



ARTICLES

TOWARDS EUROPEAN CRIMINAL PROCEDURAL LAW – SECOND PART

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THE BELGIAN *JUGE D'INSTRUCTION* AND THE EPPO REGULATION: (IR)RECONCILABLE?

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ABSTRACT: The European Public Prosecutor's Office (hereafter EPPO) was established by way of enhanced cooperation, with the adoption of Council Regulation (EU) 2017/1939 (hereafter EPPO Regulation). It has the power to conduct criminal investigations and to directly act as the prosecuting authority before national criminal courts, which is revolutionary. Interestingly, the EPPO Regulation does not explicitly regulate the relation between the EPPO and national judges at the pre-trial stage, who may intervene punctually or, in some cases, even conduct the investigation. Indeed, some civil law systems have a system of shared investigation powers between the public prosecutor and the investigating judge, meaning that the latter conducts a judicial inquiry, while the former is responsible for the prosecution. This raises the delicate question whether a judicial inquiry is compatible with the EPPO Regulation. This *Article* analyses this question, which hugely impacts the implementation

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*** Professor, ULiège (Belgium), vanessa.franssen@uliege.be. This *Article* is in part based on the findings of a bilingual study conducted at the request of the Belgian Ministry of Justice, which has not been published: V Franssen, F Verbruggen, AL Claes and A Werding, Implementatie van het Europees openbaar ministerie in de Belgischerechtsorde/Mise en oeuvre du parquet européen en droit belge, Brussels, June 2019. This contribution, however, also takes into account more recent developments and was finalised on 30 April 2021.



of the EPPO, with respect to the Belgian legal system, based on a close reading of the EPPO Regulation and taking into account its drafting history. It will argue that the EPPO Regulation is not per se irreconcilable with a judicial inquiry as the Member States did not wish the EPPO Regulation to alter the way in which criminal investigations are organised at national level. Subsequently, it will examine how an EPPO investigation conducted by an investigating judge can practically function and evaluate the Belgian EPPO Act. While the analysis concentrates on Belgium, the underlying reasoning may also be useful for other Member States with a similar legal system.

KEYWORDS: European Public Prosecutor's Office – EPPO Regulation – conformity with EU law – judicial inquiry – investigating judge – Belgium.

I. A HYBRID JUDICIAL ACTOR ENTERING THE BATTLEFIELD AGAINST EU FRAUD

On 12 October 2017, the Council of the European Union adopted the Regulation establishing the European Public Prosecutor's Office (hereafter EPPO and EPPO Regulation).¹ The Regulation was adopted via the procedure of enhanced cooperation, as provided by art. 86(1) of the Treaty on the Functioning of the European Union (hereafter TFEU).² It is the first (and thus revolutionary)³ European body with the power to conduct a criminal investigation and to directly act as a prosecuting authority before national criminal courts.

The final EPPO Regulation is the fruit of conflicting visions and provides a much more complex structure for the EPPO than the one envisaged in the Commission's proposal of 2013.⁴ First of all, during the four years of negotiations on the Regulation,⁵ the EPPO shifted from a rather centralised hierarchical structure led by one person to a strongly

¹ Regulation (EU) 2017/1939 of the Council of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ("the EPPO").

² So far, 22 Member States have joined the enhanced cooperation: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Germany, Greece, Spain, Finland, France, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Romania, Slovenia and Slovakia. OLAF, *European Public Prosecutor's Office* ec.europa.eu.

³ D Flore, 'Le parquet européen à la croisée des chemins' in S Dewulf (ed), *La [CVDW]. Liber Amicorum Chris Van den Wyngaert* (Maklu 2017) 238.

⁴ Proposals to create the EPPO date back to the nineties with the Corpus Juris. The idea was eventually introduced in art. 86 TFEU. In 2013, the Commission launched the Commission Proposal COM(2013) 534 for a Council Regulation on the establishment of the European Public Prosecutor's Office. For a full history of the debate on the creation of a European public prosecutor's office: L Bachmaier Winter, 'Introduction: the EPPO and the Challenges Ahead' in L Bachmaier Winter (ed), *The European Public Prosecutor's Office: Challenges Ahead* (Springer 2018) V; M Delmas-Marty (ed), *Corpus Juris: Introducing Penal Provisions for the Purpose of the Financial Interests of the European Union* (Economica 1997); D Flore, *Droit pénal européen: Les enjeux d'une justice pénale européenne* (Larcier 2009); W Geelhood, LH Erkelens and AWH Meij (eds), *Shifting Perspectives on the European Prosecutor's Office* (Springer 2018); V Mitsilegas, *EU Criminal Law* (Oxford Hart 2009); JAE Vervaele, 'The European Community and Harmonisation of the Criminal Law Enforcement of Community Policy: Ignoti nulla cupido?' in C Bassiouni, V Militello and H Satzger (eds), *European Cooperation in Criminal Matters: Issues and Perspective* (Cedam 2008) 31 ff.

⁵ These long negotiations are reflected in the number of recitals.

decentralised model led by a college with representatives from each Member State.⁶ This gives the EPPO a strong intergovernmental flavour, contrary to the federal logic of the centralised model in the Commission's proposal.⁷ Secondly, the references to national law have multiplied. While the proposal of the Commission referred 37 times to national law, the EPPO Regulation now contains 86 references. This shows some distrust among Member States and towards the European level, with a preference to remain in control as much as possible.⁸

Like any other EU regulation, the EPPO Regulation is binding in its entirety and directly applicable in all (participating) Member States. It does not require transposition into national law.⁹ National law will thus have to be interpreted in conformity with the EPPO Regulation and any conflicting rule will be set aside.¹⁰ Nevertheless, as indicated, the EPPO Regulation is full of compromises and refers to national law for several matters instead of regulating them at the European level.¹¹ Hence, the functioning of the EPPO is, to a large extent, governed by national rules of criminal procedure. In order to get national legislation in line with the EPPO Regulation and make the EPPO function properly, some adjustments in the national legislation might, however, be required. Member States will thus inevitably have to manoeuvre between the rules determined in the EPPO Regulation and the margin of appreciation it leaves in order to respect the diversity of rules on national criminal procedure.¹²

⁶ L Bachmaier Winter, 'Introduction: the EPPO and the Challenges Ahead' cit. VI; JAE Vervaele, 'The European Public Prosecutor's Office (EPPO): Introductory Remarks' in W Geelhoud, LH Erkelens and AWH Meij (eds), *Shifting Perspectives on the European Prosecutor's Office* cit. 12 ff.

⁷ For one of the first analyses of the Commission's proposal, see V Franssen, 'Proposed Regulation on the European Public Prosecutor – Thinking Federal?' (8 August 2013) European Law Blog europeanlawblog.eu.

⁸ D Flore, 'Le parquet européen à la croisée des chemins' cit. 230. Or, to quote A Weyembergh and C Brière, the Member States' "willingness to renationalise the EPPO as much as possible, and to keep the strongest control possible over its activities". A Weyembergh and C Brière, 'Towards a European Public Prosecutor's Office (EPPO), Study for the LIBE Committee of the European Parliament' (2016) European Parliament www.europarl.europa.eu 51.

⁹ Art. 288 TFEU.

¹⁰ This follows from the principle of precedence of EU law; art. 5(3) EPPO Regulation cit.

¹¹ L Seiler, 'Le parquet européen: une révolution sans bouleversements' (2019) *Revue de droit pénal et de criminologie* 1188.

¹² V Franssen, A Werding, AL Claes and F Verbruggen, 'La mise en œuvre du parquet européen en Belgique: quelques enjeux et propositions de solution' in C Chevallier-Govers and A Weyembergh (eds), *La création du Parquet européen. Simple évolution ou révolution au sein de l'espace judiciaire européen* (Bruylant 2021) 135, 144 ff.; F Verbruggen, V Franssen, AL Claes and A Werding, 'Implementation of the EPPO in Belgium: Making the Best of a (Politically) Forced Marriage?' (18 November 2019) European Law Blog europeanlawblog.eu.

This *Article* focuses on an issue that the EPPO Regulation does *not* explicitly address, although it is particularly delicate for the implementation of the EPPO in some legal systems,¹³ namely the relation between the EPPO and the national judges at the pre-trial stage.

Today, most civil law systems put the prosecutor at the centre of the pre-trial investigation with the power to decide on the orientation of the investigation and to direct the police and other law enforcement authorities. For certain more intrusive investigation measures, the prosecutor might be legally obliged to obtain the authorisation of a pre-trial judge (e.g., the *Ermittlungsrichter* in Germany).¹⁴ Such obligation is fully compatible with the EPPO Regulation.¹⁵ However, other civil law systems (like Belgium, France, Luxembourg¹⁶ and Spain¹⁷) provide a system of shared investigation powers between the public prosecutor and the investigating judge (*juge d'instruction*). In these systems, the investigating judge not only authorises investigation measures, but can actually conduct the investigation and decide on its orientation. This type of investigation is called a judicial inquiry.¹⁸

This *Article* concentrates on the Belgian system,¹⁹ and the question whether the intervention of the Belgian pre-trial judges in EPPO cases is compatible with the EPPO Regulation. Since the latter is based on the prosecutorial model,²⁰ it is unsure whether, and how, an investigating judge can still carry out the pre-trial investigation.

As it will be argued below, the EPPO Regulation does not prohibit the Belgian judicial inquiry, even though the latter does not match the philosophy behind the EPPO. This does not mean, however, that the conclusion will necessarily be the same for other legal systems with a judicial inquiry. Since some aspects of the organisation of the judicial inquiry might

¹³ In Spain, e.g., this is still one of the main stumbling blocks for the implementation of the EPPO. See e.g., Europa Press, *El CGPJ advierte de las dificultades de adaptar la Fiscalía Europea en España con la actual LECrim* www.europapress.es.

¹⁴ K Ligeti, 'The Place of the Prosecutor in Common Law and Civil Law Jurisdictions' in DK Brown, J Iontcheva Turner and B Weisser (eds), *The Oxford Handbook of Criminal Process* (Oxford University Press 2019) 139, 146.

¹⁵ Arts 30(2) and 30(5) EPPO Regulation cit.: "The procedures and the modalities for taking the measures shall be governed by the applicable national law". This also follows from art. 31 on cross-border investigations. To note that the original proposal of the Commission included an EU-wide requirement of a prior judicial authorisation for the EPPO's most intrusive investigation measures (art. 26(4)). In the final text of the EPPO Regulation, there is no trace left of this partial approximation of national rules.

¹⁶ For a presentation of the powers of the Luxembourgish *juge d'instruction*, see J Nies, 'A Special Toolkit of Investigation Techniques in Luxembourg' in K Ligeti and V Franssen (eds), *Challenges in the field of economic and financial crime in Europe* (Hart 2017) 86-88.

¹⁷ For a presentation of the powers of the Spanish *juez de instrucción*, see L Bachmaier Winter and A del Moral García, 'Spain' in F Verbruggen and V Franssen (eds), *International Encyclopaedia of Laws: Criminal Law* (Wolters Kluwer 2020) 34-35 and 215-217.

¹⁸ K Ligeti, 'The Place of the Prosecutor in Common Law and Civil Law Jurisdictions' cit. 146 and 147.

¹⁹ I.e., the legal system the authors are most familiar with. Nonetheless, the analysis will also encompass some punctual comparison with other legal systems, in particular France, Luxembourg and Spain.

²⁰ 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 2013), 986, 987.

be different, the solution might differ too. The goal of this *Article* is twofold. On the one hand, it aims to stimulate the reflection process among Member States on whether their legal system meets the requirements of the EPPO Regulation, preferably before making far-reaching and maybe unnecessary adjustments, by the time the EPPO launches its first investigations.²¹ On the other hand, it intends to evaluate some of the changes made recently by the Belgian legislator to implement the EPPO in the national legal order, in particular those relating to the role of the investigating judge and the pre-trial tribunal and court.²²

The analysis will be structured as follows. Part II will briefly summarise the main features of the EPPO Regulation that are relevant for the relation between the EPPO and Belgian pre-trial judges. Next, Part III will provide a concise overview of the functioning of the judicial inquiry under current Belgian law. It should be noted that this system might fundamentally change in the coming years, as a comprehensive reform of Belgian criminal procedure is in the make,²³ but this reform will certainly not be finalised by the time the EPPO becomes operational. Subsequently, Part IV will present the main arguments supporting the thesis that the EPPO Regulation does not prohibit the Belgian judicial inquiry in EPPO cases. This reasoning will be based on the current wording but also on the drafting history of the EPPO Regulation. In Part V, we will conduct a step-by-step analysis of how a judicial inquiry in EPPO cases, from beginning to end, could function within the Belgian legal framework, without changing the way in which criminal investigations are essentially organised. Part VI will assess whether the Belgian EPPO Act has made all necessary amendments with respect to the judicial inquiry to be in line with the EPPO Regulation. In the conclusion, we will present our general findings.

II. BRIEF OVERVIEW OF THE EPPO'S RELEVANT FEATURES

The protection of the EU's financial interests is a shared competence between the EU and its Member States.²⁴ The EPPO is created to enhance this protection through criminal enforcement at EU level. Therefore, the EPPO is competent to investigate and prosecute, for example, fraud involving EU subsidies, VAT-fraud, customs fraud and other criminal

²¹ According to the most recent information, the EPPO would start its operational activities on 1 June 2021. See EPPO, *Start date of EPPO operations: European Chief Prosecutor proposes 1 June 2021 to the European Commission* (7 April 2021) www.eppo.europa.eu.

²² Act of 17 February 2021 holding several provisions in criminal justice matters (*Loi du 17 février 2021 portant des dispositions diverses en matière de justice*), *Moniteur belge* 24 February 2021 (hereafter Belgian EPPO Act).

²³ MA Beernaert, 'Le nouveau Code de procédure pénale en projet: quelques lignes de force' in V Franssen and A Masset (ed), *Actualités de Droit Pénal et de Procédure Pénale* (Anthemis 2019) 133; R Verstraeten and A Bailleux, 'Het voorstel van een nieuw wetboek van strafvordering: algemene beginselen en fase van het onderzoek' in A Bailleux, B Spriet, R Van Herpe, J Vanheule, F Verbruggen and R Verstraeten, *Themis: Straf- en strafprocesrecht* (die Keure 2019) 143.

²⁴ Art. 325 TFEU.

offences like passive and active corruption. The material scope of the EPPO is defined by referral to Directive (EU) 2017/1371 on the fight against fraud to the EU's financial interests²⁵ (hereafter PFI Directive).²⁶ In addition to the offences described in the PFI Directive, the EPPO is also competent for any other criminal offence that is inextricably linked to those in the PFI Directive, including offences committed within a criminal organisation.²⁷

The organisational structure of the EPPO can be summarised as follows. It has a central office in Luxembourg and decentralised offices in the Member States.²⁸ The central level is composed of the European Chief Prosecutor (and his deputies), the College, the Permanent Chambers, the European Prosecutors (who form the College),²⁹ and the Administrative Director.³⁰ The decentralised level consists of the European Delegated Prosecutors (hereafter EDPs) in the participating Member States.³¹ The central level takes up two main tasks. First, the College takes decisions on strategic matters, including determining priorities or deciding on general issues arising from individual cases.³² Second, the Permanent Chamber and the European Prosecutor (of the Member State where the investigation is conducted) supervise and direct specific EPPO investigations.³³ The actual investigation and prosecution measures are undertaken at the decentralised level in the participating Member States, by the EDPs who are part of the national prosecution service.³⁴

The EPPO Regulation emphasises the independence of the EPPO.³⁵ The European prosecutors cannot seek nor take instructions from any person or institution outside the EPPO's structure, and always have to act in the interest of the EU as a whole. For the EDPs this becomes quite complex, as they are "active members of the national prosecution

²⁵ 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.

²⁶ Art. 22(1) EPPO Regulation cit.

²⁷ *Ibid.* art. 22(3).

²⁸ F Verbruggen, V Franssen, AL Claes and A Werding 'Implementation of the EPPO in Belgium: Making the Best of a (Politically) Forced Marriage?' cit.

²⁹ The European Prosecutors, forming together with the European Chief Prosecutor the EPPO College, were appointed on 27 July 2020. Implementing Decision (EU) 2020/1117 of the Council of 27 July 2020 appointing the European Prosecutors of the European Public Prosecutor's Office.

³⁰ Art. 8(3) EPPO Regulation cit.

³¹ *Ibid.* art. 8(4) and recital 21; AM 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: Challenges Ahead* (Springer 2018) 8.

³² Art. 9 EPPO Regulation cit. and recital 24.

³³ *Ibid.* arts 10 and 12; AM Santos, 'The Status of Independence of the European Public Prosecutor's Office and Its Guarantees' cit. 10-11 and 13-14.

³⁴ *Ibid.* art. 17(2).

³⁵ *Ibid.* art. 6(1).

service"³⁶ and may, besides conducting EPPO investigations, also exercise tasks as national prosecutors.³⁷ It is also important to stress that while investigating and prosecuting, the EDPs have "the *same powers as national prosecutors*".³⁸ A Belgian EDP will thus have the same investigation and prosecutorial powers as any other Belgian prosecutor.

III. THE BELGIAN SYSTEM OF JUDICIAL INQUIRIES

In Belgium, criminal investigations are always led by a judicial authority, either the public prosecutor or the investigating judge.³⁹ The preliminary inquiry (called the *information*)⁴⁰ is led by a (federal)⁴¹ prosecutor, whereas the judicial inquiry (or *instruction*)⁴² is conducted by an investigating judge.⁴³

There are several possibilities to open a judicial inquiry. It is often the prosecutor who decides to refer a case to the investigating judge and asks him (or her) to investigate specific facts.⁴⁴ For most offences (in particular, crimes and misdemeanours (*délits*)), the victim too can request the investigating judge to start an inquiry, by means of a complaint with civil party petition (*plainte avec constitution de partie civile*).⁴⁵ Furthermore, in some cases, the investigating judge has the power to launch a judicial inquiry at his own initiative (*infra*, mini-judicial inquiry). Once a judicial inquiry is opened, the investigating judge is in charge of and directs the investigation. This means he gives instructions to the police and any other competent authority, which will execute them.

The reason for referral to an investigating judge is that the prosecutor has less extensive powers than the investigating judge.⁴⁶ For instance, only the investigating judge has the power to order the production of traffic and location data concerning electronic

³⁶ *Ibid.* art. 17(2).

³⁷ D Flore, 'Le parquet européen à la croisée des chemins' cit. 232-233.

³⁸ Art. 13(1) EPPO Regulation cit. Emphasis added.

³⁹ K Ligeti, 'The Place of the Prosecutor in Common Law and Civil Law Jurisdictions' cit. 146.

⁴⁰ Belgian Code of Criminal Procedure (*Code d'instruction criminelle*, hereafter CIC), art. 28*bis*.

⁴¹ The prosecutor (*procureur du Roi*) is competent to investigate and prosecute in his own judicial district. If he wants to accomplish an investigation measure in another district, he has to inform the prosecutor of that district. Arts 137 and 150 Belgian Judicial Code of 10 October 1967 (*Code judiciaire*), *Moniteur Belge* 31 October 1967; art. 23 CIC cit. The Belgian Federal Public Prosecutor's Office is a distinct prosecution service that can act throughout the whole Belgian territory. It is, for instance, competent to prosecute cases that have an international dimension or concern several districts, or cases regarding terrorist offences or criminal organisations. Arts 143, 144*ter* and 144*quater* Belgian Judicial Code cit; MA Beernaert, HD Bosly and D Vandermeersch, *Droit de la procédure pénale* (la Charte 2017) 340.

⁴² Art. 55 CIC cit.

⁴³ O Michiels and G Falque, *Principes de procédure pénale* (Larcier 2019) 227.

⁴⁴ Art. 61 CIC cit.

⁴⁵ *Ibid.* art. 63(1).

⁴⁶ Nevertheless, it should be noted that the prosecutor has more powers when and as long as there is a situation of *flagrant délit* (i.e., when an offence is being committed or has recently been committed, see arts 41 and 46 CIC cit.).

communications⁴⁷ and to take a DNA sample from a suspect against his will or from a minor below the age of 16 years.⁴⁸

It should be noted, though, that there are quite some cases where the prosecutor can ask an investigating judge to accomplish an investigation measure that falls within the latter's competence *without* formally opening a judicial inquiry. This procedure, created in 1998, is called a "mini judicial inquiry" (*mini-instruction*). The investigating judge can decide to grant or refuse the prosecutor's request. If he decides to authorise the investigation measure, he is allowed to keep the case file and start a judicial inquiry on his own initiative. Otherwise, he is obliged to return the file to the prosecutor.⁴⁹ Nevertheless, a limited number of intrusive measures can never be conducted through a mini judicial inquiry and thus always require a full-blown judicial inquiry, e.g., an arrest warrant which marks the beginning of pre-trial detention,⁵⁰ the search of private premises⁵¹ or the secret interception of private communications.⁵²

As follows from the previous paragraphs, the investigating judge does not merely exercise judicial control over coercive investigation measures. In some cases, he is also in charge of and directs the criminal investigation and thus can be said to wear two "hats".⁵³ This does not mean, however, that during the judicial inquiry, the public prosecutor becomes a powerless bystander. Even though he cannot give orders to the investigating judge, which is a logical consequence of the judge's independence, he keeps several prerogatives.⁵⁴ For instance, the prosecutor may at any moment request access to the file and ask the investigating judge to conduct specific investigation measures.⁵⁵ In

⁴⁷ Art. 88*bis* CIC cit.

⁴⁸ *Ibid.* art. 90*undecies*.

⁴⁹ *Ibid.* 28*septies*. MA Beernaert, HD Bosly and D Vandermeersch, *Droit de la procédure pénale* cit. 624-628.

⁵⁰ Act on pre-trial custody (*Loi du 20 juillet 1990 relative à la détention préventive*), *Moniteur belge* 14 August 1990 art. 16.

⁵¹ Art. 89*bis* CIC cit.

⁵² *Ibid.* art. 90*ter*. It is worth pointing out that this investigation measure also encompasses secret searches in information systems and extends to all content of private communications, even if the communication is no longer in transmission. For a more detailed analysis of this legal provision, see V Franssen and O Leroux, 'Recherche policière et judiciaire sur internet: analyse critique du nouveau cadre législatif belge' in V Franssen and D Flore (eds), *Société numérique et droit pénal. Système, Système, Europe* (Larcier/Bruylant 2019) 161-165.

⁵³ This double hat, giving rise to an "ambivalent role", has been criticised and is one of the reasons why the authors of the reform of the Belgian Code of Criminal Procedure propose to replace the investigating judge by a pre-trial judge (see *infra*). See e.g., MA Beernaert, 'Le nouveau Code de procédure pénale en projet: quelques lignes de force' cit. 136-137.

⁵⁴ MA Beernaert, HD Bosly and D Vandermeersch, *Droit de la procédure pénale* cit. 826-827.

⁵⁵ According to Belgian criminal procedure, the public prosecutor has a general right of action on the basis of art. 1 *Loi contenant le titre préliminaire du code de procédure pénale* and art. 22 CIC cit. R Declercq, *Beginnelsen van strafrechtspleging* (6th ed Kluwer 2014) 316; R Verstraeten and F Verbruggen, *Strafrecht en strafprocesrecht voor bachelors* (12th ed Intersentia 2019) 159.

case of refusal, he may appeal the decision of the investigating judge before the pre-trial court (*chambre des mises en accusation*).⁵⁶ In addition, he can always,⁵⁷ and in particular during the supervision of lengthy investigations,⁵⁸ ask the pre-trial court to give orders to the investigating judge⁵⁹ or, in extreme cases, to remove the latter from the case.⁶⁰

When the investigating judge has completed the judicial inquiry, the public prosecutor receives the criminal file back in view of drafting the final submissions⁶¹ in which he defines the charges and indicates whether the case should be referred for trial or dismissed. At this stage, the prosecutor can still request the investigating judge to accomplish further investigation measures to complete the investigation.⁶² When the public prosecutor has drafted his final submissions, he brings the case to the pre-trial tribunal (*chambre du conseil*), which will decide whether or not to refer the case for trial to the competent court.⁶³ Being independent and impartial,⁶⁴ the pre-trial tribunal is obviously not obliged to follow the public prosecutor's final submissions. Under certain conditions, the parties (including the public prosecutor) can appeal the decision of the pre-trial tribunal before the pre-trial court.⁶⁵

It is uncertain whether the judicial inquiry will continue to exist under Belgian law.⁶⁶ Indeed, the previous Belgian government that came into power in 2014 decided to revise the whole criminal procedure and set up a reform commission of experts to prepare a new Code.⁶⁷ The reasons for this comprehensive reform of the Code of Criminal Procedure (*Code*

⁵⁶ This right of appeal is a consequence of the prosecutor's general right of action. Belgian Court of Cassation judgment of 22 March 1994 n. P.94.202 N; Declercq, *Beginselen van strafrechtspleging* cit. 316-317.

⁵⁷ Art. 136bis CIC cit.

⁵⁸ *Ibid.* art. 136bis(1).

⁵⁹ *Ibid.* art. 228.

⁶⁰ *Ibid.* art. 235.

⁶¹ We opted for this term and not "indictment" as this document is not a formal charging decision that brings the case to the trial court. It is the pre-trial tribunal (or, upon appeal, the pre-trial court) that refers the case for trial; this (court) decision determines which suspects are referred, for which facts and under which charges. This terminological distinction is important for the analysis made in Part V.

⁶² Art. 127 CIC cit.

⁶³ *Ibid.* art. 128. Other decisions like e.g., grant the suspension of the ruling are also possible.

⁶⁴ Art. 6(1) of the European Convention on Human Rights [1950] and art. 47(2) of the Charter of Fundamental Rights of the European Union [2012].

⁶⁵ Art. 135 CIC cit.

⁶⁶ Interestingly, the same reflection is ongoing in Spain where a major reform of the Spanish criminal procedure would encompass the abolition of the investigating judge and the creation of a pre-trial judge (*juez de garantías*). The draft bill entailing this reform (*Anteproyecto de Ley de Enjuiciamiento Criminal*) was published in the course of 2020 and can be consulted at: www.mjusticia.gob.es, in particular 59-60. An impact analysis was published in January 2021: 'Anteproyecto de Ley Orgánica de Enjuiciamiento Criminal, Memoria del Análisis de Impacto Normativo', *Ministerio de Justicia* www.mjusticia.gob.es.

⁶⁷ Ministerial Decree setting up the commissions for the reform of criminal law and criminal procedure (*Arrêté ministériel de 30 octobre portant création des Commissions de réforme du droit pénal et de la procédure pénale*), *Moniteur belge* 29 December 2015.

d'instruction criminelle, hereafter CIC) are multiple: the legislation is outdated (it dates back to the 19th century) and, due to many punctual reforms over time, it has become incoherent and a difficult read, resulting in strong critiques.⁶⁸ One of the major novelties of the proposed reform is the creation of a unified pre-trial investigation, which puts an end to the classic distinction between a preliminary and a judicial inquiry. According to the proposal of the experts, the prosecutor would be in charge of the investigation, but would have to request the *ex ante* authorisation of a pre-trial judge (*juge de l'enquête*) for coercive measures that infringe upon fundamental rights or freedoms.⁶⁹ Moreover, the pre-trial judge would exercise judicial control on the investigation.⁷⁰ Clearly, this future system much more resembles the underlying logic of the EPPO, according to which the public prosecutor is in charge of the investigation. Nevertheless, it remains to be seen whether this proposal will eventually result in a new Code of Criminal Procedure.⁷¹ Indeed, the proposed reform is facing quite strong opposition from the judiciary and some legal scholars⁷² as the investigating judge is considered a fundamental feature of Belgian criminal procedure. The new Belgian government, which took office on 1 October 2020, has confirmed its intention to reform the Code of Criminal Procedure, taking the proposals made by the reform commission appointed by the previous government as a starting point for further discussions, but has also indicated that it will appoint a new commission of experts.⁷³

IV. IS A JUDICIAL INQUIRY COMPATIBLE WITH THE EPPO REGULATION?

IV.1. NO UNAMBIGUOUS PROHIBITION OF JUDICIAL INQUIRIES

The functioning of the EPPO is based on the prosecutorial model (without any role for the investigating judge) that can be found in most countries of the EU.⁷⁴ As a consequence, one might read into the provisions of the EPPO Regulation that the EPPO is based on the idea of prosecutors having full investigation and prosecutorial powers and that it

⁶⁸ MA Beernaert, 'Le nouveau Code de procédure pénale en projet: quelques lignes de force' cit. 134.

⁶⁹ *Ibid.* 135 and 141-142; R Verstraeten and A Bailleux, 'Het voorstel van een nieuw wetboek van strafvordering: algemene beginselen en fase van het onderzoek' cit. 146.

⁷⁰ MA Beernaert, 'Le Nouveau Code de procédure pénale en projet: quelques lignes de force' cit. 143-146.

⁷¹ The reform proposed by the Commission resulted in a Bill that was brought before Parliament in May 2020: *Proposition de loi contenant le Code de procédure pénale*, Doc. Parl., Ch. représ., sess. ord., 2019-2020, n. 55-1239/001. However, at the moment of finalising this contribution, the parliamentary discussions have not yet started.

⁷² See e.g., M Claise, 'Ne tirez pas sur le juge financier' in M Cadelli (eds), *La figure du juge d'instruction: réformer ou supprimer?* (Anthemis 2017) 57, 59 and 63.

⁷³ P Magnoste and A De Croo, 'Rapport des formateurs/Verslag van de formateurs' (30 September 2020) Média des Bruxelles bx1.be 48-49.

⁷⁴ DA Alvarez, 'The EPPO Implementation. A Perspective from Spain' (2018) *eu crim* 124.

therefore prohibits systems with an investigating judge.⁷⁵ Or, to put it simply, judicial inquiries do not match the philosophy of the EPPO Regulation.

Especially art. 28(1) of the EPPO Regulation could, following this vision, be read as an affirmation that only the EDP can take the lead of the investigation: “The [EDP] handling a case may, in accordance with this Regulation and *with national law*, either undertake the investigation measures and other measures on his/her own or instruct the competent authorities in his/her Member State. Those authorities shall, *in accordance with national law*, ensure that all instructions are followed and undertake the measures assigned to them”.⁷⁶

When reading art. 28(1), the emphasis could indeed rest on the EDP “handling a case” with the power to either undertake the (investigation) measures on his own or to “instruct” the competent national authorities to carry them out, leaving no margin of discretion for these authorities. It could moreover be stressed that the title of art. 28 “Conducting the investigation”⁷⁷ could be interpreted as allowing only the EDPs to conduct, and thus lead, an EPPO investigation.⁷⁸

Nevertheless, neither a provision of the EPPO Regulation, nor its general philosophy based on a prosecutorial model can, in our view, lead to the conclusion that the EPPO Regulation explicitly forbids a system with an investigating judge. Despite the wording of art. 28(1), it does not prescribe in any way that an investigation in EPPO cases can only be led by the EDP himself (contrary to earlier versions of the Regulation, *infra*, IV.2).

⁷⁵ JB Jacquin, ‘Les pouvoirs hors normes du futur parquet européen’ (19 August 2019) *Le Monde* www.lemonde.fr; J Nies, ‘La répartition des rôles entre le Parquet européen et les parquets nationaux’ (2019) *Journal des tribunaux* 11, 13; J Bigot and S Joissains, ‘Rapport d’information fait au nom de la commission des affaires européennes sur la coopération judiciaire en matière pénale et la mise en œuvre du parquet européen’ (16 May 2019) *Sénat* www.senat.fr; L Seiler, ‘Le parquet européen: une révolution sans bouleversements’ cit. 1212; HH Herrnfeld, D Brodowski and C Burchard, *European Public Prosecutor’s Office: Article-by-Article Commentary* (Hart Publishing 2020) 249 and 252.

⁷⁶ Emphasis added. *Cfr* other language versions of the EPPO Regulation: e.g., French: “Le procureur européen délégué chargé d’une affaire peut, conformément au présent règlement et au droit national, soit prendre des mesures d’enquête et d’autres mesures de sa propre initiative, soit en charger les autorités compétentes de son État membre. Lesdites autorités veillent, conformément au droit national, à ce que toutes les instructions soient suivies et prennent les mesures qu’elles ont été chargées de prendre. Le procureur européen délégué chargé de l’affaire utilise le système de gestion des dossiers pour signaler au procureur européen compétent et à la chambre permanente tout événement important concernant l’affaire, conformément aux règles établies dans le règlement intérieur du Parquet européen” (emphasis added). E.g., German: “Der mit einem Verfahren betraute Delegierte Europäische Staatsanwalt kann im Einklang mit dieser Verordnung und dem nationalen Recht die Ermittlungsmaßnahmen und andere Maßnahmen entweder selbst treffen oder die zuständigen Behörden seines Mitgliedstaats dazu anweisen. Diese Behörden stellen im Einklang mit dem nationalen Recht sicher, dass alle Weisungen befolgt werden, und treffen die ihnen zugewiesenen Maßnahmen. Der betraute Delegierte Europäische Staatsanwalt unterrichtet gemäß den in der Geschäftsordnung der EUSTa festgelegten Vorschriften den zuständigen Europäischen Staatsanwalt und die Ständige Kammer durch das Fallmanagementsystem von allen wesentlichen Entwicklungen des Falles” (emphasis added).

⁷⁷ “Conduite de l’enquête” in French and “Führung der Ermittlungen” in German.

⁷⁸ MA Beernaert, ‘Le Nouveau Code de Procédure Pénale en Projet: Quelques Lignes de Force’ cit. 139.

First of all, the EU legislator did not create a European criminal court or European pre-trial courts (as opposed to the proposal made by the *Corpus juris*,⁷⁹ for instance). He limited himself to the creation of a European Public Prosecutor's Office that will act before national courts. In addition, as explained above, there are many references to national law in the EPPO Regulation. To conduct criminal proceedings, the EPPO will thus have to rely, to a large extent, on national rules of criminal procedure. Therefore, Ligeti considers the EPPO Regulation compatible with different forms of authority and division of tasks between the actors in the criminal process at the national level.⁸⁰

Most significant in this regard, is recital 15, which emphasises that “[the] Regulation is without prejudice to Member States’ national systems concerning the way in which criminal investigations are organised”.⁸¹ Furthermore, recital 12 states that, “[i]n accordance with the principle of proportionality [...], this Regulation *does not go beyond what is necessary in order to achieve those objectives* and ensures that *its impact on the legal orders and the institutional structures of the Member States is the least intrusive possible*”.⁸²

In light of these recitals, art. 28(1) of the EPPO Regulation does not necessarily exclude the intervention of an investigating judge in EPPO cases. Otherwise, it would force Member States to change “the way in which criminal investigations are organised” and have a far-reaching impact on “the institutional structures of the Member States”, particularly in Belgium where the Constitutional Court has insisted on the importance of upholding the procedural safeguards offered by the judicial inquiry (which are higher than those in a preliminary inquiry)⁸³ and where, as indicated *supra*, the judicial inquiry is still regarded by many stakeholders as a fundamental pillar of national criminal procedure. Instead, when reading art. 28(1), the emphasis could rest on conducting the investigation “in accordance with national law” (including investigations led by investigating judges), a reference to national law that was added by the Member States during the negotiations (*infra*, IV.2). If art. 28(1) was meant to oblige national legislators to abolish investigating

⁷⁹ For a concise analysis of the role of the pre-trial judge (taking the form of a *juge des libertés*) and the option of creating a European pre-trial court in the *Corpus juris*, see K Ligeti and V Franssen, ‘Le contrôle juridictionnel dans les projets de Parquet européen’ in G Giudicelli-Delage, S Manacorda and J Tricot (eds), *Le contrôle judiciaire du Parquet européen: Nécessité, modèles, enjeux* (Société de législation comparée 2014) 127, 134-139.

⁸⁰ K Ligeti, ‘The Place of the Prosecutor in Common Law and Civil Law Jurisdictions’ cit. 160.

⁸¹ The same interpretation counts for other language versions of the EPPO Regulation. E.g., in German: “Diese Verordnung lässt die nationalen Systeme der Mitgliedstaaten in Bezug auf die art. und Weise, wie strafrechtliche Ermittlungen organisiert werden, *unberührt*, or in French: “Le présent règlement s’applique *sans préjudice* des systèmes nationaux des États membres concernant la manière dont les enquêtes pénales sont organisées” (emphasis added).

⁸² Emphasis added.

⁸³ See e.g., Belgian Constitutional Court judgment of 25 January 2017 n. 6/2017 (2017) Nullum Crimen 351, case comment by S Raats; Belgian Constitutional Court judgment of 21 December 2017 n. 148/2017, para. B.22.4; R Verstraeten and A Bailleux, ‘Het voorstel van een nieuw wetboek van strafvordering: algemene beginselen en fase van het onderzoek’ cit. 149-150.

judges in EPPO cases, and thus fundamentally change “the way in which criminal investigations are organised”, then this should have been done unambiguously and without the insertion of recital 15 (at the initiative of the Member States, *infra*, IV.2).

As a consequence, even if art. 28(1) determines that the EDP can “instruct”⁸⁴ the competent national authorities to undertake (investigation) measures and that the latter have to “ensure that all instructions are followed and undertake the measures assigned to them”, this does not mean that the public prosecutor can *force* a judge to undertake a certain investigation measure. Another interpretation would make the references to national law, but also the authorisation of the judge, which is a necessary condition for certain intrusive investigation measures in light of European law,⁸⁵ pointless.

Moreover, art. 30(1) of the EPPO Regulation sets that “Member States shall ensure that the European Delegated Prosecutors are entitled to order or request” at least the six investigation measures including the interception of electronic communications and the search of premises,⁸⁶ and art. 30(4) of the EPPO Regulation states that “[t]he European Delegated Prosecutors shall be entitled to request or to order any other measures in their Member State that are available to prosecutors under national law in similar national cases, in addition to the measures referred to in paragraph 1”.⁸⁷ Art. 30(3) and (5) further stresses that Member States can subject these investigation measures to conditions or limitations. The procedures and modalities for taking investigation measures shall thus be governed by the applicable national law. This includes making the investigation measure conditional upon

⁸⁴ In French “charger” and in German “anweisen”.

⁸⁵ For instance, the European Court of Human Rights has emphasised the importance of a judicial warrant with respect to the search of private premises (ECtHR *Sociétés Colas Est and Others v France* App n. 37971/97 [16 April 2002] para. 49) and personal searches (ECtHR *Kobiashevili v Georgia* App n. 36416/06 [14 March 2019] paras 39-41 and 61-71). At the EU level, the need for a court order is explicitly required for the production of “transactional” and content data by service providers in the Commission’s proposal for a Regulation of the European Parliament and of the Council on European production and preservation orders for electronic evidence in criminal matters (art. 4(2) COM(2018) 225 final). If adopted this way, this will be a new step in the approximation of national law, as the EU legislator has so far only required the intervention of a “judicial authority”, which can be a judge or a public prosecutor. See e.g., art. 6 Framework Decision 2002/584/JHA of the Council of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. That said, the Court of Justice has emphasised, with respect to the European arrest warrant, the need for the intervention of an independent (issuing and executing) judicial authority, a standard that is, for instance, not met by German nor by Dutch public prosecutors as they can receive instructions from the executive. Joined cases C-508/18 and C-82/19 PPU *Ministry for Justice and Equality v OG and PI* ECLI:EU:C:2019:456 para. 88; Case C-510/19 AZ ECLI:EU:C:2020:953 paras 56 and 70. Moreover, in the field of data retention, the Court has recently ruled that a measure authorising the real-time collection of traffic and location data must “be subject to a prior review carried out either by a court or by an independent administrative body whose decision is binding”. Joined cases C-511/18, C-512/18 and C-520/18 *La Quadrature du Net and Others* ECLI:EU:C:2020:791 para. 189.

⁸⁶ Emphasis added.

⁸⁷ Emphasis added.

the authorisation of a pre-trial judge. Indeed, unlike the Commission's proposal,⁸⁸ the EPPO Regulation does not contain any minimum rules on judicial authorisation and thus leaves national criminal procedure, as far as this aspect is concerned, unaffected.

In this regard, it is also worthwhile referring to recital 87, highlighting that "the procedural acts of the EPPO that are adopted before the indictment and intended to produce legal effects vis-à-vis third parties (a category which includes the suspect, the victim, and other interested persons whose rights may be adversely affected by such acts) are subject to *judicial review by national courts [...] in accordance with the requirements and procedures laid down by national law*".⁸⁹

What follows from the above provisions, is that EDPs will be able to give orders to national authorities such as the police and administrative authorities under the same conditions as prosecutors in similar national cases. However, if national law requires the intervention of a judge, the EDPs will have to "request" the investigation measure.⁹⁰ Whether this judge only intervenes punctually (like the *Ermittlungsrichter* in Germany), *ex ante* or *ex post*, or takes over and leads the investigation from that moment onwards (like the *juge d'instruction* in Belgium) is not defined by the Regulation.⁹¹ An EDP could thus request the Belgian investigating judge to conduct a measure that requires, under Belgian law, his *ex ante* intervention and potentially even request the opening of a judicial inquiry (*supra*, III). The judge being independent and impartial, he could, however, not be obliged to authorise the requested measure.⁹²

Still, it should be stressed that to be able to effectively conduct the investigation and undertake the necessary investigation measures,⁹³ the EPPO strongly relies on national authorities, whether through an order or a request. In light of the principle of sincere cooperation, all national authorities, including the investigating judge, should actively support EPPO investigations and cooperate with the EPPO.⁹⁴

In sum, the EPPO Regulation does, in our view, not prohibit the intervention of an investigating judge in EPPO cases. As Pradel rightly concludes, "la présence active du procureur européen délégué est compatible avec les fonctions du juge national de la mise en état, en application d'une sorte de répartition des pouvoirs sous le double signe de

⁸⁸ Art. 26(4) Proposal for a Regulation COM(2013) 534 cit.

⁸⁹ Emphasis added.

⁹⁰ It should also be noted that, contrary to the Commission's initial proposal, the EPPO Regulation does *not* set minimum requirements regarding the need of a judicial authorisation for intrusive investigation measures. F Verbruggen, V Franssen, AL Claes and A Werding 'Implementation of the EPPO in Belgium: Making the Best of a (Politically) Forced Marriage?' cit.

⁹¹ *Ibid.*

⁹² Pradel comes to the same conclusion: J Pradel, 'Le parquet européen est-il compatible avec les juges nationaux de la mise en état en affaires pénales?' (2019) *Recueil Dalloz* 650.

⁹³ Recital 70 EPPO Regulation cit.

⁹⁴ Recital 69 and art. 5(6) EPPO Regulation cit.; F Verbruggen, V Franssen, AL Claes and A Werding 'Implementation of the EPPO in Belgium: Making the Best of a (Politically) Forced Marriage?' cit.

l'efficacité européenne et de la souveraineté nationale. Le juge d'instruction, notamment, devrait donc être maintenu. Et la confiance mutuelle pourrait faire le reste".⁹⁵ In addition to the above, it should be emphasised that the EPPO still remains a public prosecutor's office⁹⁶ and does not affect the competences of national judges. What matters, to quote the European Commission, is that the EPPO is "the sole competent *prosecution* authority in EPPO cases".⁹⁷ In effect, the existence of a judicial inquiry as organised under Belgian law does *not* affect the EPPO's prosecution powers, it only impacts the way in which the EPPO conducts its investigation. The Belgian judicial inquiry is thus, in principle, not incompatible with the EPPO Regulation, even if it remains to be seen how it will practically function in the context of an EPPO investigation (*infra*, V).

IV.2. INTERPRETATION CONFIRMED BY THE DRAFTING HISTORY OF THE EPPO REGULATION

The above analysis is also supported by the drafting history of the EPPO Regulation. The history of the drafting of the EPPO Regulation indeed shows that the EU Member States did not intend to radically change the relation between public prosecutors and judges. The comparison between the wording of the Commission's original proposal,⁹⁸ intermediate versions of the text and the final Regulation is most telling, in particular with respect to art. 28(1) and recital 15 of the EPPO Regulation.

In the Commission's proposal, art. 18 (corresponding to current art. 28 of the EPPO Regulation) read:

"The designated [EDP] shall *lead* the investigation on behalf of and under the instructions of the European Public Prosecutor. The designated [EDP] may either undertake the investigation measures on his/her own or instruct the competent law enforcement authorities in the Member State where he/she is located. *These authorities shall comply with the instructions of the [EDP] and execute the investigation measures assigned to them*".⁹⁹

⁹⁵ J Pradel, 'Le parquet européen est-il compatible avec les juges nationaux de la mise en état en affaires pénales?' cit.

⁹⁶ This is also expressed by the terms used in certain language versions of the Regulation: e.g., in Dutch "*openbare aanklager*", a term that stresses the accusatory function of a public prosecution service. This choice is somewhat surprising because, in practice, this is just one of the many tasks performed by modern prosecutors. F Verbruggen, V Franssen, AL Claes and A Werding 'Implementation of the EPPO in Belgium: Making the Best of a (Politically) Forced Marriage?' cit.

⁹⁷ European Commission, 'Draft Minutes VTC Meeting of the EPPO Expert Group' (30 June 2020) 3, emphasis added.

⁹⁸ Proposal for a Regulation COM(2013) 534 cit.

⁹⁹ Emphasis added. *Cfr* other language versions of the EPPO Regulation: e.g., in German: "Der benannte Abgeordnete Europäische Staatsanwalt leitet das Ermittlungsverfahren im Namen und nach den Weisungen des Europäischen Staatsanwalts. Der benannte Abgeordnete Europäische Staatsanwalt kann die Ermittlungsmaßnahmen entweder selbst durchführen oder die zuständigen Strafverfolgungsbehörden

The Commission's proposal thus emphasised that the investigation would be led by the EDP and made no reference to national law. Moreover, the Commission's proposal did not contain a recital similar to recital 15 of the EPPO Regulation. This indicates the more European-centred approach of the Commission, advocating in favour of a more far-reaching integration of EU and national law.

As explained above (*supra*, II), some Member States were quite reluctant to create a strongly centralised EPPO.¹⁰⁰ Unsurprisingly, they substantially amended the initial proposal, first in the hope to achieve consensus among all Member States, then opting for enhanced cooperation.¹⁰¹

In the draft regulation of the Council of 31 January 2017,¹⁰² art. 18 of the Commission's proposal was altered to art. 23, which reads as follows: "The [EDP] *handling* a case may, in accordance with this Regulation and with national law, either undertake the investigation measures and other measures on his/her own or instruct the competent authorities in his/her Member State. These authorities shall, *in accordance with national law*, ensure that all instructions are followed and undertake the measures assigned to them [...]".¹⁰³

The verb "lead" was thus deleted and replaced with "handling", which has a less directive connotation. Furthermore, the Council added no less than two references to national law, thereby increasing the role of national law when the EPPO conducts investigation measures.

Moreover, in the above draft Regulation, the Council inserted a recital 10, which is identical to the text of current recital 15 of the EPPO Regulation, marking clearly the Member States' desire to leave more autonomy to the national legal system.

The wording of the Regulation thus shifted from an EDP *leading* an investigation and giving orders to national authorities, to an EDP *instructing* national authorities to conduct

in dem Mitgliedstaat, in dem er seinen Standort hat, dazu anweisen. Diese Behörden befolgen die Weisungen des Abgeordneten Europäischen Staatsanwalts *und führen die ihnen übertragenen Ermittlungsmaßnahmen durch*"; in French: "Le procureur européen délégué désigné mène l'enquête au nom et sur instructions du procureur européen. Le procureur européen délégué désigné peut soit procéder aux mesures d'enquête de sa propre initiative, soit donner instruction en ce sens aux autorités répressives compétentes de l'État membre où il est affecté. Ces autorités se conforment aux instructions du procureur européen délégué *et exécutent les mesures d'enquête dont elles sont chargées*" (emphasis added).

¹⁰⁰ Even before the Commission presented its proposal, France and Germany published a common memo in which they advocated in favour of a less European-centred EPPO. See D Flore, 'Le parquet européen à la croisée des chemins' cit. 234 and the references made there. Shortly after the publication of the Commission's proposal, several national parliaments objected too, raising a so-called yellow card: V Franssen, 'National Parliaments Issue Yellow Card against the European Public Prosecutor's Office' (4 November 2013) European Law Blog europeanlawblog.eu.

¹⁰¹ D Flore, 'Le parquet européen à la croisée des chemins' cit. 234-235.

¹⁰² Draft regulation Council doc. n. 5766/17 Interinstitutional File 2013/0255 (APP) Proposal for a Regulation of the European Council of 31 January 2017 on the establishment of the European Public Prosecutor's Office.

¹⁰³ Emphasis added.

an investigation measure according to national law and thus leaving unaffected the way in which criminal investigations are organised at the national level. Consequently, if national law requires the intervention of an investigating judge and/or the opening of a judicial inquiry for a certain measure, this should be possible in EPPO cases.

These arguments hold true for the final version of the EPPO Regulation, since the wording of art. 28(1) and recital 15 remained unchanged in the later stages of the negotiations.¹⁰⁴

To conclude, there is no provision in the Regulation that *expressly* states that the EPPO must be able to conduct the investigation on an exclusive basis and the letter of the EPPO Regulation does, in our opinion, not prohibit Member States from preserving the current role of the investigating judge conducting a judicial inquiry in EPPO investigations.¹⁰⁵ National criminal procedural law continues to apply to criminal proceedings relating to EPPO cases.¹⁰⁶ The foregoing analysis of the drafting history of a key article and recital of the EPPO Regulation corroborates that reading. The long negotiation process, the shift from a federal to a decentralised logic, and the insertion of multiple references to national law clearly show that the Member States did not wish for the EPPO Regulation to interfere too much with the national legal systems.

V. STEP-BY-STEP ANALYSIS OF A JUDICIAL INQUIRY IN EPPO CASES IN BELGIUM: NEED FOR LEGISLATIVE AMENDMENTS?

Once clarified that a judicial inquiry is not prohibited by the EPPO Regulation, the question remains to determine how an EPPO investigation conducted by an investigating judge could practically function in the Belgian legal system without requiring a major overhaul. Even if the role of the investigating judge as such is not incompatible with the Regulation, some legislative changes might still be necessary. In this Part, we will therefore discuss the different stages of an EPPO investigation in the hypothesis of a judicial inquiry, analysing at each step whether Belgian legislation is in conformity with the provisions of the Regulation, and if not, what amendments are needed. Next, in Part VI, we will present the relevant provisions of the Belgian EPPO Act, which was adopted in February 2021, and assess whether the amendments made are sufficient to resolve the problems identified in this Part.

¹⁰⁴ With the only minor and irrelevant exception that the final version reads “those” authorities and not “these”.

¹⁰⁵ This thesis is supported by J Pradel, ‘Le parquet européen est-il compatible avec les juges nationaux de la mise en état en affaires pénales?’ cit. 650.

¹⁰⁶ Y De Vries and SJ Lopik, ‘Het Europees openbaar ministerie komt eraan: waakhond of papieren tijger?’ (2019) *Nederlands tijdschrift voor Europees recht* 7.

V.1. THE OPENING OF THE EPPO INVESTIGATION

An EPPO investigation can start in two ways.¹⁰⁷ On the one hand, the EDP himself can start an investigation when there are reasonable grounds to believe that an offence falling within the competence of the EPPO is being or has been committed.¹⁰⁸ On the other hand, the EDP can exercise its right of evocation, i.e., take over a case from a judicial or law enforcement authority of a Member State that initiated the investigation and that, according to its obligation based on art. 24(2) of the EPPO Regulation, informed the EPPO about the existence of this investigation.¹⁰⁹ Notwithstanding that the EPPO and national authorities have shared competences (i.e., both can prosecute EPPO offences), the EPPO's competence has priority.¹¹⁰ However, the right of evocation exists only as long as the national investigation has not been finalised and provided that an indictment has not been submitted to a court.¹¹¹

The EPPO has to exercise this right of evocation within five days after receiving all the relevant information from the national authorities.¹¹² During the five days period for the decision of evocation, the national authorities have to "refrain from taking any decision under national law that may have the effect of precluding the EPPO from exercising its right of evocation".¹¹³ Nevertheless, they have to "take any urgent measures necessary, under national law, to ensure effective investigation and prosecution".¹¹⁴ If the EPPO decides to exercise its right of evocation, the national competent authorities will hand over the file to the EPPO and stop their own investigation.¹¹⁵

In case of disagreement between the EPPO and the national authorities over the question whether the criminal conduct falls within the material scope of the EPPO, "the national authorities competent to decide on the attribution of competences concerning prosecution at the national level shall decide who is to be competent for the investigation".¹¹⁶ It is thus up to the Member States to decide which authorities will take this decision.

¹⁰⁷ Art. 25(1) EPPO Regulation cit. See also arts 41-42 of the Internal Rules of Procedure of the European Public Prosecutor's Office, College Decision 003/2020 of 12 October 2020 (hereafter IRP).

¹⁰⁸ Art. 26(1) EPPO Regulation cit.

¹⁰⁹ *Ibid.* arts 24(2) and 27.

¹¹⁰ *Ibid.* art. 25(1) and recital 58.

¹¹¹ *Ibid.* art. 27(7).

¹¹² *Ibid.* art. 27(1).

¹¹³ Recital 58 seems to be broader than art. 27(2) as it states that "the authorities of Member States should refrain from acting, unless urgent measures are required, until the EPPO has decided whether to conduct an investigation", whereas art. 27(2) only mentions "any decision under national law that may have the effect of precluding the EPPO from exercising its right of evocation".

¹¹⁴ Art. 27(2) EPPO Regulation cit.

¹¹⁵ *Ibid.* art. 27(5).

¹¹⁶ *Ibid.* art. 25(6).

Clearly, the above rules do not cause a problem when a Belgian investigation is led by a national (local or federal) public prosecutor. Yet, does the EPPO's right of evocation create any difficulty when the ongoing investigation is a judicial inquiry?

Firstly, we can assume that the terms "judicial or law enforcement authority of a Member State"¹¹⁷ include the investigating judge. Therefore, the latter has the obligation to inform the EPPO if an investigation is initiated (whether at his own initiative or at the request of the public prosecutor or the victim, *supra*, III) concerning an offence that could fall within the competence of the EPPO. After informing the EPPO and while awaiting its decision, the investigating judge will still be able to take urgent investigation measures but, in accordance with art. 27(2) of the EPPO Regulation, will have to refrain from any measure that would render impossible the exercise of the EPPO's right of evocation.

Secondly, once the EPPO decides to use its right of evocation, it will take up the role of the public prosecutor, with all the rights this involves (*supra*, III). Yet, considering that the EPPO Regulation does not prohibit a judicial inquiry as the EU legislator did not wish to interfere too much with the way in which the criminal investigation is organised in the national legal systems, the investigating judge will continue to direct the judicial inquiry. The Belgian EDP handling the case for the EPPO will thus have the same position as a Belgian prosecutor in a judicial inquiry, with access to the case file and the possibility to request the investigating judge to undertake certain investigation measures (*supra*, III).

Admittedly, one could claim that the wording of art. 27(5) of the EPPO Regulation, requiring that if the EPPO exercises its right of evocation, the competent authorities of the Member States "transfer the file and refrain from carrying out further acts of investigation in respect of the same offence", prohibits the investigating judge from continuing the investigation after the EPPO's decision to exercise its competence. It should be noted, though, that art. 27(5) employs the terms "competent national authorities" and not, as in art. 24(2), "judicial or law enforcement authority" that initiated the investigation. So, in our view, it can be argued, also in the light of a general reading of the EPPO Regulation, that it is up to the Belgian public prosecution service – which is the competent national authority for the prosecution – to transfer the file to the EPPO and to refrain from requesting the investigating judge to conduct further acts of investigation in respect of the same offence.

Finally, the EPPO may only exercise its right of evocation "provided that the national investigation has not already been finalised and that an indictment has not been submitted to a court".¹¹⁸ The EU legislator thus uses a double criterion.

In Belgium, as explained above (*supra*, III), when the investigating judge has completed the judicial inquiry, he sends the criminal file back to the public prosecutor, who drafts the final submissions and brings the case to the pre-trial tribunal. The latter will

¹¹⁷ *Ibid.* art. 24(2).

¹¹⁸ *Ibid.* art. 27(7).

then decide whether or not to refer the case for trial to the competent court.¹¹⁹ This decision, once final, formally puts an end to the judicial inquiry and, at the same time, submits the case to the trial court.¹²⁰

It should be noted, though, that there may be a considerable lapse of time (months, sometimes even years) between the prosecutor's final submissions and the referral or dismissal decision. Amongst other factors, this is due to the fact that the pre-trial tribunal can decide that the investigation is incomplete and refer the file back to the public prosecutor with the suggestion to accomplish certain investigation measures.¹²¹ The latter can then request¹²² the investigating judge to undertake additional investigation measures (with a right¹²³ to appeal in case of refusal), or the judge can do so at his own initiative.¹²³ Subsequently, after having completed the investigation, which may again take considerable time, especially in cross-border investigations, the investigating judge turns the file over to the public prosecutor, who will draft new final submissions and bring the case, once more, to the pre-trial tribunal.

The formal closing of the judicial inquiry with the referral or dismissal decision of the pre-trial tribunal, in our view, also corresponds to what the EU legislator had in mind when using the term "indictment".¹²⁴ As a result, the EPPO could exercise its right of evocation until the decision of the Belgian pre-trial tribunal (or court)¹²⁵ has become final.

That said, for the sake of efficiency, it does not seem desirable to exercise this right after the national public prosecutor has brought the case with his (first) final submissions to the pre-trial tribunal. This could indeed delay the proceedings. Therefore, it would be useful for the EPPO to first consult its national counterpart before evoking the case, as provided by art. 27(4) of the EPPO Regulation: "the EPPO shall, *where appropriate, consult*

¹¹⁹ Art. 128 CIC cit.

¹²⁰ Roughly summarized, the investigating judge's competence ends when the pre-trial tribunal or court refers the case to the trial court or dismisses the case. For more details, see M Franchimont, A Jacobs and A Masset, *Manuel de procédure pénale* (Larcier 2012) 600 paras 68 and 608-618.

¹²¹ To note that the pre-trial tribunal cannot *order* the prosecutor (nor the investigating judge) to undertake such measures.

¹²² As explained in Part III, the public prosecutor can never *oblige* the investigating judge to undertake certain measures. The same holds true for the pre-trial tribunal, as it situated to the same organisational level as the investigating judge – both belong to the court of first instance. Only the pre-trial court (upon appeal) can *order* the investigating judge to do so (art. 228 CIC cit.).

¹²³ M Franchimont, A Jacobs and A Masset, *Manuel de procédure pénale* cit. 616.

¹²⁴ To note that the meaning of the term "indictment" is not entirely clear in the EPPO Regulation, especially for systems with a pre-trial hearing (*infra*, V.4). For one, art. 27(7) refers to the submission of the indictment "to a court". This "court" could be a pre-trial or a trial court, which makes a significant difference (*supra*, footnote 61). For another, the translation of the term "indictment" in other language versions of the Regulation creates confusion: e.g., "acte d'accusation" (in French), "Anklage" (in German) and "tenlastelegging" (in Dutch). For further analysis, see V Franssen, A Werding, AL Claes and F Verbruggen, 'La mise en œuvre du Parquet européen en Belgique: Quelques enjeux et propositions de solution' cit. 148-149.

¹²⁵ In the case there is an appeal against the decision of the pre-trial tribunal. See *supra*, III.

the competent authorities of the Member State concerned *before deciding* whether to exercise its right of evocation".¹²⁶

V.2. THE CONDUCT OF THE EPPO INVESTIGATION

As indicated above, the EDP will take up the role of prosecutor in a judicial inquiry and will have the *same rights and powers as a national prosecutor* in that situation¹²⁷. Once the EPPO investigation is formally opened, the Belgian EDP will thus be able to request¹²⁸ the Belgian investigating judge to take investigation measures in accordance with the rules of Belgian criminal procedure. In the hypothesis that a judicial inquiry has not yet been started, the EDP will have to ask an *ex ante* authorisation for coercive measures using the procedure of the mini judicial inquiry (*supra*, III). If the investigating judge refuses to authorise the requested measure, the EDP will be able to contest this decision before the pre-trial court. By contrast, if the coercive measure is not possible under a *mini-instruction* in accordance with art. 28*septies* CIC, the EDP will have to open a judicial inquiry.

According to arts 10(5) and 12(3) of the EPPO Regulation, the Permanent Chamber and the supervising European Prosecutor may give instructions to the EDP "whenever necessary for the efficient handling of the investigation or prosecution or in the interest of justice, or to ensure the coherent functioning of the EPPO". Does this hierarchical right potentially create problems in the Belgian legal context? In fact, the EPPO Regulation itself endeavours to avoid conflicts between such instructions and national law. Indeed, the aforementioned provisions explicitly state that the instructions should be "in compliance with applicable national law". If the Permanent Chamber or the European Prosecutor were to instruct the EDP to take a certain measure which the latter considers not to be in compliance with Belgian law (for example, a remote search of a computer system without the prior authorisation of an investigating judge,¹²⁹ or a search of private premises without launching a judicial inquiry)¹³⁰, then he would have to "immediately inform the Permanent Chamber, proposing to amend or revoke the instructions received".¹³¹ Should the Permanent Chamber deny the EDP's request, the latter "may submit a request for review to the European Chief Prosecutor".¹³²

¹²⁶ Emphasis added.

¹²⁷ The compatibility of a judicial inquiry with a cross-border EPPO investigation will not be analysed in this *Article*.

¹²⁸ As explained above (*supra*, IV.1), there is no obligation under art. 30(1) and (4) of the EPPO Regulation to give the EPPO the right to give orders to the investigating judge.

¹²⁹ Art. 88*ter* CIC cit.

¹³⁰ *Ibid.* art. 28*septies*.

¹³¹ Art. 47(1) IRP cit.

¹³² *Ibid.* art. 47(2).

V.3. THE REALLOCATION OF AN EPPO CASE FROM ONE MEMBER STATE TO ANOTHER

While the EPPO Regulation does not prohibit the Belgian judicial inquiry in EPPO cases, there are, however, two situations where the rules of the EPPO conflict with Belgian law. The first one¹³³ concerns the reallocation of an EPPO case from one Member State to another. According to art. 26(5) of the EPPO Regulation:

“Until a decision to prosecute [...] is taken, the competent Permanent Chamber may, in a case concerning the jurisdiction of more than one Member State and after consultation with the European Prosecutors and/or European Delegated Prosecutors concerned, decide to:

- (a) reallocate the case to a European Delegated Prosecutor in another Member State;
- (b) merge or split cases and, for each case choose the European Delegated Prosecutor handling it, if such decisions are in the general interest of justice and in accordance with the criteria for the choice of the handling European Delegated Prosecutor [...]”.¹³⁴

Since the EPPO Regulation does not make a difference between a preliminary and a judicial inquiry, the Permanent Chamber must be able to reallocate a case in both situations until a final decision on the referral for trial has been made. The EPPO Regulation thus obliges Member States to allow a public prosecutor to remove a case from an investigating judge or pre-trial court, even if those judges do not agree. This raises the fundamental question whether a prosecutor can withdraw a case pending before a judge and override the latter’s decision. In principle, judges are independent and cannot be forced to follow orders or decisions of the public prosecution service (*supra*, III).

Under current Belgian law, there are, however, already a number of situations where the public prosecutor’s office can decide on the outcome of the criminal proceedings, notwithstanding the case is pending before a judge.

The public prosecutor’s office can, first of all, conclude an out-of-court settlement with the suspect during the judicial inquiry¹³⁵ and thereby terminate the criminal proceedings.¹³⁶ This settlement is, however, subject to judicial review. Indeed, the pre-trial court will check whether different conditions (including the proportionality of the agreement in the light of the seriousness of the facts and the suspect’s personality) are fulfilled,

¹³³ For the second one, see *infra*, V.5.

¹³⁴ See also arts 49-51 IRP cit.

¹³⁵ It should be noted that this possibility, which was created in 2011, was strongly criticised by legal scholars exactly because it derogates from the fundamental principle that a public prosecutor cannot remove a case pending before a judge and override the latter’s decision, all the more since there was no meaningful judicial review. In 2016, the law was amended to meet the concerns expressed by the Constitutional Court and further punctual amendments were made in 2018. For an analysis of the current legal framework, see H Van Bavel and D Delwaide, ‘Enième réforme de la transaction pénale: la fin des controverses?’ (2018) *Journal des Tribunaux* 765.

¹³⁶ Art. 216*bis*(2) CIC cit.

and if that is the case, approve the settlement.¹³⁷ Similar rules apply to the mediation procedure laid down in art. 216ter CIC.¹³⁸

Second, as indicated above (*supra*, III), the public prosecutor's office can also request the pre-trial court to remove the investigating judge from the case in certain specific cases.¹³⁹

Third, in case multiple investigating judges think they are competent to conduct the investigation, there are different ways to dismiss one investigating judge in favour of another. Following the formal procedure (called the *règlement des juges*),¹⁴⁰ the Belgian Court of Cassation decides which investigating judge can continue the inquiry. The rules of this procedure are, however, cumbersome and therefore not often applied. A more favourable solution, developed in practice, is an informal dismissal of one investigating judge by the pre-trial tribunal, after consultation between the public prosecutors concerned.¹⁴¹ In our view, this informal procedure could also be used to reallocate the case to an EDP in another Member State.

Still, the problem remains how the EPPO can reallocate a case in favour of an EDP in another Member State if the pre-trial tribunal does not agree with this decision of the EPPO. At present, a Belgian public prosecutor cannot force a pre-trial tribunal to approve his decision. Since an overall reform of Belgian criminal procedure is in the make (*supra*, III), it is not desirable to make major adjustments at this point. Nevertheless, reallocation must be possible because of the primacy of EU law.

We believe inspiration can be drawn from an existing procedure for reallocating cases to international criminal tribunals. International criminal tribunals (except for the International Criminal Court) have primacy over the Belgian courts. If the prosecutor of an international criminal tribunal gives notice that he wishes to prosecute facts that are subject to a judicial inquiry in Belgium, the Court of Cassation will withdraw the case from the pre-trial judges after verifying that the facts fall within the competence of the tribunal and that no error was made regarding the person concerned. Such verification does not involve an assessment of the possible charges.¹⁴²

¹³⁷ *Ibid.* art. 216bis(8).

¹³⁸ For an extensive analysis, see C Marr, 'La médiation pénale à la suite de la loi du 18 mars 2018: de la médiation à la "procédure médiation et mesures"' in V Franssen and A Masset (eds), *Actualités de droit pénal et de procédure pénale* (Anthemis 2019) 293.

¹³⁹ Art. 235 CIC cit.

¹⁴⁰ *Ibid.* art. 525 ff.

¹⁴¹ MA Beernaert, HD Bosly and D Vandermeersch, *Droit de la procédure pénale* cit. 873-878, para. 1135: there is no text that explicitly provides for this possibility, but there is well established case law.

¹⁴² After the withdrawal, prosecution in Belgium is no longer possible, unless the international tribunal has decided not to deliver an indictment or that the procedure is inadmissible. Arts 47-49 *Loi concernant la coopération avec la Cour pénale internationale et les tribunaux pénaux internationaux*. See, for example, Belgian Court of Cassation judgment of 9 July 1996 n. P.96.0869.F. C Van den Wyngaert, P Traest and S Vandromme, *Strafrecht en strafprocesrecht in hoofdlijnen* (Maklu 2017) 1257-1258.

The Belgian legislator could create a similar procedure for reallocating EPPO cases to another Member State. Under this procedure the pre-trial tribunal and court would be *obliged* to confirm the withdrawal decision of the Permanent Chamber of the EPPO after a formal check of the material competence of the EPPO and the criteria for withdrawal of art. 26(5) of the EPPO Regulation. This way, the legislator would avoid that the Permanent Chamber is able to withdraw cases without intervention of a judge, and would ensure the protection of the suspect's right to a "natural judge", which is part of the right to a fair trial, while also respecting the decision of the Permanent Chamber, as intended by the EU legislator.

V.4. THE CLOSING OF THE EPPO INVESTIGATION

According to the EPPO Regulation, once the investigation is completed, the EDP has to send a report to the supervising European Prosecutor with a draft decision on the outcome of the case:¹⁴³ prosecution¹⁴⁴ (with possibility for a simplified prosecution procedure if national law provides for it),¹⁴⁵ referral to the national authorities,¹⁴⁶ or dismissal.¹⁴⁷ The supervising European Prosecutor subsequently transmits the draft decision to the Permanent Chamber,¹⁴⁸ which will take the final decision.¹⁴⁹ However, pursuant to art. 36(1) of the EPPO Regulation, the Permanent Chamber cannot dismiss a case if the EDP has proposed to bring the case to judgment. This provision also shows the high degree of decentralisation of the EPPO.¹⁵⁰

When there is only one Member State that has jurisdiction over the case and the Permanent Chamber decides to prosecute, it will bring the case to prosecution in the Member State of the handling EDP. By contrast, when several Member States have jurisdiction,¹⁵¹ the Permanent Chamber will, in principle, also decide to bring the case to prosecution in the Member State of the handling EDP.¹⁵² Nevertheless, it may decide to prosecute in

¹⁴³ Art. 35 EPPO Regulation cit.

¹⁴⁴ *Ibid.* art. 36.

¹⁴⁵ *Ibid.* art. 40.

¹⁴⁶ Because the EPPO is not competent, because the conditions of arts 25(2) and (3) are not fulfilled anymore, or on the basis of the principle of prosecutorial discretion. Art. 34 EPPO Regulation; M Caianiello, 'The Decision to Drop the Case in the New EPPO's Regulation: Res Iudicata or Transfer of Competence?' (2019) *New Journal of European Criminal Law* 186, 191.

¹⁴⁷ Art. 39 EPPO Regulation cit.

¹⁴⁸ *Ibid.* art. 35.

¹⁴⁹ Unless the Permanent Chamber has delegated its decision-making power to conclude the case before. Art. 55(1) IRP cit.

¹⁵⁰ T Huisjes, 'Een Europees Openbaar Ministerie: kansen en risico's' (2019) *Proces* 150.

¹⁵¹ Arts 23 and 26 EPPO Regulation cit.

¹⁵² *Ibid.* art. 36(3).

another Member State if there are sufficiently justified grounds to do so, taking into account the criteria set out in art. 26(4) and (5) of the EPPO Regulation.¹⁵³

Furthermore, art. 36(4) of the EPPO Regulation provides that “the Permanent Chamber may, on the proposal of the handling [EDP], decide to join several cases, where investigations have been conducted by different [EDPs] against the same person(s) with a view to prosecuting these cases in the courts of a single Member State which, in accordance with its law, has jurisdiction for each of those cases”.

Once decided in which Member State the case will be tried, “the competent national court within that Member State shall be determined *on the basis of national law*”.¹⁵⁴

How can these decisions of the Permanent Chamber be reconciled with the outcome of a judicial inquiry? As indicated in Part III, the pre-trial tribunal and court decide in Belgium on the outcome of the judicial inquiry after receiving the public prosecutor’s final submissions. In contrast to e.g., French law,¹⁵⁵ a Belgian investigating judge *cannot* refer the case to trial; neither does he have the power to bring the case to the pre-trial court, which will decide on referral. Only the public prosecutor can do so – this belongs to his prosecutorial powers.

If the Permanent Chamber decides to prosecute in Belgium, to refer the case to the Belgian authorities or to dismiss the case, and the judicial inquiry took place in Belgium, there should not be any difficulties. Following the above reasoning that the EPPO Regulation does not preclude a judicial inquiry and, more generally, does not affect the role of national judges, the intervention of pre-trial tribunals at the end of the investigation remains unchanged. It should be noted that many legal systems, even without an investigating judge, provide for some kind of “filter” at the end of the investigation, consisting in a pre-trial or preliminary hearing.¹⁵⁶ Moreover, the EPPO Regulation explicitly refers to national law when it comes to determining the competent national court in the Member State where the prosecution of the EPPO case is taking place.¹⁵⁷ Consequently, if the EDP receives the case file from the Belgian investigating judge after the judicial inquiry has been terminated, he drafts the final submissions, which reflect the decision taken by the Permanent Chamber, and brings the case to the pre-trial tribunal.

At this stage, different scenarios are possible.

¹⁵³ *Ibid.*

¹⁵⁴ Art. 36(5) EPPO Regulation cit. Emphasis added.

¹⁵⁵ In France, the investigating judge also intervenes as a pre-trial tribunal at the end of the investigation, by adopting *ordonnances de règlement*. Arts 177-184 French Code of Criminal Procedure (*Code de procédure pénale*).

¹⁵⁶ For instance, in Italy, where the investigating judge was abolished in 1989 and the investigation is conducted by the public prosecutor, there is a preliminary hearing that very much resembles the role of the pre-trial tribunal in Belgium. See e.g., A Di Amato and F Fucito, ‘Italy’ in F Verbruggen and V Franssen (eds), *International Encyclopaedia of Laws: Criminal Law* (Wolters Kluwer 2016) 175-178.

¹⁵⁷ Art. 36(5) EPPO Regulation cit.

First, if the EPPO decides to prosecute, the pre-trial tribunal remains free to decide otherwise, in which case the EPPO will have to respect this decision. In this regard, there is no difference between the EPPO and the national public prosecutor's office (*supra*, III).

Second, if the EPPO decides to refer the case to the national authorities on the basis of art. 34 of the EPPO Regulation¹⁵⁸ the EDP will transfer the case to the Belgian public prosecutor's office. The latter will then take up its role within the judicial inquiry, either by preparing the final submissions or by requesting the investigating judge to conduct further investigation measures.

Finally, if the EPPO decides to dismiss the case, it should be mentioned that the grounds for dismissal of a case pursuant to art. 39(1) of the EPPO Regulation are not necessarily the same grounds for which the Belgian pre-trial tribunal may finally decide to dismiss a case,¹⁵⁹ like e.g., the dissolution of a suspect or accused legal person.¹⁶⁰ This is however not problematic since art. 39(1) refers to national law; it is thus up to the pre-trial tribunal to take the final decision on the (grounds for) dismissal.

Nevertheless, there may be some difficulties if the Permanent Chamber decides to prosecute in another Member State although the judicial inquiry took place in Belgium.¹⁶¹ Recital 78 of the EPPO Regulation is quite explicit: the EPPO Regulation, "*requires*"¹⁶² the EPPO to exercise the functions of a prosecutor, which includes [...] the choice of the Member State whose courts will be competent to hear the prosecution".¹⁶³ Hence, the EPPO Regulation could be interpreted as requiring the Permanent Chamber to decide formally on the competent Member State for trial. Member States are thus obliged to allow a public prosecutor to remove a case from the Belgian investigating judge. To solve this problem, the legislator could hold on to the same solution as the one we advise to adopt when it comes to the reallocation of an EPPO case from one Member State to another (*supra*, V.3).

V.5. THE REOPENING OF A CLOSED EPPO CASE

The second exception to the general principle that a decision taken by the EPPO cannot override the decision of a judge concerns the reopening of a closed EPPO case. According

¹⁵⁸ See also art. 57 IRP cit.

¹⁵⁹ For further analysis, see V Franssen, A Werding, AL Claes and F Verbruggen, 'La mise en œuvre du Parquet européen en Belgique: Quelques enjeux et propositions de solution' cit. 147.

¹⁶⁰ Under Belgian criminal procedure, the dissolution of the legal person does not necessarily put an end to the prosecution. Art. 20(2) Act holding the preliminary title of the Code of Criminal Procedure (*Loi contenant le titre préliminaire du code de procédure pénale*); S Van Dyck and V Franssen, 'De strafrechtelijke verantwoordelijkheid van vennootschappen: wie, wanneer en hoe?' in Orde van advocaten Kortrijk (ed), *De vennootschap in de verschillende takken van het recht* (Larcier 2013) 36-39.

¹⁶¹ Pursuant to art. 36(3) or art. 36(4) of the EPPO Regulation cit.

¹⁶² In French: "Le présent règlement fait obligation au Parquet européen".

¹⁶³ Recital 78 EPPO Regulation cit. Emphasis added. Moreover, recital 79 states that: "[t]he Member State whose courts will be competent to hear the prosecution should be chosen by the competent Permanent Chamber on the basis of a set of criteria laid down in this Regulation".

to art. 39(2) of the EPPO Regulation, the Permanent Chamber must be able to decide to reopen a case when new facts surface that were not known to the EPPO at the time of the decision to dismiss the case.¹⁶⁴

Under Belgian law, if a case was dismissed by the pre-trial tribunal or court after a judicial inquiry and new facts (called *charges nouvelles*) appear, the public prosecutor will ask the investigating judge to start a new judicial inquiry. However, at the end of this new judicial inquiry, it is up to the pre-trial tribunal to assess independently the existence of new 'charges', together with the question whether or not to refer the case for trial to the competent court.¹⁶⁵

Yet, if the Permanent Chamber decides to reopen a closed EPPO case on the basis of new facts, the Belgian pre-trial tribunal and court seem to be bound by this decision. In other words, the Belgian tribunal or court will *not* be able to assess the existence of new facts as it does in non-EPPO cases. The wording of art. 39(2) of the EPPO Regulation ("shall not bar further investigation") appears to aim at that result. While this requires an adjustment in the conduct of the proceedings, there is no need for a legislative amendment. This "conflict" between the EPPO Regulation and national criminal procedure can be solved by interpreting the Belgian criminal procedure in conformity with EU law.

VI. THE BELGIAN EPPO ACT: PRESERVING THE *STATUS QUO*

In the meantime, the Belgian legislator has adopted new legislation to implement the EPPO into the national legal order. In this Part, we will first present some key features of this new legislation and, subsequently, focus on the judicial inquiry to assess whether the law meets the concerns expressed above to ensure conformity with EU law.

VI.1. BRIEF OVERVIEW OF THE BELGIAN EPPO ACT

The most important changes introduced by the Belgian EPPO Act for the purpose of our analysis are the following.¹⁶⁶

First of all, the Belgian legislator opted to create an autonomous, stand-alone public prosecutor's office for the Belgian European Prosecutor (hereafter EP)¹⁶⁷ and EDPs, rather

¹⁶⁴ Art. 39(2) EPPO Regulation cit. and art. 59 IRP cit.; M Caianiello, 'The Decision to Drop the Case in the New EPPO's Regulation: Res Iudicata or Transfer of Competence?' cit. 194.

¹⁶⁵ Arts 246-248 CIC cit.; M Franchimont, A Jacobs and A Masset, *Manuel de procédure pénale* cit. 607-608.

¹⁶⁶ This overview does not include the legislative changes regarding the relation between the EDPs and the customs administration, which enjoys far-reaching autonomous investigation and prosecutorial powers under Belgian law. For an analysis of the concerns in that respect, see V Franssen, A Werding, AL Claes and F Verbruggen, 'La mise en œuvre du Parquet européen en Belgique: Quelques enjeux et propositions de solution' cit. 162-172.

¹⁶⁷ The EP is included as well, even though he is formally speaking part of the central office of the EPPO, presumably to ensure that he can conduct the EPPO investigation personally, in accordance with art.

than integrating them into the existing public prosecutor's offices (e.g., in the Federal Prosecutor's office, as we have proposed elsewhere).¹⁶⁸ This new public prosecutor's office is competent for the whole Belgian territory when prosecuting EPPO offences.¹⁶⁹ When conducting EPPO investigations, the EP and EDPs have the same investigation and prosecutorial powers as other Belgian public prosecutors.¹⁷⁰ Consequently, whenever a national public prosecutor needs to request the authorisation of an investigating judge, so will the EP and EDP. Furthermore, the EP and EDPs will exercise the function of public prosecutor before national trial courts.¹⁷¹

Secondly, when initiating an investigation concerning an offence that belongs to the material competence of the EPPO, the District Public Prosecutor (*procureur du Roi*), the Prosecutor General (*procureur général*) and the Federal Prosecutor (*procureur fédéral*) are obliged to inform the EDPs without undue delay.¹⁷² The specific rules for this notification will be determined in a (still to be adopted) memorandum (*circulaire*) of the College of Prosecutors General (*collège des procureurs généraux*). After the notification, the EDPs will decide whether to exercise the EPPO's competence.¹⁷³ In case of disagreement, the District Public Prosecutor, the Prosecutor General or the Federal Prosecutor can challenge the decision of the EDPs to conduct the criminal proceedings before the College of Prosecutors General, which, after consulting the EDPs and the national public prosecutor, shall decide who is competent to deal with the case. No appeal is possible against the decision of the College of Prosecutors General.¹⁷⁴ The College of Prosecutors General may, however, also decide to refer a question to the Court of Justice for a preliminary ruling in accordance with art. 42(2)(c) of the EPPO Regulation. By contrast, in non-EPPO investigations, it is up to the *Federal Prosecutor* to decide which public prosecutor's office is competent.¹⁷⁵ Unfortunately, the explanatory memorandum to the EPPO Bill¹⁷⁶ does not give a justification for this different procedure in EPPO cases.

Thirdly, and most importantly for the subject of this contribution, the Belgian legislator has chosen to leave intact the judicial inquiry when it comes to EPPO cases. That said,

28(4) of the EPPO Regulation. Nevertheless, this reference could, in our view, have been omitted as the EPPO Regulation defines the role and powers of the EP.

¹⁶⁸ V Franssen, A Werding, AL Claes and F Verbruggen, 'La mise en œuvre du Parquet européen en Belgique: Quelques enjeux et propositions de solution' cit. 151-154.

¹⁶⁹ Art. 156/1(1) Belgian Judicial Code cit., inserted by art. 3 Belgian EPPO Act cit.

¹⁷⁰ Art. 47*quaterdecies* CIC cit., inserted by art. 7 Belgian EPPO Act cit.

¹⁷¹ Art. 156/1(2) Belgian Judicial Code cit.

¹⁷² *Ibid.* art. 156/1(3).

¹⁷³ *Ibid.* art. 156/1(4), para. 1.

¹⁷⁴ *Ibid.* art. 156/1(4), para. 2.

¹⁷⁵ *Ibid.* art. 144*ter*(3).

¹⁷⁶ Explanatory Memorandum to the EPPO Bill, *Doc. Parl.*, Ch. représ., sess. ord., 2020-2021, n. 55-1696/001, 11-12.

specialised investigating judges will be designated.¹⁷⁷ The selected judges should have useful experience in investigating offences which belong to the competence of the EPPO. Unlike the EDPs, these investigating judges can still work on other (i.e., non-EPPO) cases but shall give priority to those brought before them by an EDP (or the EP if he decides to conduct the EPPO investigation himself). In the event the specialised investigating judge is legally impeded, another non-specialised investigating judge belonging to the same court of first instance can, however, take over.¹⁷⁸

VI.2. IS THE NEW BELGIAN LEGISLATION IN CONFORMITY WITH THE EPPO REGULATION?

The Belgian legislator thus agrees with our point of view that the judicial inquiry is not incompatible with the EPPO Regulation. Creating an exclusive group of investigating judges for EPPO matters was not strictly necessary; yet, it does send an important (political) signal to the EU that EPPO cases are treated as a priority and it ensures that the investigation is conducted by a judge who is familiar with the hybrid and rather complex functioning of the EPPO.

Following art. 5(6) and recital 69 of the EPPO Regulation, the Belgian investigating judge will of course have to sincerely cooperate with the EPPO.¹⁷⁹ Conversely, the EPPO is also obliged to assist the investigating judge on the basis of the principle of loyalty that applies between the EU and its Member States.¹⁸⁰ Therefore, it is of utmost importance for the investigating judge to have all relevant information at his disposal, in particular in the context of a mini judicial inquiry, in order to be able to decide whether the requested investigation measure is useful, proportionate and necessary.¹⁸¹

It is important to highlight that the choice made by the Belgian legislator to maintain the judicial inquiry (and, of course, the mini judicial inquiry, where the investigating judge only intervenes punctually, but with the possibility to take over the investigation; *supra*, III) in EPPO cases, differs notably from the approach taken by the French legislator, who decided in December 2020 that EPPO investigations would always be conducted under the authority of the EDP, thus excluding the possibility of a judicial inquiry in EPPO cases,¹⁸² and

¹⁷⁷ Art. 79 Belgian Judicial Code cit., amended by art. 2 Belgian EPPO Act cit. The designation of these judges is the responsibility of the First President of the respective courts of appeal.

¹⁷⁸ Art. 62*bis* CIC cit., as amended by art. 9 Belgian EPPO Act cit.

¹⁷⁹ Art. (5)6 and recital 69 EPPO Regulation cit.

¹⁸⁰ Case C-2/88 *Zwartfeld and Others* ECLI:EU:C:1990:440.

¹⁸¹ *Cfr* art. 30(5) EPPO Regulation.

¹⁸² Arts 696-115(2), 696-116 and 696-117 French Code of Criminal Procedure, as amended by Act n. 2020-1672 of 24 December 2020 on the EPPO, on environmental criminal law and on special criminal law (*Loi n. 2020-1672 du 24 décembre 2020 relative au Parquet européen, à la justice environnementale et à la justice pénale spécialisée*), *Journal officiel de la République française* 26 December 2020 (hereafter French EPPO Act).

the Luxembourgish legislator, who will most likely follow the French example.¹⁸³ Interestingly, though, in Luxembourg the Council of State (*Conseil d'Etat*) has rendered a highly critical opinion on the EPPO Bill, in particular because the role of the investigating judge and his relation with the EDP is not clearly defined and because the proposed legislation is difficult to reconcile with national rules regarding the judicial inquiry.¹⁸⁴ Most recently, the Spanish government approved a draft bill¹⁸⁵ which attributes to the EPPO the authority to lead the investigation and opts for a pre-trial judge (*juez de garantías*) who will authorise certain investigation measures.¹⁸⁶ If this draft bill is adopted, Spain will thus also discard the investigating judge in EPPO cases and perhaps, later on, also for all other cases. Indeed, like in Belgium, a broader reform of the Spanish criminal procedure is being prepared, including the abolition of the investigating judge in favour of a prosecutorial investigation with the punctual intervention of a pre-trial judge.¹⁸⁷ And similar to Belgium, fundamental concerns have been expressed with respect to this aspect of the reform, which affects one of the essential characteristics of Spanish criminal procedure.¹⁸⁸

While the choice to maintain the judicial inquiry is, for the reasons put forward in Part IV, reconcilable with the EPPO Regulation, the question arises whether the Belgian EPPO Act adequately addresses the concerns expressed above in Part V. Contrary to the French EPPO Act and the Luxembourgish EPPO Bill,¹⁸⁹ the Belgian EPPO Act is rather limited, thereby avoiding – quite rightly so – to repeat the provisions of the EPPO Regulation, which are directly applicable. Moreover, the Act also relies to a certain extent on further implementation by the College of Prosecutors General.

With respect to the *opening* of an *EPPO investigation*, the Belgian legislator explicitly deals with the obligation to notify the EPPO set forward in art. 24(2) of the EPPO Regulation. Whereas in our view the investigating judge could be considered a “judicial or law enforcement authority of a Member State” (*supra*, V.1), the Belgian EPPO Act allocates the

¹⁸³ Bill of 1 February 2021 on the implementation of the EPPO Regulation and amending the Code of Criminal Procedure (*Projet de loi relative à la mise en application du règlement (UE) 2017/1939 du Conseil du 2 octobre 2017 mettant en oeuvre une coopération renforcée concernant la création du Parquet européen et modifiant le Code de procédure pénale*), Ch. sess. ord. 2020-2021 n. 7759 (hereafter Luxembourgish EPPO Bill). See in particular the newly inserted art. 136-6(1) of the Luxembourgish Code of Criminal Procedure.

¹⁸⁴ Council of State, Opinion on the Luxembourgish EPPO Bill, 27 April 2021, Ch. sess. ord. 2020-2021 n. 7759/05, 6-8.

¹⁸⁵ The full text of the Spanish EPPO Draft Bill is available at: leyprocesal.com.

¹⁸⁶ Iustel, *El Consejo de Ministros aprueba el Anteproyecto de Ley de la Fiscalía Europea* (28 April 2021) www.iustel.com.

¹⁸⁷ See footnote 66.

¹⁸⁸ See e.g., L Bachmaier Winter, ‘Jueces de instrucción o fiscales’ (28 April 2020) ABC www.abc.es.

¹⁸⁹ It is worthwhile pointing out that the Luxembourgish Council of State severely criticises the approach of the government following the French example, arguing that national law should not repeat the provisions of the Regulation and only provide for further rules if the Regulation refers to national law or requires further implementation. Council of State, Opinion on the Luxembourgish EPPO Bill, 27 April 2021, Ch., sess. ord., 2020-2021, n. 7759/05, 2-3.

obligation to inform the EPPO to the public prosecutor,¹⁹⁰ even in case of a judicial inquiry.¹⁹¹ The specific rules for the notification will be further detailed in a memorandum of the College of Prosecutors General. This approach is not necessarily problematic since the public prosecutor plays an active role in the Belgian judicial inquiry and is often the party who decides to open a judicial inquiry (*supra*, III). However, if the public prosecutor for some reason would fail to inform the EPPO, the investigating judge, in our view, still has the obligation to do so pursuant to art. 24(2) of the EPPO Regulation.

In contrast, the Belgian EPPO Act does unfortunately not clarify the *relation between the EPPO and the pre-trial tribunal and court*. As explained in Part V, there are two situations where the Permanent Chamber must be able to overrule the Belgian pre-trial tribunal and court. On the one hand, there is the issue of the *reallocation of EPPO cases* to another Member State. For the sake of legal certainty, the right to a fair trial (access to a judge) and the smooth functioning of the EPPO, we proposed a procedure where the pre-trial tribunal and court would be obliged to confirm the withdrawal decision of the Permanent Chamber of the EPPO after a formal check. The Belgian EPPO Act falls short in this respect.

On the other hand, the Permanent Chamber must be also able to decide to *reopen a case* when new facts surface that were not known to the EPPO at the time of the decision to dismiss the case.¹⁹² If it decides to do so, the Belgian pre-trial tribunal and court are, in our opinion, bound by this decision. Here too, the Belgian legislator did not explicitly address the issue and decided to merely rely on the direct applicability of the EPPO Regulation and the primacy of EU law. While this approach is surely defensible, it requires national authorities (also those which are not specialised in EPPO cases) to know the EPPO procedure in order to avoid procedural mistakes.

VII. CONCLUSION

Following the analysis above, a careful reading of the EPPO Regulation does, in our view, not exclude the co-existence of the EPPO with the Belgian investigating judge in EPPO cases. The EU legislator deliberately created a margin of appreciation for the Member States. The recently adopted Belgian EPPO Act gratefully uses this margin of appreciation to avoid major changes to the way in which criminal investigations are organised under national criminal procedure at a moment where a fundamental reform of the system is in preparation. Therefore, the Belgian legislator essentially preferred a *status quo* for the implementation of the EPPO. As the above step-by-step analysis in Part V has demonstrated, only minor legislative adjustments were indeed needed for the EPPO to be able to perform its tasks in

¹⁹⁰ Art. 156/1(3) Belgian Judicial Code cit.

¹⁹¹ Explanatory Memorandum to the EPPO Bill, *Doc. Parl.*, Ch. représ. sess. ord. 2020-2021 n. 55-1696/001, 15.

¹⁹² Art. 39(2) EPPO Regulation cit. and art. 59 IRP cit.; M Caianiello, 'The Decision to Drop the Case in the New EPPO's Regulation: Res Iudicata or Transfer of Competence?' cit. 194.

the current Belgian legal system, without abolishing the judicial inquiry. Other conflicts can easily be solved by interpreting Belgian law in conformity with EU law.

To show its commitment to the EPPO project, Belgium opted for the creation of a separate public prosecutor's office, consisting in a first phase of two EDPs who will work exclusively on EPPO investigations, in combination with the designation of specialised investigating judges, who will give priority to EPPO investigations. As we have argued elsewhere, the creation of an isolated mini structure will not facilitate the integration of the EDPs in the national system, nor smoothen the cooperation with existing national authorities causing tensions between the latter and the new EU body in terms of budget, qualified police investigators and technical resources. We would indeed have preferred a more integrated approach, while safeguarding the independence of the EDPs in conducting their investigations.¹⁹³

In contrast, the designation of specialised investigating judges seems like a good middle-ground solution. Still, one might regret that the Belgian EPPO Act was formulated in a very general way and does not address some of the specific problems highlighted in Part V. Even if the issues with the hierarchical structure of the Permanent Chamber in relation with the Belgian investigating judge and pre-trial tribunal/court can be solved, to a certain extent, by the direct application of the EPPO Regulation, the Belgian EPPO Act could have brought more legal certainty by explicitly regulating them.

Meanwhile, other countries with a judicial inquiry have chosen (France), or are likely to choose (Luxembourg, Spain) a different solution and set aside the investigating judge in EPPO investigations. What will be the impact of those radical choices in the internal legal order, remains to be seen. Without a doubt, the solution opted for by those other Member States puts Belgium in a unique position, but in our view the only correct one to avoid significant internal problems which would undermine the future investigations of the EPPO.¹⁹⁴ As Bachmaier Winter rightly pointed out when referring to the problem of

¹⁹³ V Franssen, A Werding, AL Claes and F Verbruggen, 'La mise en œuvre du Parquet européen en Belgique: Quelques enjeux et propositions de solution' cit. 149-154.

¹⁹⁴ If a new set of procedural rules had been created merely for offences falling within the EPPO's competence, while maintaining the existing rules for all other offences, the question would have arisen whether the difference in treatment (different procedures and levels of protection of defence rights) between suspects in EPPO investigations (without the possibility of a judicial inquiry), and suspects in ordinary national investigations (with a judicial inquiry) would not constitute an unlawful discrimination and hence create serious constitutional problems. As explained in Part III, in recent years, the Belgian Constitutional Court has increasingly criticised the discrepancies in applicable safeguards - between pre-trial and judicial inquiries (see the references in footnote 83). Therefore, if the Belgian legislator had opted for such a set of separate procedural rules for EPPO offences, discarding the judicial inquiry, it would not have been unlikely for the Constitutional Court to annul these rules, especially because there is no explicit EU prohibition to maintain the judicial inquiry in EPPO cases. This could, consequently, have undermined a large number of pending EPPO cases. For a further analysis, see V Franssen, A Werding, AL Claes and F Verbruggen, 'La mise en œuvre du Parquet européen en Belgique: Quelques enjeux et propositions de solution' cit. 159-160.

legal transplants and the increasingly predominant model of prosecutor-led investigations: “Estar en minoría no significa estar equivocado”.¹⁹⁵

Ultimately, only the Court of Justice can provide certainty on the correct interpretation of the EPPO Regulation, either upon a reference for a preliminary ruling, or presuming the European Commission would disagree with the options chosen by the Belgian legislator, via infringement proceedings against Belgium.¹⁹⁶ But by that time, the reform of Belgian criminal procedure might be a fact, which would put a definitive end to the discussion.

¹⁹⁵ Free translation: “Being in the minority does not mean being wrong”. L Bachmaier Winter, ‘Jueces de instrucción o fiscales’ cit.

¹⁹⁶ For a more detailed analysis, see F Verbruggen, V Franssen, AL Claes and A Werding ‘Implementation of the EPPO in Belgium: Making the Best of a (Politically) Forced Marriage?’ cit.; V Franssen, A Werding, AL Claes and F Verbruggen, ‘La mise en œuvre du Parquet européen en Belgique: Quelques enjeux et propositions de solution’ cit. 159-160.

