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No Case to Answer for the European Public Prosecutor Under the European Convention on Human Rights? Considerations on Convention Liability for Actions of the European Public Prosecutor's Office

Johan Callewaert

ABSTRACT
The hybrid EPPO structure is operating under a hybrid set of fundamental rights, thus calling into question the well-established principle of the single set of norms applicable throughout criminal proceedings. Moreover, the system is characterized by a distortion of the commonly applied logical link between liability for violations of fundamental rights and control over the actions entailing those violations. EU Member States risk being held accountable under the Convention for actions on behalf of the EPPO which they did not fully control and which were subject to a different corpus of fundamental rights. The EU, for its part, takes the risk of seeing EPPO prosecutions being invalidated by domestic courts applying a Convention protection level which may be higher than the Union level. The only way to minimize the impact of these distortions is for the EU to become a Contracting Party to the Convention, along with its own Member States. This would do away with the ambivalence of the legal framework characterizing the protection of fundamental rights under the EPPO Regulation. It would also contribute to a better implementation of the principles of the rule of law and procedural fairness, advocated by the Regulation itself. Such a move would seem all the more important in light of the fact that if the EPPO proves successful, its competence might be extended in the future to other areas.

RESUME
Doté d'une structure hybride, le Parquet européen opère sur la base d'un ensemble hybride de droits fondamentaux, ce qui bat en brèche le principe bien établi selon lequel les procédures pénales doivent obéir tout au long de leur déroulement à une corps unique de normes. Le système se caractérise en outre par une distorsion du lien logique communément appliqué entre la responsabilité pour les violations de droits fondamentaux et le contrôle des actions ayant conduit à ces violations. Les Etats membres de l'UE risquent de voir retenue leur responsabilité conventionnelle pour des actes qui ont été accomplis au nom et pour le compte du Parquet européen mais dont ils n'avaient pas la pleine maîtrise et qui étaient régis par un corpus de droits fondamentaux différent. L'UE, pour sa part, prend le risque de voir des poursuites du Parquet européen invalidées par des juridictions nationales appliquant un niveau de protection conventionnel supérieur à celui du droit de l'Union. La seule manière de réduire l'impact de ces distorsions consiste pour l'UE à devenir Partie contractante à la Convention, au même titre que ses Etats membres. Cela écarterait l'ambiguïté du régime prévu par le Règlement sur le Parquet européen en matière de protection des droits fondamentaux. Cela contribuerait aussi à un meilleur respect des principes de l'Etat de droit et de l'équité procédurale reconnus par le Règlement lui-même. Un tel développement apparaît d'autant plus important à la lumière du fait que si le Parquet européen se révèle être un succès, ses compétences pourraient se voir étendues à l'avenir à d'autres domaines.

KEYWORDS :
European Public Prosecutor's Office; European Convention on Human Rights; European Union; Member States; Equality before the Convention; Attribution; Liability

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Johan Callewaert*

1. INTRODUCTION: A NEW EU OFFICE IN A NOVEL LEGAL FORMAT

On 28 September 2020 the European Prosecutors and the European Chief Prosecutor gave solemn oath before the Court of Justice of the European Union (CJEU), marking the start of the activity of the newly created European Public Prosecutor's Office (EPPO) seated in Luxembourg. The EPPO is an independent and decentralised prosecution office of the European Union, with the competence to investigate, prosecute and bring to judgment the criminal offences defined in Directive 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law (the PIF Directive). Regulation 2017/1939 establishing the European Public Prosecutor's Office (the Regulation) under enhanced cooperation was adopted on 12 October 2017, pursuant to Article 86 TFEU, and entered into force on 20 November 2017. At this stage, 22 EU Member States are participating.[1] This new office was created with a view to enhancing the effectiveness of the fight against fraud to the Union's financial interests, which previously was exclusively within the remit of the Member States and proved deficient, notably in cases of cross-border offences.

Many things have already been said about the EPPO and its novel, hybrid structure combining European and national elements.[2] Strangely enough, though, one aspect seems

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[1] https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/networks-and-bodies-supporting-judicial-cooperation/european-public-prosecutors-office_en (last consulted on 24.2.2021).

[2] Among many others, see Morgan Bonneure and Michaël Fernandez-Bertier, "Habemus executorem! La création du parquet européen", Journal de droit européen, 2018, p. 42 ; Chloé Brière, "Le parquet européen: analyse critique d'une réussite tempérée par d'importants défis à relever", Cahiers de droit européen, 2019, p. 149; Constance Chevallier-Govers and Anne Weyembergh (edit.), "La création du Parquet européen - Simple évolution ou révolution au sein de l'espace judiciaire européen ?" , Bruxelles, Bruylant, 2021 ; Hélène Christodoulou, "Le parquet européen à l'origine de la mutation de la procédure pénale nationale", Dalloz Actualité (https://www.dalloz-actualite.fr), 27 February 2020 ; Peter Csonka, Adam Juszczak and Elisa Sason, "The Establishment of the European Public Prosecutor's Office", eucrim 3/2017, p. 125; Francesco De Angelis, "The European Public Prosecutor's Office", eucrim 4/2019, p. 272 ; Katalin Ligeti and Vanessa Franssen, "Le contrôle juridictionnel dans les projets de parquet européen", in : Geneviève Giudicelli-Delage, Stefano Manacorda and Juliette Tricot (dir.), "Le contrôle judiciaire du parquet européen – néccesité, modèles, enjeux", Société de législation comparée, Paris, 2015, p. 127 ; Alexandre Met-Domestici, "The

to hardly have received any attention so far, which is the extent to which the European Convention on Human Rights (the Convention) might, or not, apply to it and the consequences which this would entail. This is all the more surprising in view of the importance of respect for fundamental rights in this area, as reflected by the chapter devoted to procedural safeguards in the Regulation, and of the involvement of the national authorities in the operation of the EPPO, which are in principle subject to the Convention. Will these authorities remain such, or will they escape Convention liability when working for the EPPO ? And how about the Convention in relation to the EPPO itself ? What will be the overall impact of this novel legal set-up on the applicable fundamental rights and on Convention liability ? These are some of the questions which this paper endeavours to answer.

2. THE PROBLEM: NO EQUALITY BEFORE THE CONVENTION BETWEEN THE EU AND ITS MEMBER STATES

The origin of the problem lies with the different status which the EU and its Member States have under the Convention, which results from the fact that while the EU is not a Contracting Party to the Convention, all its Member States are. Consequently, the EU cannot be held accountable in Strasbourg for acts of its institutions and assimilated bodies.[3] By contrast, legal acts performed by EU Member States applying Union law come within the scope of the Convention and can give rise to adjudication by the European Court of Human Rights (Court).[4]

EU Member States indeed remain liable under the Convention for any acts performed under Union law. This is a direct consequence of the principle according to which the responsibility of the Contracting States to the Convention extends to their entire jurisdiction within the meaning of Article 1 of the Convention.[5] In respect of the EU Member States, this also includes Union law as part of their respective domestic legal systems.[6] Thus, the creation of the EU[7] did not remove the responsibility of the Member States under the Convention for their application of Union law. Rather, since the Member States did not withdraw from the Convention when creating or joining the EU and, consequently, remain bound by it, they also remain under a Convention obligation to apply Union law in a manner which is compatible with the Convention. As the Court stated in *Bosphorus*, EU Member

Hybrid Architecture of the EPPO", eucrim 3/2017, p. 143 ; Ante Novokmet, "The European Public Prosecutor's Office and the Judicial Review of Criminal Prosecution", New Journal of European Criminal Law, 2017, p. 374.

[3] ECHR 18.2.1999, Matthews v. the United Kingdom, 24833/94, § 32; ECHR 30.6.2005, Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland ("Bosphorus v. Ireland"), 45036/98, § 152. On this judgment, see Florence Benoit-Rohmer, "A propos de l'arrêt *Bosphorus Air Lines* du 30 juin 2005 : l'adhésion contrainte de l'Union à la Convention", Revue trimestrielle des droits de l'homme, 2005, p. 827.

[4] See, among many others, ECHR 21.1.2011, M.S.S. v. Belgium and Greece, 30696/09; ECHR 23.5.2016, Avotiņš v. Latvia, 17502/07.

[5] ECHR 18.2.1999, Matthews v. the United Kingdom (cited above), § 29; ECHR 30.6.2005, Bosphorus v. Ireland (cited above), § 153.

[6] See e. g. ECHR 15.11.1996, Cantoni v. France, 17862/91, § 30.

[7] The reference to the EU here includes all its predecessor organisations.

States are considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention.[8] By contrast, the EU having its own legal personality[9], it is not subject to the Convention as long as it does not formally accede to it.

The rule according to which Member States engage their own responsibility under the Convention when applying Union law stems from the consideration that when doing so, they act on their own behalf, not on behalf of the EU, regardless of the fact that by fulfilling their obligations under Union law, the Member States also serve the interests pursued by the EU in the field of international cooperation and European integration. They nonetheless retain control over the decision-making process leading to their actions and over their execution, which is why these actions come within the scope of their own jurisdiction for the purposes of Article 1 of the Convention.

This approach, however, might not fit with the EPPO, given the novelty of its hybrid structure combining centralised EU and decentralised national components, thus raising new questions as to the respective Convention liabilities for EPPO actions and as to how to determine them. The novelty of this format indeed lies in the fact that while the functioning of the EPPO relies in several different ways on the activity of domestic authorities, this activity can no longer be automatically considered as being performed on behalf of the Member States concerned since, in contrast with most applications involving Union law before the Strasbourg Court so far, it is being performed as an inherent part of the operation of an EU body controlling large parts of that operation on the ground.

The question therefore arises as to how to go about this new form of cooperation between the EU and its Member States under the Convention. This comes down to asking whether legal acts performed in this context by domestic authorities are to be considered, from a legal point of view, as being performed by the EPPO itself or by the national authorities cooperating with the EPPO. In other words, are EPPO actions attributable to the Member States or to the EU ? Or to both ?

Indeed, as matters currently stand, only the Member States and not the EU are Contracting Parties to the Convention. Consequently, only acts by the former come within the scope of the Convention and can be challenged on that basis. Thus, the way the dividing line between EU and national responsibility runs through the EPPO structure will have a considerable impact on the protection of the fundamental rights of the citizens in this area. As a starting point of the analysis, one should take a brief look at the structure of the EPPO.

[8] Bosphorus v. Ireland (cited above), § 154.
[9] Art. 47 TEU.

3. THE EPPO STRUCTURE: COMBINING PARTNERS NOT EQUAL BEFORE THE CONVENTION

Recital 86 of the Regulation emphasises 'the specific nature of the tasks and structure of the EPPO, which is different from that of all other bodies and agencies of the Union'. One of these specificities lies certainly in the fact that while the EPPO is an EU office operating in the interest of the sole EU, it does so by nonetheless relying on the operational and judicial support of the Member States, this being seen as a concretisation of the principle of subsidiarity.[10] The Regulation characterizes this as a 'system of shared competence between the EPPO and national authorities in combating crimes affecting the financial interests of the Union'.[11]

As a result, the EPPO has been given a two-level structure combining a centralised European level with a decentralised national level. The European level consists of the Central Office of the EPPO, comprising the European Chief Prosecutor and 22 European Prosecutors, one from each participating Member State, who together build the EPPO College. It will only be responsible for the general oversight of the EPPO.[12]

As for the investigations and prosecutions on the ground, they will be carried out at a decentralised domestic level by national prosecutors acting as so-called European Delegated Prosecutors (the EDPs).[13] The latter will use the procedures provided for in the Regulation and, where applicable, national law.[14] Interestingly, the EDPs will wear a double hat, being at the same time members of the EPPO and members of their own national judiciary.[15] When acting as European Delegated Prosecutors, they shall act on behalf of the EPPO in their respective Member States and shall have the same powers as national prosecutors.[16] The so-called Permanent Chambers, set up at central level, shall monitor and direct their activity.[17]

At national level, the system will to a large extent rely on two different categories of domestic authorities, i.e. the national enforcement and the national judicial authorities.[18] This is in keeping with the purpose of the decentralised level in the EPPO structure which is to allow the EPPO to be in the proximity of the criminal offences to be prosecuted and

[10] Alexandre Met-Domistici, "The Hybrid Architecture of the EPPO" (cited above), p. 144.
[11] Recital 13 of the Regulation.
[12] Art. 9(2) of the Regulation.
[13] Recital 30 of the Regulation.
[14] Art. 5(3) and 28(1) of the Regulation; Peter Csonka, Adam Juszczak and Elisa Sason, "The Establishment of the European Public Prosecutor's Office" (cited above), p. 129.
[15] Art. 13(3) of the Regulation.
[16] Art. 13(1) of the Regulation.
[17] Art. 10(2) of the Regulation.
[18] Recital 69 of the Regulation.

to work hand in hand with the national enforcement authorities when carrying out investigations and prosecutions.[19]

From a Convention point of view, however, the EPPO structure represents a new challenge in that it combines partners who are not equal before the Convention, the national authorities being in principle bound by the Convention whereas the EPPO, as an EU office, is not. This also entails the consequence that the hybrid structure of the EPPO is operating within a hybrid legal framework regarding fundamental rights. The implications of this entirely novel constellation are discussed hereinafter, not without an inevitable element of speculation.

4. THE CONSEQUENCE: HYBRID CONVENTION LIABILITY FOR EPPO ACTION

Turning now to the initial question whether, in view of the hybrid structure of the EPPO, acts by the latter are attributable under the Convention to the EU or the Member States, it seems clear that it arises only in respect of procedural acts which, as Article 42(1) of the Regulation characterizes them, are intended to produce legal effects vis-à-vis third parties, such as investigation measures[20] or pre-trial detentions.[21] For only as a consequence of such acts can a person have victim status for the purposes of Article 34 of the Convention.[22] Consequently, any Convention liability in an EPPO context can only be incurred at the decentralised national level, following action undertaken on the ground either by a EDP or by domestic authorities.

In assessing the extent of Convention liability for EPPO action, one should distinguish between the respective actors involved in the operation of the EPPO, since they are not all subject to the Convention and exercise different levels of control over EPPO actions. The novelty here might then be the fact that in contrast with the principles applied so far in the case-law, Convention liability in an EPPO context is being disconnected from the control exercised over the acts giving rise to that liability. In this way, the hybrid nature of the EPPO is itself generating a different, hybrid kind of Convention liability, no longer adjusted to the amount of control exercised.

A. The European Delegated Prosecutors: Full Control, No Liability

Most operational decisions regarding investigations and prosecutions are expected to fall within the responsibility of the EDPs.[23] As regards the latter, the Regulation states that

[19] Peter Csonka, Adam Juszczak and Elisa Sason, "The Establishment of the European Public Prosecutor's Office" (cited above), pp. 126-127.
[20] Art. 30 of the Regulation.
[21] Art. 33 of the Regulation.
[22] Article 34 of the Convention states the right of every individual claiming to be the victim of a violation by one of the Contracting States of his or her Convention rights to file an application with the European Court of Human Rights.
[23] Alexandre Met-Domestici, "The Hybrid Architecture of the EPPO" (cited above), p.146.

when they act in their capacity as members of the EPPO, as opposed to their capacity as national prosecutors, they do so *on behalf of* the EPPO[24] and therefore on behalf of the EU as such. Article 8(1) of the Regulation indeed provides that the EPPO shall be an indivisible Union body operating as one single Office with a decentralised structure.

This would appear to settle the issue about the attribution of the procedural acts performed by the EDPs. In this respect, Recital 32 states that 'the European Delegated Prosecutors should be an integral part of the EPPO and as such, when investigating and prosecuting offences within the competence of the EPPO, they should act exclusively on behalf and in the name of the EPPO on the territory of their respective Member State'. Thus, in that capacity they are members of an EU body, acting in the sole interest of the EU, their competences and powers being to a large extent determined by Union law, with national law being applied only to the extent that the Regulation contains no relevant provisions.[25]

Under these circumstances, the Strasbourg case-law, and notably the *Boivin* decision,[26] would appear to point towards considering action by EDPs as attributable to the EU, given the separate legal personality of the latter and the absence of involvement of national authorities in the decision-making process concerning the actions undertaken by the EDPs, who enjoy full independence and autonomy vis-à-vis those authorities.[27] Their action would therefore be outside the scope of the Convention.

B. The National Authorities: In Between Control and Liability

The EDPs, however, can be expected to rely to a significant extent on the national authorities, i.e. on the enforcement authorities but also on the national judiciary of the Member States on whose territory they will operate. Interestingly, while the Regulation explicitly provides that the EDPs shall act on behalf of the EPPO,[28] no such indication is given as regards the domestic authorities operating in the same context. How about their liability under the Convention ? This will depend on whether their action will fall within the jurisdiction of their respective Member States or within that of the EU, i.e. on whether their action will be attributable under the Convention to the Member State concerned or to the EU.

[24] Art. 13(1) of the Regulation.
[25] Art. 5(3) of the Regulation.
[26] ECHR 9.9.2008 (dec.), Boivin v. France and Belgium and 32 other Member States of the Council of Europe, 73250/01. The Court found *inter alia* that "… the impugned decision thus emanated from an international tribunal outside the jurisdiction of the respondent States, in the context of a labour dispute that lay entirely within the internal legal order of Eurocontrol, an international organisation that has a legal personality separate from that of its member States. At no time did France or Belgium intervene directly or indirectly in the dispute, and no act or omission of those States or their authorities can be considered to engage their responsibility under the Convention."
[27] See Recital 32 stating that the EDPs should be granted "a functionally and legally independent status which is different from any status under national law".
[28] Art. 13(1) of the Regulation.

As indicated above, this seems to be a rather novel question. For up until the EPPO took up its duties, national authorities implementing Union law have always been considered as nonetheless acting on their own behalf and in pursuance – at least in part – of their own interests. The initiative and the competence to undertake and carry out action pursuant to Union law remained with those national authorities, even when there was an Union law obligation to act, such as in the *Bosphorus* case. In simple terms, they were in control of any action being performed on this basis.

With the EPPO the question will arise, it would seem for the first time in the history of the Convention, whether in these new legal circumstances national authorities can still be considered to act on their own behalf when providing operational support and/or judicial assistance to an EU body, in this case the EPPO. In answering that question, one should however distinguish the enforcement from the judicial national authorities, their respective actions being of a different nature.

(i). National Enforcement Authorities: No Control, No Liability

As regards the national enforcement authorities, such as police forces and investigators supporting EPPO operational action, Article 28(1) of the Regulation provides that

> 'The European Delegated Prosecutor 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.'

Thus, a EDP is entitled to give instructions to the competent domestic authorities. Recital 69 states in this respect:

> 'The EPPO should rely on national authorities, including police authorities, in particular for the execution of coercive measures. Under the principle of sincere cooperation, all national authorities and the relevant bodies of the Union, including Eurojust, Europol and OLAF, should actively support the investigations and prosecutions of the EPPO, as well as cooperate with it, from the moment a suspected offence is reported to the EPPO until the moment it determines whether to prosecute or otherwise dispose of the case.'

Thus, investigation measures by national authorities acting under the instructions of EDPs are presented by the Regulation as equivalent to those measures being taken by the EDPs themselves[29], i.e. on behalf of the EU. Moreover, the operational control over actions carried out by domestic authorities on the basis of Union law is here, in contrast with

[29] The available options will depend on the procedural law of the Member State concerned.

previous cases, no longer with the national but with the EU authorities.[30] How does the Convention apply to this new constellation ?

It remains of course to be seen how these authorities will cooperate with the EDPs in practice, there being little doubt that the concrete *modus operandi* might vary depending on a number of personal and local circumstances. But the fundamental legal question arising out of this constellation would appear to be whether in supporting and/or participating in such EPPO investigations, the domestic enforcement authorities will enjoy a degree of operational autonomy and control over their actions which goes beyond what is required for the simple execution of instructions and would therefore justify considering the said authorities to be in charge to the point of acting *on their own behalf* and *engaging their own responsibility* under the Convention. Of course, they will be under a duty to cooperate with the EDPs[31] but that duty alone does not necessarily prejudge their actual degree of autonomy in discharging it.

These issues have of course arisen too recently for there to be relevant case-law already available. Moreover, the mere fact that the Member States make available to the EPPO part of their own enforcement authorities would not appear to automatically allow the conclusion that they are responsible under the Convention for actions performed by these authorities in an EPPO context. Such a reasoning would indeed disregard the separate legal personality of the EU and wipe out any responsibility of the latter for EPPO action.[32]

One might therefore turn for guidance, *mutatis mutandis,* to the Convention case-law dealing with a comparable question arising in a different context, i.e. the case-law on the extent to which States can be held responsible under the Convention for military actions performed abroad under the umbrella of an international organisation such as the UN or NATO. The issue here is whether from a legal point of view, such actions are to be considered as having been performed by the States themselves, thus engaging their own Convention liability, or by the international organization whose aims the States had only helped pursuing by contributing troops.

While it is of course clear that enforcement authorities are not to be equated with military troops, this case-law would nonetheless appear to offer some criteria which could be

[30] The scheme set up by the Regulation is also to be distinguished from the one introduced by Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, regarding the European Commission's powers of inspection. The latter scheme is indeed based on "close cooperation" between the Commission and the competition authorities of the Member States (Art. 11). Inspections of undertakings are carried out by Commission officials (Art. 20). It is only if an undertaking opposes such an inspection that the Member State concerned shall afford the necessary assistance, if need be by the police (Art. 20(6)). If this assistance requires authorization from a judicial authority according to national rules, the control by that judicial authority is limited to checking the absence of arbitrariness and the proportionality of the request for assistance (Art. 20(7) and (8)). See also General Court of the EU 8.3.2007, France Télécom SA, T-339/04 and T-340/04.

[31] Recital 69 and Art. 28(1) of the Regulation.

[32] See, *mutatis mutandis,* ECHR 9.9.2008 (dec.), Boivin v. France and Belgium and 32 other Member States of the Council of Europe (cited above).

relevant, *mutatis mutandis,* in an EPPO context, notably the territorial nature of the jurisdiction of the States and the degree of authority and control involved in the carrying out of the duties concerned. The first criterion, however, is of not much use in the present context. While it is clear that all actions of – and on behalf of – the EPPO can be expected to take place on the territory of one or more of the 22 Member States participating in the EPPO system, this is of little help in determining the respective responsibilities involved in EPPO action. State jurisdiction within the meaning of Article 1 of the Convention is of course primarily territorial[33] but there has never been any doubt in the case-law about the fact that actions by international organisations do not come within the scope of the Convention only because their effects are felt on the territory of a Contracting State. Simply because while international organisations may have their own legal personality, they do not have their own territory.

The second criterion, i.e. the degree of authority and control enjoyed by the national military command in executing missions under the umbrella of an international organisation, might be more relevant. In applying it, the Court has regard both to the legal and factual aspects of the case, i.e. to the applicable legal framework governing those missions as well as to the reality on the ground. Consequently, the analysis is made on a case-by-case basis. In essence, the Court considers that if those aspects allow the conclusion that the degree of authority and control left to the military command of the State concerned is such as to amount to an effective control over a territory, an area or certain persons, actions carried out under these circumstances will be attributed to that State and not to the international organisation providing the overarching framework for the operation. In other words, that State will be considered as having acted on his own behalf and will therefore be held responsible under the Convention. In the absence of such an effective control, the international organisation concerned and not the State providing the troops will be held responsible.[34] In fact, one would in principle not even need to rely on this specific case-law, since it only applies an ancestral common-sense legal principle according to which responsibility is the logical consequence of control.

Transposing that case-law *mutatis mutandis* to the EPPO, one should now inquire about the degree of control and autonomy enjoyed by the national enforcement authorities when they act in an EPPO context. With very little practical experience or EU case-law available on the topic, the analysis will have to mainly rely on the legal framework governing action by the EPPO.

Relevant factors in this respect would appear to be, first, that these enforcement authorities will receive instructions from the EDP in charge and will be legally bound to follow these instructions.[35] The EDPs will also be entitled to order or request them to carry out

[33] ECHR 21.1.2021, Georgia v. Russia (II), 38263/08, § 81.
[34] See, among others, ECHR 2.5.2007 (dec.), Behrami and Behrami v. France and Saramati v. France, Germany and Norway, 71412/01 and 78166/01; ECHR 21.1.2021, Georgia v. Russia (II) (cited above), § 81.
[35] Art. 28(1) and Recitals 69 and 87 of the Regulation.

investigation measures.[36] Moreover, and however much autonomy might be left to them *de iure* or *de facto*, the fact remains that actions performed by domestic authorities in this context will be meant to back-up action decided and initiated by the sole EPPO, an EU institution acting in furtherance of the sole financial interests of the EU and whose competence is limited to offences defined in the PIF-Directive and committed to the detriment of the sole EU. This being so, it seems also clear that national enforcement authorities involved in such EPPO action will report to the EDP in charge, who will in turn report to his/her EPPO hierarchy,[37] which will retain ultimate authority and control over EPPO operations.

In fact, there would appear to be little difference, in terms of operational autonomy, between the constellation described above and the one presenting itself when the very same national enforcement authorities receive instructions from a national prosecutor. This is indeed the very reason why it was decided that the EDPs should at the same time remain national prosecutors and operate on the basis of their respective national procedural law, i.e. in order for them to be able to rely on the same enforcement authorities and in the same manner. Thus, the national enforcement authorities cannot be expected to have any more control and autonomy vis-à-vis the EDPs than they have vis-à-vis the national prosecutors whom they service under national procedural law. The only difference being that with the EDPs the instructing authority is an EU and not a national institution.

If this is pertinent, the constellation thus occurring brings us rather close, *mutatis mutandis,* to the one which presented itself in the case of *Behrami and Behrami*, in which the UN Security Council was found to retain ultimate authority and control over French, German and Norwegian troops operating in Kosovo and exercising military powers which had been delegated to them, via intermediate structures, by the UN. The impugned actions were therefore attributed to the UN itself with the consequence that, the UN having its own legal personality but not being a Contracting Party to the Convention, the applications were declared inadmissible *ratione personae.*[38] By contrast, in the *Jaloud* case the Dutch Government was held responsible for military action by its troops operating in Iraq as part of a Multinational Division which was under the command of an officer of the armed forces of the United Kingdom. This was because the Netherlands had in fact assumed responsibility for providing security in that area, to the exclusion of other participating States, and because it had retained full command over its contingent there.[39] The Court could not find that the Netherlands troops had been placed 'at the disposal' of any foreign power or that they were 'under the exclusive direction or control' of any other State.[40]

[36] Art. 30(1) and (4) and Art. 33(1) of the Regulation.
[37] Art. 28(1) of the Regulation.
[38] ECHR 2.5.2007 (dec.), Behrami and Behrami (cited above), §§ 141 and 143.
[39] ECHR 20.11.2014, Jaloud v. the Netherlands, 47708/08, § 149.
[40] § 151.

In sum, applying these criteria *mutatis mutandis*, it would appear difficult not to consider the EPPO itself, and ultimately the EU, as responsible for all operative measures undertaken by the EPPO, including those executed with the support of domestic enforcement authorities. Consequently, these measures would not come within the scope of the Convention, precluding them from being challenged before the European Court of Human Rights. In other words, from a Convention perspective, there is no other responsibility involved for EPPO action than that of the EU. That said, it is also clear that the Court assesses such situations on a case-by-case basis. This should allow it to take into account any untypical constellations arising in a given case and to adjudicate accordingly.

(ii.) National Courts: Limited Control, Full Liability

The second level of domestic activity in the EPPO framework is that of the national courts. They are called upon to act in three different ways, i.e. by authorising, if national law so requires, certain measures requested by a EDP, by carrying out a judicial review of procedural acts of the EPPO which are intended to produce legal effects vis-à-vis third parties[41] and by adjudicating the cases brought before them by the EDPs.[42] The other remedies provided for by the Regulation are within the competence of the CJEU.[43]

The assessment of the legal position under the Convention of national courts acting in an EPPO context would appear to be somewhat trickier. Unlike the national enforcement authorities, they do not receive any instructions from any authorities and even less from the EPPO, national courts being independent. It can therefore be assumed that in exercising their functions under the Regulation they will act in their capacity as national judicial institutions. The fact that they are called upon to apply Union law alongside their own national procedural and/or substantive law does not alter that finding, this being common practice for the courts of the Member States. There is also no provision in the Regulation indicating, as it does for the EDPs, that they would act on behalf of any other authority than their own State.[44]

From a Convention point of view, however, the difficulty for these courts will be to determine whether they should apply the Convention when acting in an EPPO context, having regard to the fact that the Convention currently does not apply to the EU and its institutions and offices. While the Regulation is explicit about the procedural rules applicable to the investigations and prosecutions on behalf of the EPPO, stating that national law shall apply only to the extent that a matter is not regulated by the Regulation,[45]

[41] Art. 42(1) of the Regulation.
[42] Art. 36 of the Regulation.
[43] Art. 42(2) of the Regulation.
[44] In this connection, Recital 88 of the Regulation states that for the purpose of the judicial review to be carried out by the national courts, "effective remedies should be ensured in accordance with the second subparagraph of Article 19(1) TEU". The reference to this provision confirms that national courts are to be seen as acting in the context of domestic remedies.
[45] Art. 5(3) of the Regulation.

it is silent about the law to be applied by the national courts. It can therefore be assumed that their main legal source will be the national code of criminal procedure and, as regards the substantive provisions, the national law transposing the PIF-Directive. Article 41 of the Regulation, however, lists several procedural safeguards which are available to any suspected or accused person in the criminal proceedings of the EPPO, including those laid down in the EU-Charter and the directives on procedural rights, thereby stating that the procedural rights available under national law shall also apply, without prejudice to the Union law rights referred to in the same provision.

But how about the Convention ? It is of course an integral part of the legal system of all EU Member States and should therefore be applied by all national courts of the Member States, including in the field of Union law. But the EPPO, being an EU office, is not subject to the Convention. Should the national courts nonetheless apply the Convention when assessing its investigations ? Can in this way compliance with the Convention by the EPPO be imposed through the backdoor ? Or is the specification that national procedural safeguards should be applied 'without prejudice to' the Union safeguards to be understood as precluding the application of national safeguards, including those of the Convention, to the extent that they depart from, or affect the efficiency of the Union standards ? If so, could the Convention be displaced in this way ? All of this remains unclear.

However that may be, for the sake of the analysis it will be assumed hereinafter that in these circumstances the national courts will also apply the Convention, along with the relevant EU norms, since they will act as national courts and in this capacity are in principle subject to the Convention.[46] The final word on this issue will be for the European Court of Human Rights, in the context of an application. The fact remains, though, that this general ambivalence as to the applicable fundamental rights, with courts which are subject to the Convention having to assess actions by a public prosecutor who is not, generates an inconsistent legal situation raising doubts as to its compatibility with the rule of law.[47]

Assuming that the national courts will apply the Convention when assessing EPPO actions, an entirely novel constellation in criminal procedure will indeed arise in which the investigation and prosecution of cases on the one hand, and their adjudication on the other, will no longer be subject to the same corpus of fundamental rights, even though they are part of a single set of proceedings. The two main actors in a play will no longer play by the same book, as it were. Of course, the fact that, in practice, the EDPs will be taken from the national prosecutors, who are used to apply the Convention when dealing with domestic cases, might of course help minimize the impact of these problems. This, however, cannot replace a clear and consistent regulation of the matter, in compliance with the principle of

[46] As explained above, the EU Member States are under a Convention obligation to apply Union law in a manner which is compatible with the Convention. In practical terms, this comes down to an obligation on the domestic courts of the EU Member States to comply with both Union and Convention law in adjudicating their cases.
[47] Art. 5(2) of the Regulation provides that the EPPO shall be bound by the principles of rule of law and proportionality in all its activities.

the rule of law which requires clarity, uniformity and predictability of the applicable norms throughout criminal proceedings.[48] Instead, the role of the Convention and its interaction with Union law in the EPPO context seem left in a limbo which is prejudicial to all concerned.

This problem is not purely theoretical, nor is it only about the consistency of the norms applied to a set of proceedings. Actually, it is also about compliance with the Convention minimum protection standard, which Union law does not always meet. Admittedly, as an EU office the EPPO is subject to the EU-Charter, as are the national courts when they implement Union law, which would appear to be the case in an EPPO context.[49] But the EU-Charter is not equivalent to the Convention, even less so in day-to-day practice. Of course, the EU-Charter provides that its interpretation should respect the Convention protection level, while being allowed to exceed it.[50] However, this does not always play out well in reality. The *non bis in idem* principle, which is very relevant in the EPPO context,[51] is a telling illustration of Luxembourg applying different and sometimes even lower standards than Strasbourg, in spite of the prescriptions of the EU-Charter.[52] Regrettably, more than ten years after the entry into force of the EU-Charter, these prescriptions have not proven capable of fully guaranteeing a stable, harmonious and predictable relationship of the EU-Charter with the Convention, not least because of divergent methodological approaches in some areas.[53]

Numerous other issues of coherence between the fair trial requirements of the Convention and those of Union law are likely to arise in the context of criminal proceedings initiated by the EPPO. The directives concerning the rights of suspects and accused persons in criminal proceedings, for example, which are listed in Article 41(2) of the Regulation

[48] Save when the change is to the benefit of the accused.
[49] Art. 51(1) of the EU-Charter.
[50] Article 53(2) of the EU-Charter.
[51] See Recital 83 of the Regulation.
[52] See CJEU 27.5.2014, Spasic, C-129/14 PPU, ruling that Art. 54 of the Convention Implementing the Schengen Agreement, which makes the application of the *ne bis in idem principle* subject to the condition that, upon conviction and sentencing, the penalty imposed "has been enforced" or is "actually in the process of being enforced", is compatible with Art. 50 of the EU-Charter. This is in contrast with ECHR 10.2.2009, Sergey Zolotukhin v. Russia, 14939/03, § 110: "Article 4 of Protocol No. 7 is not confined to the right not to be punished twice but extends to the right not to be prosecuted or tried twice". Significant methodological differences have also cropped up in the way the two European Courts apply the *non bis in idem* principle to so-called dual proceedings, i.e. a combination of administrative and criminal proceedings applied in respect of the same reprehensible conduct. Compare e. g. CJEU 20.3.2018, Menci, C-524/15 with ECHR 15.11.2016, A and B v. Norway, 24130/11 and 29758/11. On the lack of harmony between Strasbourg and Luxembourg in the application of *non bis in idem*, see Johan Callewaert, "Do we still need Article 6(2) TEU? Considerations on the absence of EU accession to the ECHR and its consequences", Common Market Law Review, 2018, p. 1685 (1707) ; Léa Maulet, "Le principe *ne bis in idem*, objet d'un 'dialogue' contrasté entre la Cour de justice de l'Union européenne et la Cour européenne des droits de l'homme", Revue trimestrielle des droits de l'homme, 2017, p. 107 ; Laure Milano, "Le principe *non bis in idem* devant la Cour de Luxembourg, vers un abaissement de la protection accordée au principe", Revue trimestrielle des droits de l'homme, 2019, p. 161.
[53] See Johan Callewaert, "Do we still need Article 6(2) TEU? " (cited above), p. 1695; idem, "Vingt ans de coexistence entre la Charte et la Convention européenne des droits de l'homme : un bilan mitigé", to be published in the Cahiers de droit européen.

among the applicable sources of fundamental rights,[54] could easily become the source of such issues. They cover large parts of the notion of fair trial within the meaning of Article 6 of the Convention, but do not always follow the same approach as this provision, leaving the burden of sorting that out with the national courts, with all the opportunities for error which this entails. That said, no problem of compliance with the Convention will arise as long as Union law provides a level of protection equal or higher than that of the Convention.[55]

However that may be, the upshot is that under the scheme put in place by the Regulation the national courts may end up applying Convention standards to a prosecution which was carried out by an authority which was not itself bound by the Convention and may therefore not have complied with it, e.g. by not applying the *non bis in idem* principle as interpreted in Strasbourg, while having nonetheless acted lawfully under Union law. This is likely to generate quite some confusion and legal uncertainty. Judging by their public statements, it seems indeed ever more difficult for national courts to come to terms with diverging case-law on fundamental rights[56] but this newly created EPPO scenario uniting within the same proceedings different authorities not subject to the same fundamental rights standards would appear to be a recipe for even more confusion in this field.

This may also have repercussions in Strasbourg, in the context of applications challenging judgments by the national courts handing down convictions on the basis of the Regulation.[57] Presumably, the Member States concerned will incur Convention liability by reason of their own courts having endorsed, or not, the prosecution by the EPPO[58]. In that case they will find themselves as respondents in Strasbourg on account of prosecutions which were initiated, steered and controlled by an EU body and for the exclusive benefit of the EU which is not itself subject to the Convention. In this capacity, they will be held accountable for any breaches of the Convention which might be left unremedied by their courts and resulted from these prosecutions, notably those which might stem from the fact that the EPPO, although faithfully complying with Union fundamental rights, did not meet the Convention minimum. To this extent, the EPPO scheme entails a distortion of the hitherto prevailing principle according to which the single and overall responsibility of States under the Convention is the logical consequence of their full control over – and full benefit from – the actions being challenged in the application.

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[54] On those directives, see François Catteau, "Les droits procéduraux des personnes poursuivies et des victimes de criminalité devant la Cour de justice de l'Union européenne. Vers un droit européen de la procédure pénale ?", Cahiers de droit européen, 2020, p. 485.

[55] Art. 53 of the Convention.

[56] In that sense, see, among others, the complaints expressed by Mr. Justice Clarke, Chief Justice of Ireland, in his speech titled "Who Harmonises the Harmonisers?", delivered on 31 January 2020 at the Solemn Hearing on the occasion of the Opening of the Judicial Year of the European Court of Human Rights (https://www.echr.coe.int/Documents/Speech_20200131_Clarke_JY_ENG.pdf; last consulted on 24.2.2021).

[57] Of course after exhaustion of the domestic remedies in the Member State concerned.

[58] See, *mutatis mutandis*, ECHR 5.9.2017, Bărbulescu v. Romania, 61496/08, § 110.

In simple terms, the fact that EPPO proceedings are to be conducted under a double corpus of fundamental rights, one for the prosecution and another for the adjudication, is a case of 'double standards' distorting the uniformity which should in principle characterize, throughout criminal proceedings, the fundamental rights applied to the latter, as required by the rule of law. Where this results in a failure to comply with the Convention, the Member State concerned will, in addition, incur liability in Strasbourg.

By way of example, should the EPPO have applied the less protective Luxembourg interpretation of the *non bis in idem* principle rather than the more protective Strasbourg one, and should this – whatever the reason – not have been remedied by the national courts, the Member State concerned will assume full responsibility for the finding of a violation of Article 4 of Protocol no. 7 to the Convention by the European Court of Human Rights. This would include responsibility for the execution of the judgment, which may also entail consequences for the EPPO. And even if this was remedied by the domestic courts applying the Convention standards, the question remains whether it is right in principle to let the EDPs operate under different, potentially lower standards, with the consequence that their prosecution might be declared invalid in the course of a judicial review by the domestic courts.

In sum, with their involvement in this hybrid EPPO structure, the Member States take the risk of being held accountable under the Convention for actions by the EPPO which they do not fully control, which are subject to a different corpus of fundamental rights and which do not benefit them but only the EU. And the EU, for its part, takes the risk of seeing EPPO prosecutions being invalidated by domestic courts applying a Convention protection level which may be higher than the Union level.

5. CONCLUSION: AN AMBIVALENT FUNDAMENTAL RIGHTS FRAMEWORK AND DISTORTED CONVENTION LIABILITIES

The new EPPO scheme is presented by the Regulation as creating a system of shared competence between the EPPO and national authorities.[59] Yet one cannot help thinking that in terms of the fundamental rights applicable to the scheme, the competence is not well shared, characterized as it is by ambivalent standards and unequal responsibilities, to the detriment of the participating Member States and the persons prosecuted by the EPPO.

The system is indeed marked by a distortion of the commonly applied logical link between liability for violations of fundamental rights and control over the actions entailing those violations. As well as by a distortion of the unity and uniformity of the corpus of fundamental rights to be applied throughout a single set of criminal proceedings, from the investigation and prosecution up to the judicial review and the adjudication. As a result, those who can be held accountable in Strasbourg, i.e. the participating Member States, are

[59] Recital 13 of the Regulation.

not in control of the EPPO but can nonetheless be found, on account of EPPO action, in breach of fundamental rights which do not apply to the EPPO itself. Citizens, for their part, can be confronted with the prosecution being guided by different fundamental rights than the bench.

What adds to the complexity and the unbalance created by these distortions is the fact that they operate to the exclusive benefit of the EU. So, in response to the question asked in the title of this paper, there is indeed a case to answer in Strasbourg for the actions of the European Public Prosecutor, but it will, at best, be answered by the Member States rather than the EU, even in cases of shared responsibility.

The only way to minimize the impact of these distortions would be for the EU to become a Contracting Party to the Convention, along with its own Member States. While this would not remove the exclusive Convention liability of the Member States in Strasbourg, all judicial remedies to be exhausted at domestic level[60] being those of the Member States,[61] it would nonetheless represent a significant improvement, in at least two ways. First, it would formally allow Convention liability of the EPPO before the national courts, in the context of their judicial review. Secondly, it would do away with the hybrid legal framework characterizing the protection of fundamental rights under the EPPO Regulation, thereby removing all ambivalence and legal uncertainty as to the fact that all concerned – the EPPO, the domestic courts and the European Court of Human Rights – are bound to respect the same minimum fundamental rights, without prejudice to any higher standards. This would be a worthwhile contribution to a better implementation of the principles of the rule of law and procedural fairness, advocated by the Regulation itself.[62]

Such a move would seem all the more important in light of the fact that if the EPPO proves successful, its competence might be extended in the future to other areas. Moreover, the format combining European and national components in a hybrid operational set-up seems to be spreading to other areas, Frontex being only one example.[63]

[60] Art. 35 § 1 of the Convention.
[61] By virtue of the second subparagraph of Art. 19(1) TEU, according to Recital 88 of the Regulation.
[62] Art. 5(1) of the Regulation and Recital 83.
[63] See Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624. See also Romain Tinière, "Le règlement 2019/1896 et le renforcement des compétences de Frontex", *Journal de droit européen*, 2021, p. 10.