5 Investigating and Prosecuting Criminal Activity Committed Outside the EU: The Ability of EPPO to Act and the MS of Forum

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1 Introduction

In 2017, the EU created the European Public Prosecutor's Office (EPPO) with the adoption of the EPPO Regulation (2017). The EPPO is "responsible for investigating, prosecuting and bringing to judgment the perpetrators of, and accomplices to, criminal offences affecting the financial interests of the Union" (2017, Art. 4). These financial crimes are those that are provided for under the PIF Directive (2017). The EPPO Regulation provides the various situations where the EPPO will have the competence to handle these criminal offences. Additionally, the EPPO Regulation (2017, Art. 26(4)) provides criteria on the member state (MS) of forum that must be used by the EPPO. The MS of forum is the place/jurisdiction where a person will be prosecuted in. This is especially important for the EPPO as it has no jurisdiction of its own from the EU but relies on the MS own jurisdiction.

The EPPO Regulation is not only concerned with allowing the EPPO to handle cases that take place within the MS territory but also regulates how the EPPO can handle extraterritorial criminal activity as well (Art. 23(b)-(c)). In this regard, legal research has examined how the Regulation should be understood and what this will mean for the EPPO. However, the Regulation is applied by the EPPO, not by academics. It is vital to understand how the EPPO sees its obligation under the Regulation and the impact its decision has on cases. This will be accomplished through empirical research: conducting interviews with key actors within EPPO. Therefore, how does doctrinal legal research understand EPPO obligation in extraterritorial cases compared to how the EPPO actually operates?

In order to answer this question, this chapter will examine the following: first, the chapter will provide the legal framework for this issue. This will be done by examining the EPPO Regulation and how legal research has perceived its effects on the EPPO's ability to handle extraterritorial cases. Second, the chapter will provide the methodology that was employed to gather the empirical data along

with who the respondents were for this study. The study involved interviews with core experts from the EPPO – European Prosecutor, European Delegate Prosecutor, EPPO's legal service – on how the EPPO implements the EPPO Regulation. The results of this will be presented in the results section. This will provide information on how the EPPO sees its obligation and the effects that the respondents see when understanding their obligations under the Regulation.

Following this, there will be a discussion on the difference with the analytical framework based on academic thoughts on the implication of the EPPO Regulation against EPPO's understanding. The potential effects of this on cases that could potentially be handled by EPPO will also be discussed. Thus, this chapter ultimately engages with the book's central question, 'how does empirical research help us to understand the effects of law; and how can we incorporate these findings into a general 'jurisprudence of consequences'?

2 Legal Framework

2.1 Competence of the EPPO

The EPPO is allowed to handle only cases that fall within its competence under Articles 22, 23 and 25 of the EPPO Regulation (2017). These competences are called material competence, territorial and personal competence, and exercise of competence. The condition of material competence is met whenever someone's actions satisfy the following: (a) they constitute a criminal offence according to national law, and (b) they can be genuinely linked to the definition within the PIF Directive (Brodowski, 2021, p. 146). The Regulation (2017, Art. 22) also provides that the EPPO may tackle other criminal offences; however, they must be interlinked with PIF offences and must not be related to national direct taxes.

Territorial and personal competence is present to ensure that an MS will have jurisdiction for the EPPO to operate in and also the persons who can be investigated by the EPPO. There are three factors that can be used, only one of which is needed to grant the EPPO competence (Brodowski, 2021; EPPO Regulation, 2017, Art. 23; Herrnfeld, 2021a, 2021b). The first is that the offence was committed in whole or in part within one or more MS. While this is an important component for the EPPO to gain competence, it does not apply in situations that are being examined herein, namely extraterritorial commitment of the offence. The second gives the EPPO the competence to handle cases where the suspect is a Union national of a participating MS as long as there is one participating MS that has established jurisdiction over that person. The MS of nationality does not have to be the MS that has established jurisdiction (Herrnfeld, 2021a, pp. 175-176). This could occur in situations where an MS applies their jurisdiction extraterritorially to their permanent residents, for example.

The exercise of the competence of the EPPO is the final competence criterion. This criterion is focused on ensuring that the EPPO handles the serious PIF offences, and it has two elements. The first is that the damage incurred is at least €10,000 (unless there are Union interests at stake) (Zuidema, 2023, p. 390) and the second, namely the preponderance element, is that compared to other offences the PIF offence should be the focus of the criminal activity, and the EU should be the main victim (Zuidema, 2023, pp. 390-391). This ensures that the EPPO focused on the more serious criminal activity (Herrnfeld, 2021b).

The EPPO must assess the foregoing to determine if they have competence and to initiate an investigation "in accordance with the applicable national law, [if] there are reasonable grounds to believe" that an offence within their competence has been committed (EPPO Regulation, 2017, Art. 26(1)). This means that national standards are used, which can differ between MS; this means that the same facts in different MS may result in whether reasonable grounds criteria have been met (Herrnfeld, 2021b).

2.2 MS of Forum for the EPPO

The EPPO Regulation (2017, Art. 26(4)) provides that

> a case shall as a rule be initiated and handled by a European Delegated Prosecutor from the Member State where the focus of the criminal activity is or, if several connected offences within the competences of the EPPO have been committed, the Member State where the bulk of the offences has been committed.

However, if it is 'duly justified', the EPPO may deviate from the territorial element, in the following order of priority:

(a) the place of the suspect's or accused person's habitual residence;
(b) the nationality of the suspect or accused person;
(c) the place where the main financial damage has occurred (EPPO Regulation, 2017, Art. 26(4)).

This provision is known as the MS of forum criteria (Zuidema, 2023). It is designed to resolve situations where more than one jurisdiction is applicable; in other words, if more than one MS jurisdiction applies, Article 26(4) provides the tie-breaking rule (Herrnfeld, 2021c, p. 219).

In cases that involve extraterritorial situations, the first criterion – territorial principle – is inapplicable, and instead the other criterion would play a more prominent role. Academically, we provide that habitual residency (in criminal law) occurs whenever a person becomes a permanent resident in another MS (Guild et al., 2014, p. 186), nationality is self-explanatory to those that are nationals

of an MS (Herrnfeld, 2021c, p. 223), and then financial damage. Financial damage is against the EU institutions, with the appropriate jurisdiction determined based on which institution has suffered and where it is located (Wasmeier, 2015, p. 148; Herrnfeld, 2021c, p. 223).

2.2.1 Duly Justified

The MS of forum elements above cannot be used whenever the EPPO wishes; rather, the EPPO must 'duly justify' any decision to use an MS of forum other than those where the focus of the offence has predominantly taken place (EPPO Regulation, 2017, Art. 26(4)). Herrnfeld (2021c) and Panzavolta (2018) note that various reasons may be available to the EPPO to duly justify a decision. However, there are potential concerns from Luchtman (2018, p. 158), Panzavolta (2018, p. 79) and Sicurella (2023, p. 27) that the term 'duly justified' will not prevent the EPPO from engaging in forum shopping or taking arbitrary decisions when determining the MS of forum.

2.2.2 General Interest of Justice

In some instances, there may be a requirement that a case MS of forum must be re-evaluated and changed to another MS. This is allowed under the Regulation (2017) if the case is in the general interest of justice (Art. 26(5)). Caeiro and Rodrigues (2020), Giuffrida (2017), and Panzavolta (2018) provide that the EPPO cannot claim a general interest of justice simply because it would be in the interest of the EPPO but rather that the interests of others must be taken into account. These interests are the interests of the suspected person(s), due account of the state of the investigation, and ensuring that the reallocation of a case does not prolong any proceedings. Due to the potential detrimental effects on defence, such a decision to change the MS of forum must occur as early on in the investigation as possible.

2.3 MS of Forum as a Competence Element?

Interestingly, Herrnfeld (2021c, p. 217) stated that under the EPPO Regulation, the EPPO "can only initiate an investigation if also one of the criteria set out in [Art. 26] paragraph 4 [EPPO Regulation] is [also] met". If this is the case, this would mean that even if the EPPO has competence under the EPPO Regulation, it would be unable to handle the case if an MS of forum is inapplicable. This would affect the ability of EPPO to act in these situations and potentially cause persons suspected of criminal conduct to be outside the reach of the EPPO.

3 Data and Methodology

To answer the various questions, this chapter employs both doctrinal legal research methods and empirical legal research methods. The doctrinal legal research method is primarily based on the literature; it relies on how doctrinal legal research has answered these questions or the issues that have been raised. While case law is a valuable resource, to date only one case has been issued involving the EPPO itself, *GK and Others* (*Parquet européen*), which is outside the context of this research. The empirical legal research method consists of semi-structured interviews conducted, with key actors working at the EPPO. The empirical work will examine how the EPPO understands the terminology and whether this is similar to that found in legal research – as illustrated by doctrinal legal research within the legal framework presented previously.

Qualitative semi-structured interviews with key actors. This method allows the researcher to obtain in-depth information about the research topic based on the respondents' experience and expertise (Geertz, 1973; Hennink et al., 2020, p. 10). Furthermore, it allows the researcher to engage with and ask clarifying or follow-up questions based on the respondents' answers, unlike structured interviews that are predetermined (Ruslin et al., 2022). As is often customary in semi-structured interviews, the questions put to the respondents were open-ended. Such questions allow the respondents to share their perspectives, an exercise that was supported by active listening and probing by the researcher to explore relevant issues that arose during the interview based on inductive interpretation (Hennink et al., 2020, pp. 23, 128, 131-132).

The respondents were chosen using the purposive sampling method. This method, also known as judgment sampling, is a means of selecting respondents for an interview. It is a non-random selection of persons, based on what the researcher wishes to know and thereby selects the individuals who "can and are willing to provide the information by virtue of [their] knowledge or experience" (Campbell et al., 2020, pp. 653-654; Etikan et al., 2016). Thereby, this method was employed to ensure that the chosen respondents had the required qualities, knowledge and expertise that will produce useful and valuable information (Campbell et al., 2020, pp. 653-654; Hennink et al., 2020, p. 92; Kelly, 2010). The interview questions were based on two central themes: how the EPPO determines when it has the competence to handle an investigation and how the EPPO determines the MS of forum. The selected respondents work directly on these issues, either as prosecutors or as legal advisors for the EPPO.

The *verstehen* perspective was employed to understand the terminology from the three respondents' viewpoints and experience and the meaning they assign to them. Instead of adopting a purely positivistic view that treats subjects as mere objects of study, this research embraces an interpretivist perspective, which acknowledges that while individuals are shaped by their environments, they

also actively construct these environments through their interpretations of them (Hennink et al., 2020, pp. 11, 17-18; Webley, 2010, pp. 930-931). Thereby, the persons interviewed provide meaning and context to their environment, allowing for an in-depth understanding of how they interpret and navigate it.

The question then turns to a simple issue: what qualifies the person interviewed to provide an understanding of the terminology under review and give meaning to it? Respondent 'Holden' is a European prosecutor, and in this capacity the respondent is *ex officio* a member of the College of the EPPO, which provides oversight over EPPO prosecutorial tasks and guidelines on the implementation of the EPPO Regulation. Additionally, 'Holden' is a member of at least one Permanent Chamber, whose task is to oversee and direct European delegated prosecutors' (EDPs') criminal investigations with the Chamber having a direct obligation to use and understand the terminology under review (EPPO Regulation, 2017, Art. 26(4)-(5)). Likewise, respondent 'Avasarala' is a European delegated prosecutor. The task of an EDP is to conduct criminal investigation and prosecution for the MS in their respective MS (EPPO Regulation, 2017, Arts. 26-28, 36). The EDP also has the ability to directly use the additional criteria for choosing an MS of forum, and the EDP works with the Permanent Chamber whenever a decision is taken on potentially reallocating a case or merging/splitting a case (EPPO Regulation, 2017, Art. 26(4)-(5)). Finally, respondent 'Drummer' is a member of EPPO's Legal Service. The Legal Service

> has a horizontal role within the organisational structure of the EPPO, providing legal advice to the College, the European Chief Prosecutor, the European Prosecutors ... on the interpretation of the legal framework under Union law regulating the activities of the EPPO. (EPPO Annual Report 2023)

Within the study, it can be noted that there are only three persons partaking: 'Holden', 'Avasarala' and 'Drummer.' While this may seem to limit the applicability of the study due to their limited number, the persons selected for the study are the primary persons who must apply the EPPO Regulation and its effects on MS of Forum choice. They are hence the core experts, best suited for determining how the EPPO will act. They are the decision makers. During the interview, respondents also freely explained when their answer was based on how the EPPO has acted versus their own beliefs – based on the experience working at EPPO – regarding how the EPPO would act.

The respondent's participation within the study was entirely voluntary. The respondents were informed that if they desired, they would be able to refuse to answer questions or withdraw from the study at any moment and would not be required to provide a reason to use this right. This publication was also sent to the respondents to ensure that any statements or quotes used therein correctly reflect what they shared during the interview. This also allowed the

respondents to clarify or correct any misunderstandings within their responses. To ensure the confidentiality and anonymity of the respondents and the data, all of the respondents' personal information has been stored in a separate password-protected platform away from the respondent's responses. The respondents' responses do not contain any identifiers that could link the data back to them. Only the author and the research team had access to the research data. The research team consisted of the author's supervisors and one student assistant. Every respondent was informed about their rights on data protection, confidentiality and anonymity, and General Data Protection Regulation (GDPR) guidelines were followed. Additionally, permission to record the interviews was also requested and granted by the respondents. The respondent's rights and the purpose of the study were given to each respondent and the respondent was required to sign a written consent form, a copy of which was provided to the respondents.

It should be noted that this study took place after the EPPO had been in operation for only one year, having commenced operations on 1 June 2021. This means that EPPO's understanding of its obligations may have changed. Likewise, not every area of interest was fully covered –for example, the meaning of bulk or focus under the Regulation – hence the study's limitation to extraterritorial issues. It would be advantageous for the study to be repeated, first to ascertain whether the EPPO sees its understanding differently and, second, to expand the study to include elements that were not reviewed.

4 Results

4.1 Competence of the EPPO

The EPPO requires that it has competence under the Regulation and that there is a MS with jurisdiction. After all, as Holden notes, "[If] there's no MS with jurisdiction, you cannot exercise competence"; likewise, they state that "[If] a MS has jurisdiction, if it is a PIF crime, I don't see how we can reject the case". This shows the interlink between the two elements. First, all the competence requirements under the EPPO Regulation must be met, and there must also be a MS that has established jurisdiction over these criminal acts. When the EPPO is deciding whether it has competence, Holden provides that

> the rules for competence are constantly saying according to its transposition to the national rights. So, it might vary a bit from country to country, but in any case, we will have to look at the criminal activity as a whole … We will have to in certain cases, to sum up the whole criminal activity, because you might have part of the criminal activity in Portugal, part of it in Germany, but it's the same criminal activity. Borders do not change what humans can do. In these cases, and mostly in the VAT fraud cases, we put this together. Because it's one activity split according to several countries.

Holden, along with Drummer, noted that this application is due to the EPPO being a single office, which is not 'bound by the borders of the MS' when determining whether it is competent. Holden further elaborated that individual EDP may determine that – while the MS may have jurisdiction – elements of the competence criteria are not met. However, the Permanent Chamber overseeing the case will be able to see the complete picture.

Avasarala concurred that the Permanent Chamber's role is to oversee the EDP's and inform him if he must investigate. However, Avasarala did provide that they will inform the Permanent Chamber when their national law lacks jurisdiction. Holden noted that in such cases the Permanent Chamber will have the EDP "go in with the investigation, [but] when you write the indictment" you handle the part applicable to your MS.

However, while competence and MS of jurisdiction seem to be separate issues when determining whether EPPO has competence, the EPPO must ensure that an MS has established jurisdiction "because in the end, you will bring the case to a national court, so you will have to comply with the national rules". Avasarala highlighted this element, that they have to decide

> Well am I competent? Is my court competent? So, from the beginning on, I have to look, can I find some offence in my own legislation that I can put forward to my judge? And when I do, will the judge say, well, I am competent to judge that? Because if not, then I would have to say, well, you can appoint me, dear Permanent Chamber, but I'm going to give it back because I am not competent in any other country, and for my own court, I will not be competent and I cannot investigate something that is not an offence in [my MS].

Therefore, the EPPO determines competence on two fronts. The first is the criminal activity within the scope of what the EPPO was created for: Avasarala noted, "[W]e are in place for the EU budget, to protect the EU budget. So, this is … why we exist." At the same time, is there an MS(s) that has jurisdiction of these alleged offences and persons? Only if both the elements are present can the EPPO act.

When the EPPO is assessing the above, the EPPO does not necessarily need to know for certain that all the elements are present but is satisfied merely with knowing that there are reasonable grounds that they are. Drummer and Avasarala provide that the test of reasonable grounds is done based on what national systems determine is reasonable to open an investigation, since the case is investigated/ prosecuted within the national court system. Avasarala further provided that the national judge will decide whether this standard is met, and regardless of what the EPPO believes, it is the national law that determines whether that has been met. Reasonable grounds are a national standard. Drummer notes that this could be a "source of fragmentation among the MS because it is essentially a test of national law" when the EPPO would have met this requirement. The EPPO must "trust on what [they are] told and then you just need to have reasonable grounds to believe

that things are this way" (Holden). As the investigation continues, it provides a clearer picture of whether the EPPO can continue, since 'your competence depends' on it.

The consequences of not knowing whether EPPO's competence is met, or whether it is reasonable to assume it is, is that the EPPO cannot act (Avasarala). Holden notes that this does not automatically mean that the case is ignored. It depends on the reason. In situations where the facts of the case are unclear – to the point where it is unreasonable to assume the EPPO will have competence – the case must remain with the national authorities:

> You can always leave the case with the national authorities until the amount of the damage is more quantified. And actually, this is an experience that we have in the Permanent Chambers. Sometimes the case is not evoked because the amount of the damage is totally unknown [competence requirement]. So, we do not evoke, and we ask the national authorities to refer the case back to us when they have more information.

Thus, while the EPPO may not have reasonable grounds to believe that its competence is present, this can always be reassessed after more information can be provided from a national investigation (Drummer). Additionally, Holden reflected that when a case is sent to the EPPO via whistleblowers or private persons, they would also send it to the national authorities if the situation were not clear.

> In this case, we would just send the case to the national authority saying that, "well, we have nothing on which we can ground our exercise of competence, so you take it."

However, Drummer provides that if a case is referred to the national authorities from whistleblowers, then it may be the "death of a case because they are not too interested either and don't start digging, so we never see the case again". Holden notes that "[it] could happen, but it's the risk".

However, there are situations where the EPPO lacks competence. Holden recalled a case they had overseen:

> There was a crime committed in a third country with no connections, the guy was a local from that country. It was misappropriation of EU funds, and we considered that the jurisdiction was Belgian. Luckily, for this guy, the kind of contract he had with the commission do not qualify him as a Union staff. So, we just referred the case back to the Belgian authorities.

Holden elaborated that the EPPO Regulation does not allow the EPPO to have competence for criminal activity committed abroad for those who are not EU staff, even if they work with the EU. This issue can arise when handling extraterritorial cases, where only some persons are covered. This means that the EPPO is strictly

bound to the Regulation (Drummer). The consequences of unclear situations or persons not being within EPPO competence is that the EPPO cannot act.

However, when the EPPO does have competence, there is a need to determine the MS of the forum to handle the case in. Both Holden and Avasarala conveyed that Article 23 (EPPO Regulation, 2017) is used to both see if there is competence and provide the EPPO with potential MS of forums. This is important in extraterritorial cases, as MS laws do not apply to every person who commits the offence in general (Avasarala). Avasarala further provided that in cases where more than one jurisdiction is available, according to Article 23, the rules under Article 26 are used to determine where the EPPO goes.

4.2 MS of Forum Rules for the EPPO

Under the EPPO Regulation (2017), the EPPO is limited to choosing an MS of forum to territory, the habitual resident of the suspect, the nationality of the suspect or where the financial damage occurred (Art. 26(4)). Drummer explained that territory is the primary starting point for the EPPO and described the other criteria as 'fall back criteria' that the EPPO has whenever territory is either not enough or inappropriate as an MS of forum. Whether a situation is extraterritorial will depend on the MS, as the meaning of territory within the EPPO Regulation is determined by national law (Avasarala). Therefore, where a case is extraterritorial depends on the MS. However, regardless of how territory is defined by the MS, this article focuses on situations that involve acts that cannot be considered to have been committed on the MS territory.

Therefore, the EPPO would have to make use of the other criteria provided for under the EPPO Regulation, such as habitual residence, nationality or where the main financial damage has occurred. Habitual residence and nationality were not discussed with the respondents as I found them to be self-explanatory. Additionally, the Court of Justice has already determined that a person is a habitual resident (for criminal law) when they are a permanent resident (C-123/08 *Wolzenburg*, ECLI:EU:C:2009:616, paras. 66-74), whereas the nationality of a suspect is simply the MS where a person is a citizen. Main financial damage, however, was discussed with the respondents.

The extent of financial damages under Article 26(4)(c) EPPO Regulation (2017) is a very broad criterion for the EPPO (Drummer). However, its use is only as a 'fall-back criterion' by the EPPO. The reason for its broad application is that the nature of the crimes EPPO has competence for (PIF-offences) requires that Union money is at stake (Avasarala). As the Commission (and other Union institutions) is located in Brussels, this means that Belgium is theoretically always an MS of forum of last resort under the MS of forum criteria, according to Holden. Therefore, if Belgian jurisdiction can apply to the person, the case can be handled in Belgium under the EPPO Regulation.

4.2.1 Duly Justified

When the EPPO decides to deviate from the territorial principle, which is needed in extraterritorial cases, they must duly justify their decision. While this must be applicable in cases that occur extraterritorially, Drummer provides that the EPPO has to duly justify its decision when they move down the list. Additionally, these criteria are not weighted by the EPPO; it is required to strictly follow the list in order. In order to look at other criteria, however, the EPPO is required to duly justify its decision.

Holden strongly explained that duly justify is meant to prevent two things – arbitrary decisions or engaging in forum-shopping. This is the main role it plays in determining the MS of forum. Holden elaborated the difference between justifying a decision (generally) and duly justifying a decision under the EPPO Regulation. They provided that it would be possible for someone to justify an arbitrary decision or choice to use forum-shopping, 'but not duly justify' that decision. The element of duly justifying is what prevents those types of decisions from taking place.

Holden, Avasarala, and Drummer provided different reasonings that would meet the standard of 'duly justified': interest of the case, interest of the victim, protecting the EU budget, etc. Avasarala further explained that a decision is duly justified whenever the EPPO is unable to handle a case in a MS jurisdiction even though the MS of forum rules state that the case should go there: for example, the MS of forum rules provide that the case should be where the accused has permanent residency (for an act committed abroad), but that the MS lacks jurisdiction over that person. The EPPO is unable to handle the case in that MS as that MS lacks jurisdiction. Therefore, the EPPO must 'move on' to another criterion. Rather, duly justified requires, according to Holden and Avasarala, that the EPPO is able to provide good reasons to the court that they came to a certain conclusion on the MS of forum, while at the same time ensuring that those decisions are not based on forum-shopping or taken arbitrarily.

4.2.2 General Interest of Justice

However, there may be a requirement that the EPPO must redecide on the MS of forum since 'the risk would be to have an unfair outcome in some way', according to Drummer. This is the meaning of the term 'in the general interest of justice': the requirement that must be met for the EPPO to re-decide the MS of forum. Holden underlines that the ability to re-decide the MS of forum is important, as restricting this ability can lead to improper decisions and be detrimental to uncovering the truth. Furthermore, Avasarala provided that the general interest of justice takes a holistic view of the total case, the 'whole package'. When deciding the need to redecide the MS of forum, the EPPO examines the interest of not only the defendant but also of society, the victims, and general deterrent behaviours. There is a need to allow the MS of forum to take place "because the truth is important,

what happens to society is important, what happens to the victim is important, [and] what happens to the defendant is important" (Avasarala). Thus the ability to change jurisdiction is not about allowing the EPPO an advantage, but to ensure that justice prevails.

However, this then brings up the question of when and how the EPPO can actually change the MS of forum. As already noted, the various interests and the need to ensure justice is the main reason why the EPPO should consider a new MS of forum. Unlike duly justified, the EPPO would have to reason more profoundly in order to evoke the general interest of justice requirement (Holden). Holden and Drummer provide that the EPPO should generally stay with the chosen jurisdiction; however, if the reason or interest at stake would harm justice, then a change in the MS of forum is required in order to prevent a miscarriage of justice. Thereby, the respondents have indicated that while many issues may arise that could be used to argue to change the MS of forum, the EPPO must ensure that these reasons have a strong impact on the general interest of justice rather than minor issues.

4.3 MS of Forum as a Competence Element?

Herrnfeld (2021c) had stated that even if EPPO had competence, the EPPO must ensure that the jurisdiction meets one of the criteria under the MS of forum rules under Article 26(4) (EPPO Regulation, 2017). Herrnfeld wrote that this may be difficult to achieve in cases where there is universal jurisdiction by an MS. However, while the EPPO has competence, none of the MS of forum rules seem to apply.

To tackle this matter, I had asked the respondents the following hypothetical case about an Irish national who is subject to the Staff Regulation of the EU and who works for the European External Action Service (EEAS). However, when not abroad for the EEAS, he lives in Ireland. If this national commits a PIF offence abroad while employed by the EEAS, would the EPPO have jurisdiction and, if so, which MS of forum to prosecute in? Belgium authorities have ensured that any person subjected to the Staff Regulation or to the Conditions of Employment (Art. 23(c)) can be investigated and prosecuted under Belgian criminal law (*Voorafgaande titel van het Wetboek van Strafvordering*, Arts. 10ter(4) & 12bis).

When addressing this issue, Holden verified that the EPPO competence criteria are fulfilled, since the EPPO can act only if they have competence. In particular, it was clarified that the person is covered under Belgian law, thereby providing the necessary jurisdictional element. In this situation, both Holden and Avasarala provided that "if it is a PIF crime, I don't see how we can reject the case". Their focus was on whether my example fulfilled the jurisdiction element under Article 23. If jurisdiction was fulfilled, then the EPPO would have the duty to take the case and act.

As Holden and Avasarala had stated, the EPPO is involved only with PIF offences, which are offences against the EU budget. The EU budget is in Belgium (Holden and Drummer). Drummer elaborated that the EPPO can handle cases in Belgium due to the broad application of the meaning of main financial damage – which is the EU budget by the Commission. In fact, Drummer notes that financial damage is used by EPPO whenever a case involves third states (non-participating MS or non-EU states), as the other forums are generally unavailable. However, it was made clear that just because there is a broad application of main financial damage, it does not mean that the EPPO can automatically use Belgium as a jurisdiction. Rather, the other MS of forum criteria must be checked, and only if it is possible to duly justify the decision can the EPPO use this criterion. This means that according to both Holden and Drummer, the MS of forum rules do not prevent the EPPO from acting, since the limitations of Article 23 EPPO Regulation (competence criteria) would be a hindrance rather than the MS of forum rules. In other words, MS's may not have established jurisdiction, or the person accused of the crime is listed under Article 23 (EPPO Regulation, 2017).

Avasarala, however, had a different perspective on the issue. While Avasarala stated, throughout the interview, that in order for the EPPO to act it must have competence, MS of forum rules are required only when there is more than one MS that has jurisdiction. The MS of forum rules are, as Avasarala stated, meant to resolve conflicts between various applicable jurisdictions, as allowed by Article 23, that could be chosen. This also means that if there is only one jurisdiction available, this is the jurisdiction the EPPO will handle the case in.

5 Discussion

5.1 Competence

Within the literature, it is understood that the EPPO must have the competence to handle a case. This was stated by the respondents throughout the interviews. The EPPO is limited in its scope to those offences provided for by the EPPO Regulation and are capable of being investigated and charged under national law. It was expected that the EPPO obeys the law; however, it is always important that this is checked. After all, it could have been that the EPPO had a different understanding. An interesting element from the findings is the way in which the EPPO determines whether the conditions to have competence are met. The respondents review the entire criminal activity, across the MS and elsewhere, to see if all the competence elements are present, and then have the EDP handle parts of the criminal activity that can be done within the EDP MS.

The findings have shown that there are issues when EPPO is verifying whether it can investigate criminal activity. Reasonable grounds criteria have a reliance on national law, which can cause fragmentation on when the EPPO can act in different

MSs. Likewise, if the EPPO is unable to show reasonable grounds, the case must be returned to the national authorities which can have effects on the case. Depending on whether the national authority wishes to investigate further, their decision can affect whether the EPPO will ever get the case again. For example, if there is unknown information – that if the EPPO knew would mean they could investigate – and the national authority refuses to investigate further, this information will not become available. This would prevent the person committing the offence from facing justice.

Tied in with the issue of competence is the fact that the EPPO, while responsible for tackling offences against the EU budget, is limited in extraterritorial cases. The EPPO has the ability to handle those cases only if the person committing the offence is either a Union citizen from a partaking MS or EU staff. This causes an effect, as the foregoing example showed, that persons who commit these offences abroad cannot be investigated by the EPPO. While it is possible for another state to potentially handle the case, the EPPO is unable to. This situation will hold true even if MS had established universal jurisdiction over PIF offences, as this limitation is not based on national law, but on the EPPO Regulation. Additionally, they must ensure that national law provides them with a basis for handling the case. It is up to the national judge to decide whether they agree with the EPPO that there is jurisdiction. The consequences of not having jurisdiction or competence are that those who potentially commit PIF offences may not be investigated or prosecuted.

5.2 MS of Forum

Just as in academic work, the respondents provided that the EPPO must apply the rules of MS of forum in strict order. While there are academics who worry that the EPPO would still be able to engage in forum-shopping or take arbitrary decisions, as duly justified may not provide the guarantees necessary to prevent this, the respondents disagreed. Rather, what was shown was that the purpose of the term 'duly justified' was to prevent forum-shopping and arbitrary decision-making by the EPPO. According to the respondents, this was the term's main purpose. Additionally, the respondents provided various reasons that could be used to duly justify a decision, similar in nature to what was proposed in the literature. The EPPO takes the stance that the MS of forum is changed only when absolutely necessary, and that, in general, a case must remain in the MS chosen, unless there are overriding reasons to change the MS of forum, as discussed previously.

5.3 MS of Forum as a Competence Element

The interesting element (compared to the literature) is how the respondents reacted to the question of whether the EPPO is prevented from having competence

if only the MS of forum criteria are unfulfilled. The prosecutors are adamant that if EPPO has competence, they are obliged to take the case and act. This implies that the MS of forum rules cannot and will not prevent the EPPO from having the competence to act. The MS does not have the jurisdiction (a competence criterion) to prevent the EPPO from acting. Drummer highlighted that there would never be a situation where this could occur. As noted by the other respondents, in extraterritorial cases only those persons who are Union citizens or EU staff are covered if there is also an applicable jurisdiction. Union citizens should be covered by their own national law already (PIF Directive, 2017, Art. 11(1)(a)), and EU staff, as a jurisdiction of last resort, is in Belgium. This is because Belgian law provides jurisdiction over EU staff and the main financial damage will always be felt in Brussels, as this is where the EU budget is from. Therefore, if the EPPO has competence – meaning that the case took place on an MS territory (no issue) or by one of the two categories of persons listed – the EPPO will fulfil the MS of forum elements anyway. Therefore, there is no tension.

However, Avasarala had another view, namely that if the EPPO has competence and there is only one MS with jurisdiction, then the MS of forum rules do not need to be applied. Avasarala's view was very practical, as the EPPO need only ensure that it has competence and determine which MS that competence can be exercised in. If this means more than one MS, then determine the correct one based on the MS of forum rules, and if there is only one MS there is no need to make that determination. Interestingly, the way the EPPO is structured based on competence and the broad application of main financial damage means that the MS of forum rules will always be upheld. Take, for example, EU staff. Belgium has ensured that its jurisdiction applies to EU staff. This means that if an EU staffer commits a PIF offence, Belgian law applies. Also, Belgium is where the main financial damage is always felt. If there is only one MS with jurisdiction, that jurisdiction is Belgium. This fits within the MS of forum rules.

Likewise, if the offence is by a Union citizen and there is only one jurisdiction available, this should be the MS whose citizen has committed the offence. This fulfils the MS of forum rule Article 26(4)(b). Finally, if the EPPO has competence as the offence took place in whole or in part on an MS, and only one MS has jurisdiction, this fits within the MS of forum criterion. This is because the very first criterion is that cases are handled in the territory of the MS where the offence predominantly took place. Therefore, Avasarala's understanding does not negate that the MS of forum rules are unfulfilled but that it is automatically determined as it is the only jurisdiction.

6 Conclusion

This study examined the difference between how doctrinal legal research understands the EPPO obligation in investigating and prosecuting extraterritorial

cases under the EPPO Regulation versus how the EPPO key actors understand their obligations in such cases. This study has highlighted the importance of conducting empirical research, including the consequences deriving from it. The study highlighted the similarities and difference between what is understood within legal research versus practice. Elements from the respondents showed that their understanding of how to implement the Regulations are the same as how academics understand it. The limitations provided by the EPPO Regulation do prevent the EPPO from investigating some PIF offences. This is interesting as the purpose of the EPPO is to handle that type of cases.

A rather interesting element was the concern that academics had in regard to the application by the EPPO of the MS of forum criteria. As noted, the EPPO finds that the main purpose of the rules and standards within the MS of forum is to prevent an accused from being subjected to forum-shopping or arbitrary decision-making by the EPPO. The EPPO knows of the effects those types of decisions can have and that the purpose of duly justified is to prevent them from taking those types of decisions. Additionally, while academics have wondered if there will be issues that can arise with EPPO being unable to determine an MS of forum based on the Regulation, the EPPO does not see this as a factor. Rather, it is the limitations within their competence that prevent the EPPO from acting (lack of an MS with jurisdiction or person accused is not covered by the Regulation). This is not, nor will be, an issue of applying the MS of forum rules. However, according to the prosecutors, 'if it is a PIF crime, I don't see how we can reject the case'.

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