system just satisfaction for the crime committed by the perpetrator of the criminal offence. Therefore, if there is no such victim to express their particular interest in the prosecution and punishment of the perpetrator, the benefit of this legal path cannot be expected, especially considering the large number of cases that will be resolved by the EPPO throughout the EU. Even if some person enumerated in Art. 263(4) TFEU indeed decides to challenge the decision to waive criminal prosecution before the CJEU, they will often lack the necessary professional legal knowledge to formulate a submission at all and to submit it in the prescribed manner, from which will be apparent not only the reasons why the EPPO has made a mistake in its decision but also the legal basis for establishing *ius standi* before the CJEU. Moreover, citizens will have financial and time-con-

[83] See M. Damaška, *Lica pravosuđa i državna vlast* [The Faces of Justice and State Authority] (Globus, 2008) pp 210–211; M. Damaška, "Structures of Authority and Comparative Criminal Procedure" (1975) 84(3) *Yale Law Journal* p 504.

[84] This is also the case with Directive 2012/29/EU which, in Art. 11, expressly prescribes the right of the victim to a review of a decision not to prosecute. See A. Novokmet, "The Right of a Victim to a Review of a Decision not to Prosecute as Set out in Article 11 of Directive 2012/29/EU and an Assessment of its Transposition in Germany, Italy, France and Croatia" (2016) 12(1) *Utrecht Law Review*, pp 86–108.

suming burdens to prove these preconditions, which will undoubtedly require the expert assistance of counsel.[85] If this burden is to be borne by a citizen (and it seems that it will), we have to ask what is the motive for the unconditional concern for the financial interests of the EU? This issue becomes even more meaningful because the Member States themselves have not invested necessary effort in protecting the EU's financial interests because they could not or did not want to do this, and so the EU had to react and protect its interests through the EPPO.

It is clear that the judicial review of a decision to dismiss a case, as envisaged by the Regulation, opens up a series of questions to which there are no concrete answers, while the EPPO is soon to become a reality in the fullness of its powers in everyday practice. Perhaps the whole system of judicial review should be set on a more realistic basis and prescribed in a plain and simplified procedure. A good example is the system of judicial review as provided for in the Rome Statute of the International Criminal Court (Rome Statute).[86] Although the rationale and foundations for establishing these two promoters of collective (social) interest in punishing the perpetrators of the most serious criminal offences cannot be compared, because their conceptual basis is completely different, yet out of their difference the essential similarity can be grasped. The similarity is the fact that the Member States voluntarily decided to transfer part of their sovereign powers to prosecute perpetrators of specified criminal offences to a supranational body of criminal prosecution in order to protect not their individual interests, but the interests of the European and international community.[87]

Unlike the EPPO for which the Regulation has established only an optional system of judicial review of a decision to dismiss a case, assigning its initiation to individual citizens, the Rome Statute established both optional review, authorising states and the Security Council to initiate judicial review, and an *ex officio* system of judicial review through the Pre-Trial Chamber that monitors the entire course of pre-trial proceedings conducted by the Office of the Prosecutor (OTP).[88] However, it should be noted that *ex officio* judicial review is ensured only if the OTP decides to dismiss a case acting on the principle of the opportunity of criminal prosecution, i.e., if, despite the fact that the prerequi-

[85] Even if the legal aid is free, it is questionable as to whether it could mitigate complications in relation to acquiring *ius standi* before the CJEU.

[86] See W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010) pp 668–670.

[87] Klip (37) p 521.

[88] K. Ambos, "The Structure of International Criminal Procedure: 'Adversarial', 'Inquisitorial' or 'Mixed'?" in M. Bohlander (ed), *International Criminal Justice: A Critical Analysis of Institutions and Procedures* (Cameron May, 2007) pp 451–452.

sites for criminal prosecution are fulfilled (Art. 53(1)(a-b) of the Rome Statute), taking into account the gravity of the crime and the interests of the victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice (Art. 53(1)(c) of the Rome Statute), or, upon investigation, the OTP concludes that prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of the victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime (Art. 53(2)(c) of the Rome Statute).[89] In that case, the OTP is obliged to inform the State Party, the Security Council, and the Pre-Trial Chamber about the decision to dismiss a case. Then, the Trial Chamber, if a state or the Security Council did not require review of such negative decisions, should commence an *ex officio* review of a decision not to prosecute; thus, the decision of the OTP shall be effective only if confirmed by the Pre-Trial Chamber (Art. 53(3)(b) of the Rome Statute). If the Pre-Trial Chamber does not confirm the decision referred by the OTP, it shall proceed with the investigation or prosecution (Art. 110(2) of the Rules of Procedure and Evidence). On the other hand, if the OTP waives criminal prosecution by applying only the principle of the legality of the criminal prosecution (Art. 53(1)(a-b) and 53(2)(a-b) of the Rome Statute), the OTP shall inform the State Party and the Security Council thereof. If the state or Security Council is unsatisfied, they may, within 90 days, request the Pre-Trial Chamber to review a decision not to prosecute, and the Pre-trial Chamber may request the OTP to reconsider its decision (Art. 53(3)(a) of the Rome Statute). If the Pre-Trial Chamber requests the OTP to review, in whole or in part, the decision not to initiate an investigation or not to prosecute, the OTP shall reconsider that decision as soon as possible (Art. 108(2) of the Rules of Procedure and Evidence).

The advantages of the judicial review as envisaged in the Rome Statute are multiple: a) it is saved of an unnecessary bureaucratic search for citizens who would be individually interested in the success of supranational prosecution; b) a quick and easy procedure for initiating judicial review is envisaged; c) there are relatively short deadlines for issuing complaints and making a decision. Besides, the very existence of a judicial body authorised to review *ex officio* the decision to dismiss a case provides the assurance that the OTP, acting at the supranational level, will not be careless because of the existence of a body that has the authority to check its work.[90] Such a balance of power has a preventive effect by causing the prosecutor to be careful and responsible since maladmin-

[89] For more detail, see W. Schabas, "Prosecutorial Discretion v. Judicial Activism at the International Criminal Court" (2008) 6(4) *Journal of International Criminal Justice*, pp 731–761.

[90] The Pre-trial Chamber can only request the prosecutor to reconsider that decision (Art. 53(3) (it cannot force its decision upon the prosecutor as the prosecutor makes the "final decision" (Art 108(3) of the Rules of Procedure and Evidence). Ambos (n 88) p 452.

istration can easily come before the public and become the reason for which the prosecutor could be held accountable for serious misconduct in the performance of his duty to prosecute offenders in accordance with the principle of legality of criminal prosecution.

The EPPO has explicitly guaranteed the position of a body independent of any person external to the EPPO, any Member State of the European Union, or any institution, body, office, or agency of the Union in the performance of its duties, and therefore shall act in the interest of the Union as a whole (Art. 6 of the Regulation). Concurrently, such a state of affairs requires the existence of a body that will be at least equally independent and able to react when the EPPO breaches the core of its given authority. In the current system of judicial review of a decision to dismiss a case, it is only certain that control will be carried out by the CJEU. However, it is equally certain that there are no rigorous provisions where a clearly competent functional judicial body (a specialised court or specialised chamber of the CJEU) would be determined, as well as or a coherent system for initiating and conducting judicial review. In order for this system to really achieve the characteristics of a desirable system of judicial review that is fast, simple, without bureaucratic obstacles, and, above all, efficient, it is necessary to make important changes to bring it closer to this ideal. Therefore, it is first necessary to choose the model of participation of the CJEU. The current state of affairs suggests that it is easiest to create a specialised chamber within the General Court and precisely define its powers and tasks in the pre-trial procedure conducted by the EPPO.[91] The next important step is to unburden natural and legal persons of the difficult task of initiating judicial review; not only do they often have no interest in doing so, but bureaucratic, financial, and time difficulties discourage them from doing this duly and efficiently. Finally, it is essential to prescribe the form of *ex officio* judicial review of the decision to dismiss a case modelled on the aforementioned comparative solution and reasonably short time limits within which the court must decide on the lawfulness of the EPPO's decision. This will ensure a harmonised system of proceedings, strengthen the transparency of the EPPO, and create a complete system of checks and balances that will, as a result of the existence of such a system of control, encourage prosecutors to offer additional efforts and attention when deciding on bringing a case to judgement or to dismiss a case. This opens up space for an effective and efficient system in which the EPPO and the court, performing different but harmonised functions in criminal proceedings, will really enable the proper and fair functioning of the criminal justice system.

[91] See Mitsilegas and Giuffrida (n 47).

5. CONCLUSION

The implementation of judicial review in the system of the EPPO is a very complex and sensitive issue. It became problematic in 2013, when the Commission uncritically proposed that judicial review over the decision not to prosecute should be entrusted to the Member States. It is clear that such a system of review could not become a reality given the differences between the Member States regarding the principle of legality and the principle of opportunity of criminal prosecution. Even greater diversity arises when it comes to specific procedural mechanisms to control the decision to dismiss the case.

Therefore, the text of the Regulation on enhanced cooperation was indeed greeted with great relief. This is evident from the fact that the regulation explicitly prescribed that the CJEU is competent to control the decision to dismiss a case. This has confirmed for a number of critics in scientific and professional circles that the EPPO should be considered as an EU body of criminal prosecution for the purpose of judicial review. This has also been confirmed in the Permanent Chamber's authority to make a decision not to prosecute. As the Permanent Chamber makes a decision at the EU level, it is clear and quite logical that the competence of the CJEU to review a decision to dismiss a case is also prescribed at the EU level.

Nevertheless, a number of shortcomings arise from the current system of judicial review, which is why the EU legislator has a demanding task until the final design is made of a coherent and harmonised judicial review of the EPPO's work. This is evident from the fact that both the Regulation and the TFEU rely solely on the citizen as the person who should take the initiative to institute judicial review of a decision to dismiss a case. But a series of obstacles flows from this: the difficult or almost impossible expectations of citizens to monitor the work of the EPPO, financial and time costs, and the bureaucratic process of proving *ius standi* before the CJEU, which deters citizens from seeking to be a protector of the financial interests of the EU when the EPPO has not fulfilled its statutory duty.

Hence, this paper proposes *ex officio* judicial review of a decision to dismiss a case. This solution is not new and has already been recognised in the work of another supranational body of criminal prosecution at the international level, i.e., the Prosecutor of the ICC. It is clear that it is difficult and almost impossible to draw parallels between these two systems of criminal prosecution, but we should not *a priori* reject the societal benefits of obviously good ideas arising from the Rome Statute of the International Criminal Court. This idea is the concentration of review within the *ex officio* jurisdiction of the judicial Pre-trial Chamber authorised to conduct review of a decision to dismiss a case. Concrete proposals have therefore been presented in this paper to establish a realistic system of judicial review of a decision to dismiss a case,

taking into account the institutional and procedural foundations for the functioning of the EPPO at the EU level.

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Sažetak

URED EUROPSKOG JAVNOG TUŽITELJA I SUDSKA KONTROLA
ODLUKE O ODUSTANKU OD KAZNENOG PROGONA –
SKLISKO TLO ILI KONAČNO RJEŠENJE

Ovaj rad razmatra problematiku sudske kontrole odluke europskog javnog tužitelja da odustane od kaznenog progona kako je predviđeno Uredbom o provedbi pojačane suradnje u vezi s osnivanjem Ureda europskog javnog tužitelja. Najprije se analizira institucionalni okvir Ureda EJT-a i postupak za sudsku kontrolu odluke o odustanku od kaznenog progona usporednim analizama prijedloga Uredbe iz 2013. godine i konačno usvojenog teksta, pri čemu se uzimaju u obzir teorijske i praktične implikacije. Zatim se skreće pozornost na novu nadležnost Stalnog vijeća da donese odluku o odustanku od kaznenog progona razmatranjem opravdanosti uzdizanja te odluke na europsku razinu te pravnih posljedica koje iz nje proizlaze. Naposljetku se kritičkom analizom aktualnog normativnog okvira Uredbe i Ugovora o funkcioniranju Europske unije propituje stvarni potencijal Suda Europske unije da kontrolira odluke o odustanku od kaznenog progona te se daju određeni prijedlozi *de lege ferenda*.

Ključne riječi: Ured europskog javnog tužitelja, prethodni kazneni postupak, odustanak od kaznenog progona, Stalno vijeće, sudska kontrola, Sud Europske unije