

JUDICIAL REVIEW OF THE ACTS OF THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE – POSSIBLE SHORTCOMINGS AND SEVERAL CONSIDERATIONS IN RELATION TO THE SLOVAK REPUBLIC AND ITS LEGISLATION

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Abstract: *Creation of the European Public Prosecutor's Office was from its very beginning accompanied by a wide-ranging debate regarding the most challenging issues, one of them being judicial review of its acts. This article deliberates on several groups of these acts and their review by either national courts or Court of Justice of the European Union. Where appropriate, it analyses their review in relation to the Slovak Republic. As a conclusion, it offers several considerations as to the Member States' obligation to provide for effective judicial protection.*

Keywords: *European Public Prosecutor's Office, judicial review, national courts, Court of Justice of the European Union, Slovak Republic*

INTRODUCTION

The European Union has finally lived to see the European Public Prosecutor's Office (hereinafter referred to as "EPPO") to come into existence. The functioning of this body, endowed with the power to investigate, prosecute and bring to judgement perpetrators of, and accomplices to, criminal offences affecting the financial interests of the Union which are provided for in the so called PIF Directive,¹ is discussed and accompanied by many questions related to the areas such as the scope of its competence,² effectiveness of its action³ or possible discrepancies caused by its specific structure. The latter is mainly deliberated on with regard to the judicial review of the acts of the EPPO – the question to which the practical answers are yet to be seen.

When establishing a body such as the EPPO, the matter of judicial review is of crucial importance. As stated by Ignazio Patrone, "*the access to a competent court to obtain the judicial review of the acts of a public authority is, in a democratic society, a pillar of the Rule of Law: as to Article 47 of the Charter of Fundamental Rights of the EU - Right to an effective*

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¹ 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, p. 29–41.

² See, for example, VERVAELE, J. A. E. The Material Scope of Competence of the European Public Prosecutor's Office: A Harmonised National Patchwork? In: *Institute for Research into European Criminal Law* [online]. [2020-10-15]. Available at: <<http://dirittopenaleuropeo.it/wp-content/uploads/2015/10/Vervaele-2014-15.pdf>>

³ In that regard see, for example, CAIANIELLO, M. The Proposal for a Regulation on the Establishment of an European Public Prosecutor's Office: Everything Changes or Nothing Changes? *European Journal of Crime, Criminal Law and Criminal Justice*. 2013, Vol. 21, No. 2, pp. 115–125.

remedy and to a fair trial, ‘Everyone 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’.

It is inconceivable that the activity of a European Body or Agency, especially in the field of criminal law, does not provide an efficient remedy before an independent and impartial tribunal, because this could cause a serious breach of both the Charter and the European Human Rights Convention. The competence of the “tribunal” must be clearly established and every possible conflict previously prevented.”⁴

Therefore, “the issue is not if there should be a judicial review of investigation and prosecution acts adopted by the EPPO, but what kind of review and before which judge, European or national, the review must be provided.”⁵

1. JUDICIAL REVIEW OF THE EPPO’S ACTS – THE AMBIGUITIES

European Public Prosecutor’s Office is an indivisible Union body operating as one single Office with a decentralised structure organised at a central level and at a decentralised level.⁶ Its central level consists of a Central Office which further consists of the College, the Permanent Chambers, the European Chief Prosecutor, the Deputy European Chief Prosecutors, the European Prosecutors and the Administrative Director. Its decentralised level consists of European Delegated Prosecutors who shall be located in the Member States.⁷

The ambiguities related to the judicial review of the EPPO’s acts were strongly emphasised in relation to the European Commission’s view of the EPPO as a centralised body establishing a system of vertical cooperation in the field of investigation and prosecution in the European Union.⁸ Commission, in its Proposal for a Council regulation on the establishment of the European Public Prosecutor’s Office,⁹ reasoned its proposal for a model of a judicial review of the EPPO’s acts by the specific nature of the EPPO, which is different from that of all other Union bodies and agencies and requires special rules regarding judicial review.¹⁰ It further stated that *“Article 86(2) of the Treaty requires that the European Public Prosecutor’s Office exercise its functions of prosecutor in the competent courts of the Member States. The acts of investigation of the European Public Prosecutor’s Office are also*

⁴ Ignazio Patrone, Deputy Prosecutor General at the Italian Supreme Court, during public hearing in the European Parliament on “The European Public Prosecutor’s Office (EPPO) and the European Union’s Judicial cooperation Unit (EUROJUST)”. Session 3. EPPO: judicial review. Brussels, 24 May 2016.

⁵ *Ibid.*

⁶ Art. 8 paras 1 and 2 of the 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, p. 1–71, hereinafter referred to as “the EPPO regulation”.

⁷ *Ibid.*, paras 3 and 4.

⁸ See, in this regard, MITSILEGAS, E., GIUFFRIDA, F. 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*. The Hague: T.M.C. ASSER PRESS, 2018, pp. 59–98.

⁹ Proposal for a COUNCIL REGULATION on the establishment of the European Public Prosecutor’s Office, /* COM/2013/0534 final - 2013/0255 (APP) */.

¹⁰ *Ibid.*, part 3.3.5.

closely related to an eventual prosecution and will mainly deploy their effects in the legal orders of the Member States. In most cases they will also be carried out by national law enforcement authorities acting under the instructions of the European Public Prosecutor's Office, and sometimes also after having obtained the authorisation of a national court. The European Public Prosecutor's Office is therefore a Union body whose action will mainly be relevant in the national legal orders. It is therefore appropriate to consider the European Public Prosecutor's Office as a national authority for the purpose of the judicial review of its acts of investigation and prosecution. As a result, national courts should be entrusted with the judicial review of all the challengeable acts of investigation and prosecution of the European Public Prosecutor's Office, and the Union courts should not be directly competent with regard to those acts pursuant to Articles 263, 265 and 268 of the Treaty, since such acts should not be considered as acts of an office of the Union for the purpose of judicial review.”¹¹

As already argued elsewhere,¹² the Commission emphasized the links of the EPPO with national legal orders, yet disregarded the fact that EPPO acts and decisions are acts adopted by an EU agency. The Commission's draft thus effectively created a European agency lying outside European judicial control.¹³ As regards the special nature of the EPPO and its specificity in relation to other EU agencies which consists of the fact that the EPPO is an operational body whose action has the potential to affect significantly fundamental rights across the EU, it was argued that such specificity should render EU judicial review even more imperative.¹⁴ According to the current text – a result of the scientific debate after the Commission's proposal was presented – the role of the Court of Justice of the European Union is somewhat different. It is, however, still limited.¹⁵

Another issue arising from the EPPO's character is related to the field in which it should operate – namely the criminal law. In the primary law of the EU, provisions on the EU criminal law are included in the Treaty on the Functioning of the European Union in its Articles 82–89.¹⁶ Article 82 para. 2 TFEU states that the European Parliament and the Council may establish minimum rules by the means of directives, to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension. These rules may concern mutual admissibility of evidence between Member States, the rights of individuals in criminal procedure, the rights of victims of crime or any other specific aspects of criminal procedure which the Council has identified in advance by a decision. In any case, such rules should take into account the differences between the legal traditions and systems of the Member States. Nevertheless, their adoption shall not prevent Member States from maintaining or introducing a higher level of protection for individuals.¹⁷

¹¹ *Ibid.*

¹² See MITSILEGAS, E., GIUFFRIDA, F. *The European Public Prosecutor's Office and Human Rights*, op cit.

¹³ *Ibid.*, p. 79.

¹⁴ *Ibid.*

¹⁵ See, to that extent, Chapter 2 of this article.

¹⁶ For further overview of the EU criminal law, see MITSILEGAS, V. *EU Criminal Law after Lisbon: Rights, Trust and Transformation of Justice in Europe*. Oxford: Hart Publishing, 2016, pp. 336.

¹⁷ Article 82 para. 2 TFEU.

However, as stated elsewhere,¹⁸ direct harmonisation of the rules of criminal procedure at the Union level is in fact a recent phenomenon. Notwithstanding the fact that several directives aiming at ensuring rights of the defendants were adopted, it seems that neither the rules of investigation, nor the judicial review might be the object of a proposal of a directive at the European level. None of the criminal law harmonisation policies has touched directly the domain of the judicial control and we cannot expect such evolution in the near future.¹⁹

2. JUDICIAL REVIEW – WHO?

The answer to the question of who is to be the subject of the review might seem, while reading the EPPO regulation's provisions, quite simple – either national courts or the Court of Justice of the European Union. That question is, however, more complex and its answer thus hides few more considerations as to the national authorities competent to review EPPO's acts.

The Court of Justice has already offered some insights regarding the term “national court” within the framework of the law of the European Union. It is true that such insights have been noted in relation to the possibility or obligation of the national court to refer a preliminary question to the Court of Justice,²⁰ they will, nevertheless, be useful guidelines for national legislators while adopting or changing legislation concerning the judicial control of the EPPO's acts. There are at least two reasons for such considerations.

Firstly, the terminology of the Court of Justice, or of the European Union law, respectively, many times differs from that of the Member States, therefore the Court of Justice aims for coherent interpretation of certain terms. We therefore do not doubt that it will continue to do so also in this case.

Secondly, the Court of Justice will be called upon to decide on, inter alia, preliminary questions concerning the validity of procedural acts of the EPPO, in so far as such a question of validity is raised before any court or tribunal of a Member State directly on the basis of Union law. These questions will be raised by the very same courts or tribunals which shall perform the judicial review of the EPPO's acts. It would therefore be very difficult to

¹⁸ ALLEGREZZA, S. Le contrôle judiciaire du parquet au prisme des traditions nationales: Le contrôle des mesures d'enquête de l'avant-procès. In: G. Giudicelli-Delage – S. Manacorda – J. Tricot (eds.). *Le contrôle judiciaire du Parquet Européen*. Paris: Société de législation comparée, 2015, pp. 35–53.

¹⁹ *Ibid.*, p. 41.

²⁰ Laid down in the Article 267 TFEU which states:

“The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.”

imagine different interpretation of the term “national court” in the light of EU law in relation to the court empowered to refer a preliminary question to the Court of Justice and to the court empowered to perform judicial review from which such question should arise.

Court of Justice has already stated that “the expression ‘court or tribunal’ is a concept of Community law, which, by its very nature, can only mean an authority acting as a third party in relation to the authority which adopted the decision forming the subjectmatter of the proceedings.”²¹In its later case-law, it takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and – as already stated – whether it is independent.²²

A condition of a body being established by law is not a problematic criterion, as most of the time the Court of Justice merely examines whether the functioning of such body has a legal basis. Even the reference to the existence of such body is sufficient, national law does not necessarily need to lay down the competence of such body in a detailed way.²³ The condition of a body being established by law should be seen in connection with a condition of a permanent nature of the functioning of such body. The aim of these two conditions is to distinguish “proper” and permanent judicial bodies of Member States from various arbitrators and arbitration tribunals established *ad hoc*.²⁴

As regards the condition of its compulsory jurisdiction, the Court of Justice has stated that even if the jurisdiction of such body is optional in a sense that a party to the proceedings may choose to which from several bodies he or she will appeal, the compulsory jurisdiction condition is fulfilled if jurisdiction of such body does not depend on their agreement and its decisions are binding on the parties.²⁵

The application of rules of law shall be considered as a negative definition towards arbitration tribunals, since the decision of such body cannot be made *ex aequo et bono* but on the basis of applicable law.²⁶

The *inter partes* or a contradictory nature of a procedure before national court was often mentioned by the Court of Justice as well, it was, however, also stated that such condition is not absolute.²⁷ Therefore, even if the procedure before a court does not have a contradictory or *inter partes* nature, the Court of Justice examines whether such court shall give judgment in proceedings intended to lead to a decision of a judicial nature.²⁸

²¹ The Court of Justice has noted so in relation to the Article 177 of the Treaty establishing the European Economic Community regarding the possibility or obligation of national courts to refer a preliminary question to the CJEU, which was later replaced by current Article 267 TFEU. See judgment of the Court of 30 March 1993, *Pierre Corbiau v Administration des contributions*, C-24/92, ECLI:EU:C:1993:118, para. 15.

²² Judgment of the Court of 22 December 2010, *RTL Belgium SA*, C-517/09, ECLI:EU:C:2010:821, para. 36.

²³ See, in that regard, BOBEK, M. et al. *Předběžná otázka v komunitárním právu*. Praha: LINDE PRAHA, a.s., 2005, p. 28 as well as a judgment of the Court of 17 September 1997, *Dorsch Consult*, C-54/96, ECLI:EU:C:1997:413.

²⁴ BOBEK, M. et al. *Předběžná otázka v komunitárním právu*.

²⁵ Judgment of the Court of 6 October 2015, *Consorti Sanitari del Maresme*, C-203/14, ECLI:EU:C:2015:664, paras. 22 and 23 and order of the Court of 13 February 2014, *Merck Canada*, C-555/13, ECLI:EU:C:2014:92, paras. 17 and 18.

²⁶ BOBEK, M. et al. *Předběžná otázka v komunitárním právu*.

²⁷ See, for example, judgment C-54/96 *Dorsch Consult*, para. 31.

²⁸ See, in that regard, judgment of the Court of 16 December 2008, *Cartesio*, C-210/06, ECLI:EU:C:2008:723, para. 56.

And, finally, as regards the condition of independence, it was already mentioned that it involves primarily an authority acting as a third party in relation to the authority which adopted the contested decision.²⁹ The concept of independence has, however, two other aspects. The first aspect, which is external, presumes that the body is protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them. That essential freedom from such external factors requires certain guarantees sufficient to protect the person of those who have the task of adjudicating in a dispute, such as guarantees against removal from office. The second aspect, which is internal, is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject-matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law. Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it.³⁰

These criteria and along with a functionalist approach of the CJEU³¹ have resulted in an acceptance of several non-typical judicial bodies to be considered as a court or a tribunal of a Member State.³² Despite the necessity to take into account different legal systems of EU Member States and to examine a case with a regard to its specific circumstances and despite a slight change of certain conditions,³³ some of them remain quite clear and their absence does not allow to consider such body as a court or tribunal within the framework of EU law.

It was taken into account by some authors that a control, especially in a pre-trial stage of proceedings, is conducted also by prosecutors. They argued that prosecutors should not, within the European legal space, be perceived as a “judicial authority” due to the lack of their independence towards the outcome of the case relating to the overlapping of their inquisitorial function and function of control.³⁴ Generally, we would not consider it necessary to engage in such debate in relation to the Article 42 of the EPPO regulation, since it refers to the *judicial* review of the acts of the EPPO. However, the Preamble of the EPPO regulation contains a paragraph which may cause confusion. It says that “[t]he investigations of the EPPO should as a rule be carried out by European Delegated Prosecutors in the

²⁹ Judgment of the Court of 19 September 2006, *Graham J. Wilson v Ordre des avocats du barreau de Luxembourg*, C-506/04, ECLI:EU:C:2006:587, para. 49.

³⁰ *Ibid.*, paras. 50–53.

³¹ See, in that regard, MEDAL J. R. Concept of a Court or Tribunal under the Reference for a Preliminary Ruling: Who Can Refer Questions to the Court of Justice of the EU? *European Journal of Legal Studies*. 2015, Vol. 8, No. 1, p. 111.

³² For some of the examples see MEDAL J. R. Concept of a Court or Tribunal under the Reference for a Preliminary Ruling: Who Can Refer Questions to the Court of Justice of the EU?

³³ As may be seen on the example of the *inter partes* condition.

³⁴ See ALLEGREZZA, S. Le contrôle judiciaire du parquet au prisme des traditions nationales: Le contrôle des mesures d'enquête de l'avant-procès.

*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')."*³⁵

It therefore seems that the complex debate on who is a proper subject to review EPPO's investigation acts led to a simple resolution – where there is a legislation such as that mentioned in the paragraph 30 of the EPPO regulation's Preamble, the review of these acts remains in the hands of the prosecutors, in this case supervising European Prosecutors. Where there is no such legislation, the Member States shall provide for a judicial review of such acts. Such considerations and result leaves greater space for the Member States' autonomy as regards tasks of judiciary and prosecutors, they, however, may have undesirable effects in the framework of the Member States' cooperation which aims to achieve a complex, yet still clear rules in this area. Just to name few, in one Member State, an individual may be affected by an act of the EPPO which will be subject to a review by an independent judicial authority on a national level whereas in another Member State, another individual may be affected by a similar type of EPPO's act which will be subject of the review by the European Prosecutor, that is, on the European level. What is more, shall a disputable question arise as regards such act, national court may refer a preliminary question to the CJEU. What then in a case when such disputable question arises in a situation where the act of the European Delegated Prosecutor is reviewed by the European Prosecutor?

These issues will probably be – so we believe – resolved by the case-law of the CJEU, either when it comes to the meaning of the paragraph 30 of the EPPO regulation's Preamble or the status of the European Prosecutors in the preliminary procedure.

In the Slovak Republic, currently there is no legislation providing for the judicial review of the prosecutor's acts. It is merely possible to lodge a complaint against prosecutor's acts only in those cases where the law explicitly allows it. In that case, a prosecutor himself or herself may uphold such complaint if a change of the previous decision does not affect the rights of another party of criminal proceedings. If that is not the case, the prosecutor shall bring the matter before his or her superior prosecutor.

It would be – taking into account the context of European Union law – quite problematic legislation if there was not for the paragraph 30 of the EPPO regulation's Preamble, since the review provided for in relation to such acts is not a kind of review which may be considered judicial. However, the above-mentioned paragraph may mean that it is not

³⁵ See para. 30 of the Preamble of the EPPO regulation.

necessary to amend the legislation in the Slovak Republic as regards the review of the acts of the prosecutor's office.

3. JUDICIAL REVIEW – WHAT?

Judicial review of the EPPO's acts is supposed to be performed by national courts as well as the Court of Justice of the European Union, depending on the object of the review. National courts were argued to be more suitable for performing judicial review of certain acts of the EPPO despite EPPO's character as the Union body and the fact that it is the Court of Justice of the European Union that is entitled to decide on the validity of acts adopted by the institutions of the Union.³⁶ Final version of the EPPO regulation followed the Commission's view regarding legal effects of certain EPPO's acts within national legal order associated with better suitability of national courts to decide on them.³⁷

According to the EPPO regulation currently in force, national courts shall review – in accordance with the requirements and procedures laid down by national law – procedural acts of the EPPO that are intended to produce legal effects vis-à-vis third parties³⁸ as well as the failure to adopt such acts if the EPPO was legally required to adopt them under the EPPO regulation.³⁹

On the other hand, the Court of Justice shall decide – as stated by the Article 267 TFEU – on the preliminary questions concerning the validity of procedural acts of the EPPO, in so far as such a question of validity is raised before any court or tribunal of a Member State directly on the basis of Union law as well as the interpretation or the validity of provisions of Union law, including the EPPO regulation. Furthermore, in relation to any conflict of competence between the EPPO and the competent national authorities, it shall decide on the interpretation of the Articles 22 and 25 of the EPPO regulation, regarding the material competence of the EPPO and the exercise of its competence.⁴⁰

The only exception of the general rule on the national courts' competence to review EPPO's procedural acts intending to produce legal effects vis-à-vis third parties is the CJEU's competence to review the decisions of the EPPO to dismiss a case, in so far as they are contested directly on the basis of Union law. It shall further have jurisdiction in any dispute relating to compensation for damage caused by the EPPO, in any dispute concerning arbitration clauses contained in contracts concluded by the EPPO, in any dispute concerning staff-related matters as well as on the dismissal of the European Chief Prosecutor or European Prosecutors.⁴¹ It also remains the sole responsibility of the CJEU to decide on decisions of the EPPO that affect the data subjects' rights under Chapter VIII of the EPPO regulation regarding the data protection and decisions of the EPPO which are not procedural acts, such as decisions of the EPPO concerning the right of public access to documents, or any other administrative decisions. It shall also decide on decisions dis-

³⁶ Art. 19 para 3 (b) of the Treaty on the European Union.

³⁷ See, in that regard, para. 87 of the Preamble of the EPPO regulation.

³⁸ Art. 42 para. 1 of the EPPO regulation.

³⁹ *Ibid.*

⁴⁰ See Article 42 para. 2 of the EPPO regulation.

⁴¹ See Article 42 paras. 3 to 7 of the EPPO regulation.

missing European Delegated Prosecutors if the College finds that he or she no longer fulfils the requirements set out in the EPPO regulation, is unable to perform his or her duties, or is guilty of serious misconduct.⁴²

In the following section, we further describe several categories of EPPO's acts which are an object of review either by national courts or the Court of Justice of the European Union. Such description is in some places accompanied by tackling questions and issues and, if appropriate, by examples in relation to the Slovak Republic.

a) procedural acts of the EPPO that are intended to produce legal effects vis-à-vis third parties and failure to adopt them reviewed by national courts

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. The same applies to failures of the EPPO to adopt procedural acts which are intended to produce legal effects vis-à-vis third parties and which it was legally required to adopt under the EPPO regulation.⁴³

In relation to this group of acts which are considered to be an object of a judicial review performed by national courts, we may encounter several inconveniences. First of all, it is not impossible that a wording “are intended to produce legal effects vis-à-vis third parties” will be interpreted differently by national courts. Moreover, it may even happen that by the time the Court of Justice will have an opportunity to decide on the interpretation of such provision, it will have been interpreted in an incorrect way by some of the national courts. Since it is the content and the effect of the act that is a precondition for national court having competence in a specific case, such misinterpretation may have serious unintended consequences, one of them being, for example, a violation of the right to the lawful judge or a different treatment of the accused depending on the Member State or even a court by which his or her case is handled. It is therefore of crucial importance that national courts refer preliminary questions to the Court of Justice any time there appear any doubts as regard the interpretation of this provision to avoid such consequences.

Furthermore, even if the condition of intending to produce legal effect vis-à-vis third parties is interpreted and applied in a precise and coherent manner, the acts of prosecution which may be an object to the judicial review performed by national courts differ from one Member State to another. For example, in France, a decision to bring or not to bring a public action before a court by the Public Prosecution Office follows from the opportunity principle and therefore it cannot be an object of a judicial review. On the contrary, in Italy, such decision follows from the principle of legality of criminal proceedings and is an object of a judicial review.⁴⁴ Nevertheless, it does not exclude the possibility of

⁴² See Article 42 para. 8 of the EPPO regulation.

⁴³ See Article 42 para. 1 of the EPPO regulation.

⁴⁴ Compare PARIZOT, R. Le contrôle judiciaire du parquet dans le système français. In: G. Giudicelli-Delage – S. Manacorda – J. Tricot (eds.). *Le contrôle judiciaire du Parquet Européen. Nécessité, modèles, enjeux*. Paris: Société de législation comparée, 2015, pp. 101–112 and BERNARDI, A., MORELLI, F. Les contrôles judiciaires dans le modèle italien. In: G. Giudicelli-Delage – S. Manacorda – J. Tricot (eds.). *Le contrôle judiciaire du Parquet Européen. Nécessité, modèles, enjeux*. Paris: Société de législation comparée, 2015, pp. 113–126.

adopting new legislation in relation to the prosecutors of the EPPO, bearing in mind, however, that they should be granted by their Member State at least the same powers as national prosecutors.⁴⁵

As regards the Slovak Republic, among the acts against which it is possible to lodge a complaint is, for example, a decision regarding detention of property or property rights in a pre-trial procedure,⁴⁶ a decision to transfer a case to other competent authority,⁴⁷ to transfer a case to an authority competent to disciplinary proceedings,⁴⁸ a decision to close a case if a prosecution is inadmissible or a punishability of an act committed became extinguished,⁴⁹ a decision to dismiss a case because there is no reason for criminal prosecution,⁵⁰ a decision to stay the prosecution⁵¹ as well as stay the prosecution conditionally,⁵² a decision that the accused has proved himself or herself in a probationary period and, if that is not the case, a decision to continue with proceedings,⁵³ a decision adopted while participating on actions carried out by the policemen, while acting instead of policemen by himself or herself or by carrying out an investigation or an accelerated investigation⁵⁴ and a decision by which a prosecutor replaced a decision adopted by a policeman.⁵⁵

b) procedural acts of the EPPO that are intended to produce legal effects vis-à-vis third parties reviewed by Court of Justice of the EU

As already mentioned, CJEU shall also have jurisdiction over certain procedural acts of the EPPO that are intended to produce legal effects vis-à-vis third parties. According to the para. 3 of the Article 42 of the EPPO regulation, 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. It shall do so in accordance with the fourth paragraph of the Article 263 TFEU which states that any natural or legal person may, under the con-

⁴⁵ See, as regards European Delegated Prosecutors, para. 33 of the Preamble of the EPPO regulation. It is interesting, however, that in relation to the European Prosecutors which may decide to perform duties of European Delegated Prosecutors by themselves, the EPPO regulation does not lay such obligation. It may therefore – in an extreme example – happen that a European Prosecutor acting instead of a European Delegated Prosecutor will have lesser powers than a European Delegated Prosecutor or national prosecutor would have had. Nonetheless, the action of Member States should not – as requires by the principle of loyal cooperation – undermine the functioning of the European Union and its institutions, bodies and agencies. It is thus hardly imaginable that some of the Member States voluntarily participating via enhanced cooperation would do so on purpose.

⁴⁶ §50 and 51 of Slovak Code of Criminal Procedure.

⁴⁷ §197 para. 1 of Slovak Code of Criminal Procedure.

⁴⁸ §197 para. 2 of Slovak Code of Criminal Procedure.

⁴⁹ §197 para. 3 of Slovak Code of Criminal Procedure.

⁵⁰ §197 para. 4 of Slovak Code of Criminal Procedure.

⁵¹ § 215 para. 6 of Slovak Code of Criminal Procedure.

⁵² § 216 para. 6 of Slovak Code of Criminal Procedure. The same applies to the accused that is cooperating. See, in that regard, § 218 para 3 of Slovak Code of Criminal Procedure.

⁵³ § 217 paras. 1 and 3 of Slovak Code of Criminal Procedure. The same applies to the accused that is cooperating if he or she fulfilled conditions provided for by the Code of Criminal Procedure. See § 218 paras 1 and 3 of Slovak Code of Criminal Procedure.

⁵⁴ § 230 para. 2(c) of Slovak Code of Criminal Procedure.

⁵⁵ § 230 para. 2(e) of Slovak Code of Criminal Procedure.

ditions laid down in the first and second paragraphs of that Article,⁵⁶ 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.

Therefore, any natural or legal person may institute proceedings before the Court of Justice of the EU – in this case, it shall be the General Court⁵⁷ – against an act of dismissing a case if such act is of direct and individual concern to them.

The decision to dismiss a case against a person shall be adopted by the Permanent Chamber pursuant to the law of the Member State of the handling European Delegated Prosecutor where prosecution has become impossible. It shall be based on a report provided by the European Delegated Prosecutor handling the case which is supposed to contain a summary of the case and a draft decision of its dismissal. Such report shall be submitted to the supervising European Prosecutor who shall forward those documents to the competent Permanent Chamber accompanied, if he or she considers it to be necessary, by his or her own assessment.⁵⁸

The case against a person may be dismissed only on the grounds such as the death of the suspect or accused person or winding up of a suspect or accused legal person, the insanity of the suspect or accused 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's or accused person's case has already been finally disposed of in relation to the same acts or the lack of relevant evidence.⁵⁹

c) procedural acts of the EPPO that are not intended to produce legal effects vis-à-vis third parties and failure to adopt them

Article 42 of the EPPO regulation on judicial review does not explicitly lay down which subject shall have jurisdiction over procedural acts of the EPPO that are not intended to produce legal effects vis-à-vis third parties or to decide whether the EPPO failed to adopt them. The preamble of the EPPO regulation, however, sheds light on this matter. It is stated

⁵⁶ According to the first paragraph of the Article 263 TFEU, “[t]he Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.” According to its second paragraph, “[i]t shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.” In relation to the fourth paragraph, however, only the last sentence of the first paragraph seems to be of importance.

⁵⁷ Since there is no exception stated in the Article 51 of the Statute of the Court of Justice of the EU to the general rule laid down in the Article 256 para. 1 TFEU, according to which the General Court shall have jurisdiction to hear and determine at first instance actions or proceedings referred to in Articles 263.

⁵⁸ See Art. 35 para. 1 of the EPPO regulation.

⁵⁹ Art. 39 para. 1 of the EPPO regulation. For further conditions for the dismissal of the case, see paras. 2, 3 and 4 of that Article.

there that “[w]here national law provides for judicial review concerning procedural acts which are not intended to produce legal effects vis-à-vis third parties or for legal actions concerning other failures to act, this Regulation should not be interpreted as affecting such legal provisions. In addition, Member States should not be required to provide for judicial review by the competent national courts of procedural acts which are not intended to produce legal effects vis-à-vis third parties, such as the appointment of experts or the reimbursement of witness costs.”

Member States thus do not have to adopt a legislation to ensure judicial review over such acts or to allow individuals to bring an action for not adopting such acts before national courts, if they, however, already have such legislation in force or decide to adopt it, it will not be affected by the EPPO regulation. In this case, a situation may arise that in one participating Member State an individual will be able to bring such action while in another he or she will not have this opportunity.

d) decisions of the EPPO that are not procedural acts

As stated by the Article 42 of the EPPO regulation concerning judicial review, jurisdiction over administrative acts remains with the Court of Justice of the EU. This wording may seem vague at the first sight, the preamble, once again, clarifies this category further. It states that the provision of the EPPO regulation on judicial review does not alter the powers of the Court of Justice to review the EPPO administrative decisions, which are intended to have legal effects vis-à-vis third parties, namely decisions that are not taken in the performance of its functions of investigating, prosecuting or bringing to judgement.⁶⁰ As similarly mentioned in relation to the category of procedural acts of the EPPO that are intended to produce legal effects vis-à-vis third parties, such jurisdiction lies with the General Court.

Furthermore, the General Court shall have jurisdiction over disputes concerning a case when the College dismisses a European Delegated Prosecutor if it finds that he or she no longer fulfils the requirements laid down in the EPPO regulation, is unable to perform his or her duties, or is guilty of serious misconduct.⁶¹ It shall be noted that a European Delegated Prosecutor might be dismissed also by a Member State, it has to, however, comply to the requirements set out in the EPPO regulation.^{62, 63}

e) decisions related to the non-contractual liability, contractual liability and staff-related matters

The Article 268 TFEU states that the Court of Justice of the European Union shall have jurisdiction in disputes relating to compensation for damage in the case of non-contrac-

⁶⁰ Para. 89 of the preamble of the EPPO regulation.

⁶¹ Article 17 para. 3 of the EPPO regulation.

⁶² More specifically, in its Article 17 para. 4.

⁶³ Although it does not concern the judicial review of the EPPO s acts, it must be noted that according to the Article 42 para. 7 of the EPPO regulation, the Court of Justice may, upon the application of the European Parliament, of the Council or of the Commission, dismiss the European Chief Prosecutor if it finds that he or she is no longer able to perform his/her duties, or that he or she is guilty of serious misconduct. The same applies to the European Prosecutors. Yet, the EPPO regulation does not specify whether such jurisdiction belongs to the Court of Justice or the General Court. It thus seems to be an issue that will need a clarification in the future.

tual liability of the Union which shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.⁶⁴ It applies to damage caused through the fault of a European Delegated Prosecutor in the performance of his or her duties as well. Such jurisdiction is reserved for the General Court.⁶⁵

As regards the contractual liability of the EPPO, it shall be governed by the law applicable to the contract in question. Jurisdiction in accordance with Article 272 TFEU in any dispute concerning arbitration clauses contained in contracts concluded by the EPPO⁶⁶ is conferred on the General Court⁶⁷ and contracts concluded by the EPPO and being object to such review may be governed either by public or private law.⁶⁸

As for the personal liability of the EPPO staff, it shall be governed by the applicable provisions laid down in the Staff Regulations and the Conditions of Employment.⁶⁹

According to the Article 270 TFEU, the Court of Justice of the European Union shall have jurisdiction in any dispute between the Union and its servants within the limits and under the conditions laid down in the Staff Regulations of Officials and the Conditions of Employment of other servants of the Union. In the light of the Statute of the CJEU, such jurisdiction is vested in the General Court which shall exercise at first instance jurisdiction in disputes between the Union and its servants including disputes between all institutions, bodies, offices or agencies, on the one hand, and their servants, on the other, in respect of which jurisdiction is conferred on the Court of Justice of the European Union.⁷⁰

f) decisions on preliminary questions

According to the second paragraph of the Article 42 of the EPPO regulation, the Court of Justice shall have jurisdiction to give preliminary rulings concerning the validity of procedural acts of the EPPO, in so far as such a question of validity is raised before any court or tribunal of a Member State directly on the basis of Union law, on the interpretation or the validity of provisions of Union law, including the EPPO regulation, and on the interpretation of the Articles of the EPPO regulation regarding material competence of the EPPO and the exercise of its competences in relation to any conflict of competence between the EPPO and the competent national authorities.⁷¹

As emphasized by the EPPO regulation itself, national courts should always refer preliminary questions to the Court of Justice when they entertain doubts about the validity of procedural acts of the EPPO that are intended to produce legal effects vis-à-vis third parties in relation to Union law.⁷² As further stated by the preamble of the EPPO regulation,

⁶⁴ See also Article 340 TFEU.

⁶⁵ See, in this regard, Article 256 para. 1 TFEU.

⁶⁶ See Article 42 para. 5 of the EPPO regulation.

⁶⁷ See Article 256 para. 1 TFEU and the Statute of the CJEU which does not reserve such jurisdiction for the Court of Justice in its Article 50a.

⁶⁸ See Article 272 TFEU.

⁶⁹ See Article 113 para. 7 of the EPPO regulation.

⁷⁰ See Article 50a of the Statute of the Court of Justice of the European Union.

⁷¹ Article 42 para. 2 of the EPPO regulation.

⁷² Para. 88 of the preamble of the EPPO regulation.

“national courts may not refer to the Court of Justice preliminary questions on the validity of the procedural acts of the EPPO with regard to national procedural law or to national measures transposing Directives, even if [the EPPO regulation] refers to them. This is however without prejudice to preliminary references concerning the interpretation of any provision of primary law, including the Treaties and the Charter, or the interpretation and validity of any provision of Union secondary law, including [the EPPO regulation] and applicable Directives. In addition, [the EPPO regulation] does not exclude the possibility for national courts to review the validity of the procedural acts of the EPPO which are intended to produce legal effects vis-à-vis third parties with regard to the principle of proportionality as enshrined in national law.”⁷³

4. CHALLENGES AHEAD AND CONCLUDING REMARKS ON HOW TO DO IT RIGHT

While transforming from merely economic group of states to a more complex entity, the European Union started to shift more and more of its attention towards individuals and their rights. One of the fruits of such shift was a requirement of an effective judicial protection from the EU itself.

Currently, the Article 19 of the Treaty on the European Union⁷⁴ lays down the obligation of EU Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. Furthermore, the Charter of Fundamental Rights of the European Union⁷⁵ enshrines in its Article 47 a fundamental right to an effective remedy and to a fair trial.⁷⁶ According to its Article 51, the provisions of the Charter are addressed to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties. The Court of Justice further stated in its judgment in the case *Fransson* that *[s]ince the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.*⁷⁷ The long list of the Court

⁷³ *Ibid.*

⁷⁴ Which may be referred to as “TEU” in this article.

⁷⁵ Hereinafter referred to as “the Charter”.

⁷⁶ Article 47 of the Charter states:

Everyone 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.

⁷⁷ Judgment of the Court of 26 February 2013, *Fransson*, C-617/10, ECLI:EU:C:2013:105, para. 21.

of Justice's decisions only confirms that judicial protection forms an integral part of the EU legal order.⁷⁸

On the other hand, the 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 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 effectivity. 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, or effective judicial protection, 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.⁷⁹

One may claim that the Article 19 TEU is a very general rule to point out to in such situation. The Court of Justice has, however, in its judgment in a case C-192/18 *European Commission v Republic of Poland* stated that it entrusts the responsibility for ensuring the full application of EU law in all Member States and the judicial protection that individuals derive from EU law to national courts and tribunals and to the Court of Justice. Member States are thus to provide remedies sufficient to ensure for individuals compliance with their right to effective judicial protection 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.⁸⁰ Furthermore, “[a]s regards the material scope of the second subparagraph of Article 19(1) TEU, that provision refers to the ‘fields covered by Union law’, irrespective of whether the Member States are implementing Union law within the meaning of Article 51(1) of the Charter.”⁸¹ Moreover, although the organisation of justice in the Member States falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law and, in particular, from the second subparagraph of Article 19(1) TEU.⁸²

The preamble of the EPPO regulation refers to the Article 19 TEU, too, when it states that “[t]he legality of procedural acts of the EPPO that are intended to produce legal effects vis-à-vis third parties should be subject to judicial review before national courts. In that regard, effective remedies should be ensured in accordance with the second subparagraph of Article 19(1) TEU. Furthermore, as underlined by the case-law of the Court of Justice, the

⁷⁸ See, for example, among others, judgment of the Court of 27 February 2018, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, C-64/16, ECLI:EU:C:2018:117, judgment of the Court of 26 March 2020, *Miasto Łowicz and Prokurator Generalny zastępowany przez Prokuraturę Krajową*, C-558/18 and C-563/18, ECLI:EU:C:2020:234 and judgment of the Court of 26 July 2017, *Moussa Sacko v Commissione Territoriale per il riconoscimento della Protezione internazionale di Milano*, C-348/16, ECLI:EU:C:2017:591.

⁷⁹ Judgment of the Court of 6 June 2013, *Donau Chemie AG*, C-536/11, ECLI:EU:C:2013:366, para.3.

⁸⁰ See judgment of the Court of 5 November 2019, *European Commission v Republic of Poland*, C-192/18, ECLI:EU:C:2019:924, paras. 98 and 99.

⁸¹ *Ibid.*, para. 101.

⁸² *Ibid.*, para. 102.

national procedural rules governing actions for the protection of individual rights granted by Union law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Union law (principle of effectiveness)."

Furthermore, as was stated above, the authors of the EPPO regulation proposal were clear about the necessity of the judicial review of EPPO's investigation and prosecution acts. Therefore, the above-mentioned provision of the EPPO regulation's Preamble⁸³ seems to come at odds with previous long-lasting debates concerning the final wording of the provisions laying down judicial review of the EPPO's acts as well as with the rest of the EPPO regulation. We do not consider it a convenient result to provide for judicial review of certain EPPO's acts in one Member State while leaving that option out in another. It is true that a question of EU harmonisation or even approximation in certain fields of law is a very sensitive matter, especially in the field of criminal law closely associated to the sovereign powers of the state. Moreover, a harmonisation of procedural rules brings with it further complications arising from the fact that such harmonisation often touches also other areas and procedures which were not intended to be touched. Nevertheless, the above-mentioned considerations as to the effective judicial protection across the Europe willing to cooperate in such delicate matters would bring a fresh breeze in the common heading of the Union's Member States.

Therefore, while the absence of judicial review of prosecution offices' acts at the national level might have been not exactly a spark to get the attention of the European Union until now, it might be so in cases when Member States' law which do not provide for judicial review of prosecutor offices' acts will have to be applied to the EPPO and its acts as well. This may concern also the Slovak Republic which – at this state of affairs – does not provide for effective judicial protection of individuals which may be affected by EPPO's functioning and its acts from the EU law point of view and – would it not be for a paragraph 30 of the Preamble of the EPPO regulation – would therefore have to change its current legislation in order to fully comply with EU law effective judicial protection requirements.

As for their protection, individuals that feel their rights may have been encroached upon by the prosecutor's office may – after the fulfilment of a requirement of using all of the remedies available to them, that is, in this case, lodging a complaint against a prosecutor's decision – lodge a constitutional complaint to the Constitutional Court of the Slovak Republic.⁸⁴ If the current legislation regarding national prosecutor's office and a review of their investigation and prosecution acts shall apply to the EPPO as well, individuals whose rights will have been limited by the EPPO's procedural acts having effect vis-à-vis third parties would have only that exact option. While this option seems to fulfil the requirement of the equivalence principle, it falls short, in our opinion, in relation to the effectivity principle.

Should the aforementioned provision of the Preamble be clarified by the CJEU as one in which light the rest of the EPPO regulation shall be read as not requiring to adopt leg-

⁸³ Para. 30 of the Preamble of the EPPO regulation.

⁸⁴ Article 127 of the Constitution of the Slovak Republic.

islation laying down judicial review of certain types of EPPO's acts, the Slovak Republic does not need to adopt a legislation providing for a judicial review at least of the procedural acts of the EPPO that are intended to produce legal effects vis-à-vis third parties or a failure to adopt them to comply with the requirements of the EPPO regulation. However, we consider it to be more convenient to adopt such legislation in order to move towards the effective judicial protection requirements. In our opinion, such review should be provided for by courts meeting the requirement set out in the case law of the Court of Justice, preferably by a court which will have the competence to handle the case at its trial stage.

As regards the group of prosecution acts against which a complaint might be lodged at this time in the Slovak Republic, it might be sufficient to maintain it also in relation to the EPPO. Asking the Member States to unify as closely as possible the group of prosecution acts that may be reviewed might cause unpleasant inconvenience especially with regard to the legal orders that prefer the principle of legality over the principle of opportunity or vice versa.⁸⁵

However, the review of such acts should be – at least in relation to the acts of the EPPO – judicial. The doubts and concerns about increasing of courts' workload and the length of the proceedings are quite understandable, nonetheless, the practice in some of the Member States shows that it is not impossible to manage. Furthermore, the principle of equivalence requires only the means for ensuring rights stemming from EU law being at least equally favourable than those regarding rights stemming from national legal order, not the other way around. It would therefore be sufficient from the EU law point of view to adopt a legislation ensuring judicial review of procedural acts having effect vis-à-vis third parties or a failure to adopt them only by the EPPO.

It is undoubtedly difficult to reach such state of integration where procedural laws of every Member State without proper harmonisation or approximation offer the state authorities or individuals the same or at least almost the same conditions and opportunities to carry out their duties or to exercise their rights or even to seek judicial redress. The EU, however, might be up to the challenge. After all, where there is the will, there is the way. And on the thorny way towards EPPO's creation, 22 participating Member States have shown to have it.

⁸⁵ That matter may cause complications in relation to the judicial review as well, since the paragraph 66 of the Preamble of the EPPO regulation states that “[i]n 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.” In some of the participating Member States, the investigation and prosecution activities of the Prosecutor's Office are guided by the opportunity principle and therefore there is no review provided for a decision to start an investigation, that being fully on the prosecutor's consideration. Such states should therefore adopt a new set of rules regarding the possibility to review such decisions of the EPPO's prosecutors.