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The Good, the Bad and the Ugly?

Exploring the tension between efficiency and sovereignty in the establishment of the European Public Prosecutor's Office

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Abstract

The European Public Prosecutor's Office (EPPO) is widely seen as a landmark achievement because it is the first supranational EU body with real operational powers in the criminal justice sector. Before the establishment of the EPPO in 2017 under enhanced cooperation, the collaboration between the Member States in the field of criminal law had been dominated by a firmly intergovernmental approach. The already existing examples of EU agencies or bodies like Europol, Eurojust, and OLAF, have no real operational capacity. The Member States seemed to be very reluctant to give up control in this very sensitive area. Against this backdrop, the establishment of the EPPO is a mystery. Why did the Member States agree to give up powers to the supranational level although they had always been so reluctant to lose control in the criminal justice area? Drawing on Principal-Agent Theory and the concept of core state power, this thesis attempts to explore the motivation behind the Member States' actions. It becomes clear that the negotiations, which lasted from 2013-2017, were characterized by the tension between functional questions about how to ensure the EPPO's independence and efficiency in a highly fragmented legal landscape and concerns about losing national sovereignty. It is shown that the common narrative in the literature draws a picture of the negotiations which resembles the movie title "The Good, the Bad and the Ugly". While the Commission ("The Good") genuinely tried to ensure the EPPO's efficiency, the Member States ("The Bad"), riddled by sovereignty anxieties, watered the proposal down as far as possible to maintain control over the EPPO (as for the "Ugly"? Well, there are also Member States that do not participate in the EPPO at all...). This thesis proves that this narrative is if not wrong, then largely overstated. It will be shown that the Member States, just like the Commission, were largely driven by the sincere concern to implement a structure which would work in practice. They merely disagreed with the Commission about the means to achieve it. Sovereignty concerns, although present, played a much minor rule than commonly assumed. These findings are highly relevant because they question the conventional wisdom that in the criminal justice sector, the Member States rarely delegate according to functional logics, eventually even signalling a 'functional turn' in the AFSJ.

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Keywords

European Public Prosecutor’s Office (EPPO)

EU Criminal Justice System

Delegation

Efficiency

Sovereignty

Principal-Agent Theory

Core State Power

PIF directive

EPPO Regulation

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List of Abbreviations

AFSJ	Area of freedom, security, and justice
ECP	European Chief Prosecutor
EDP	European Delegated Prosecutor
EP	European Prosecutor
EPPO	European Public Prosecutor’s Office
PIF	protection des intérêts financiers
TEU	Treaty on European Union
TFEU	Treaty on the functioning of the European Union

1 Introduction

The biggest puzzle about the European Public Prosecutor's Office (**EPPO**) is the mere fact of its creation. When looking at the history of the Area of Freedom, Security and Justice (**AFSJ**) and EU criminal law specifically, one could think that the EPPO should not exist. Before the EPPO Regulation[1] was adopted in October 2017, cooperation in criminal justice on Union level was firmly intergovernmental. The existing examples of EU bodies in this field like Europol, Eurojust, or OLAF, showed that Member States liked to maintain control and preferred intergovernmental methods of cooperation.[2] Against this backdrop, the establishment of the EPPO is surprising because it is the first supranational body in the field of criminal law with real operational powers. In other words, it is the first time that the Member States delegated real powers to the supranational level in the "most sensitive field of all Union law."[3] At the same time, only 22 Member States participate in the EPPO, which was adopted under enhanced cooperation, while 5 Member States chose not to join, which raises more questions about the reasons for the (non) participation. The research question of this dissertation will therefore be the following:

Why did the Member States decide (not) to agree to the establishment of the EPPO in its specific form?

The dependent variable of this research question is the (non) agreement of the Member States to the EPPO Regulation. This variable has two dimensions. First, it refers to the general decision of Member States to participate in the EPPO (the "whether" of delegation). Inextricably linked to this question, however, is the dimension of institutional design (the "how" of delegation), because the decision to delegate necessarily includes the choice over a specific institutional form.[4] Accordingly, the theoretical framework of this thesis (see below) will develop independent variables and hypothesis to account for both aspects.

Before setting out the research design, it will be necessary to give a brief introduction to the history of the EPPO and the main aspects of the EPPO Regulation.

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[1] European Union, "Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO')", *Official Journal of the European Union*, L283/1, 31 October 2017 ("**EPPO Regulation**").
[2] Katalin Ligeti and Angelo Marletta, "Accountability and Judicial Review *vis-à-vis* the EU Citizen", *New Journal of European Criminal Law* 7, no. 2 (2016): 182.
[3] Alex Brenninkmeijer, "The European Public Prosecutor's Office: A Chronicle of a Failure Foreseen", in *Shifting Perspectives on the European Public Prosecutor's Office*, ed. Willem Geelhoed, Leendert H. Erkelens and Arjen W. Meij (The Hague: T.M.C. Asser Press, 2018), 194.
[4] Jonas Tallberg, ""Delegation to Supranational Institutions: Why, How, and with What Consequences?", *West European Politics* 25, no. 1 (2002): 24.

The idea of an EPPO was not 'born out of thin air' but was a product of decades of scholarly and political work, starting with the *Corpus Juris* study in 1997.[5] The idea gained political traction in the negotiations for an EU constitution. However, the provision which was finally inserted in the Lisbon treaty (art. 86 TFEU[6]), represents a compromise. It limited the competence of the EPPO to PIF offences[7] with the possibility to extend it to serious cross-border crimes. It also imposed a unanimity requirement in the Council which was complemented with the possibility to launch enhanced cooperation with at least 9 Member States. It took another four years before the Commission launched its proposal in July 2013.[8] In the following subsidiarity procedure, numerous national parliaments objected against the proposal, which was already a sign for the difficulty of the following negotiations in the Council. These negotiations proved indeed to be very contentious, complex, and lengthy.[9] One of the reasons for the complexity was that the PIF crimes, for which the EPPO was supposed to be competent, were not defined in the EPPO Regulation but in the PIF directive,[10] which was negotiated at the same time. While the European Parliament could only consent to the EPPO Regulation, it was involved in the PIF directive as co-legislator, therefore having an indirect influence over the EPPO Regulation as well. In late 2016, a final text was found by the Council. After Sweden had declared that based on this agreement, it would not join the EPPO, the unanimity had officially failed, so that enhanced cooperation was launched. In March 2017, 17 countries declared their will to participate in the EPPO. Five others subsequently joined, the last of them being Malta and the Netherlands. Poland, Hungary, Sweden, Denmark, and Ireland do not participate in the EPPO yet.

The EPPO was set up as an independent Union body with a 'hybrid-structure'.[11] This means that there is a centralized level in Luxembourg and a decentralized level consisting of

[5] Lothar Kuhl, "The European Public Prosecutor's Office – More Effective, Equivalent, and Independent Criminal Prosecution against Fraud?", *eucrim* no. 3 (2017): 136.
[6] European Union, "Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union of 13 December 2007", *Official Journal of the European Union,* C115, 9 May 2008.
[7] „protection des intérêts financiers", e.g. fraud, money laundering, corruption, misappropriation to the detriment of the EU budget.
[8] European Commission, "Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office", COM (2013) 534 final, Brussels, 17 July 2013 ("**Commission proposal**").
[9] For an extensive summary see Lothar Kuhl and Romana Panait, "Les Négociations Pour Un Parquet Européen Un Organe D'enquête Et De Poursuite Européen Pour La Lutte Antifraude Dans L'union Européenne, Ou Un Deuxième Acteur De Coordination Judiciaire ?" *Revue de science criminelle et de droit pénal comparé* no. 1 (2017): 41.
[10] European Union, "Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests", *Official Journal of the European Union,* L198, 28 July 2017 ("**PIF Directive**").
[11] For an extensive summary of the EPPO Regulation, see Peter Csonka, Adam Juszczak and Elisa Sason, "The Establishment of the European Public Prosecutor's Office – The Road from Vision to Reality", *eucrim* no. 3 (2017): 125.

at least two ‘double-hatted’ European Delegated Prosecutors (**EDP**) in each Member State, who conduct the investigation and prosecution. They wear a double hat because they belong to the EPPO and their national prosecution office at the same time. The central office consists of multiple layers: one European Chief Prosecutor (**ECP**) and two deputies, then a College of one European Prosecutor (**EP**) per Member State plus the ECP, and Permanent Chambers of three prosecutors. While the ECP and the College have mainly representative and management tasks, the Permanent Chambers take important operational decisions like the dismissal of a case. However, as a rule, the supervision of the EDPs is not performed by the Permanent Chambers but by the EP who is from the same Member State as the EDP. This EP therefore forms a ‘national link’ from the decentralized to the central level. The EPPO has a shared competence over PIF offences with the Member States, although for VAT fraud only above a threshold of 10 million EUR and in cross-border cases. It can evocate cases or initiate own investigations, for which it enjoys extensive investigative and prosecutorial powers.

In conclusion, the EPPO is a landmark achievement in the field of criminal justice cooperation. The debate leading to its creation was long, fierce, and emotional. In the end, the EPPO Regulation represents a compromise. The Council introduced numerous substantial changes to the Commission proposal during the negotiations, which in the eyes of many observers watered down the proposal’s ambition. Therefore, when literature describes the negotiations, they usually tell a story strikingly reminiscent of the movie title “*The Good, the Bad and the Ugly*”:

> “**The Good**” is the Commission, which fights for an efficient protection of EU taxpayers’ money.
>
> “**The Bad**” are represented by the Member States which in the end joined the EPPO but did everything in their power to water down the proposal with the goal of protecting their national sovereignty.
>
> “**The Ugly**” – one may forgive the rather unflattering label – are the Member States that didn’t even bother participating.

This thesis will explore whether this narrative reflects the reality.

2 Research Design

The following chapter will first present the theoretical framework of this dissertation, upon which a series of independent variables and hypothesis will be developed to lay the groundwork for the analytical part of this thesis. The chapter will then conclude with a methodology section.

2.1 Theoretical Framework

In principle, the idea of creating an EPPO is not at all special. Delegating powers from EU Member States to a supranational body is a recurring theme since the 1990s. The EU has seen the establishment of independent agencies on such a scale that it led scholars to speak of an "agencification" of the EU.[12] This trend did not exclude the AFSJ despite its firm intergovernmental character, as shown by the creation of bodies like Europol, Eurojust. The practical importance of this phenomenon resulted in a vast academic literature, studying the different aspects of delegation both on a national and EU level from a great variety of theoretical angles – and under many names.[13] This thesis uses the common term of "non-majoritarian institution" (NMI). With regards to the key terms of "delegation" and "NMI", it follows the definitions of Thatcher and Stone Sweet. They define an NMI as "those governmental entities that (a) possess and exercise some grant of specialized public authority, separate from that of other institutions, but (b) are neither directly elected by the people, nor directly managed by elected officials."[14] Delegation on the other hand is understood as "an authoritative decision, formalised as a matter of public law, that (a) transfers policy making authority away from established, representative organs (those that are directly elected, or are managed directly by elected politicians), to (b) a non-majoritarian institution, whether public or private."[15] The EPPO fits seamlessly into these definitions. It is an NMI because it possesses various operational powers, ranging from investigating crimes[16] to prosecuting perpetrators before national courts.[17] The European (Chief) Prosecutors and European Delegated Prosecutors are neither directly elected by the citizens nor are they managed by politicians.[18]

[12] See e.g. Ligeti, Marletta, *loc. cit.*
[13] e.g. "*unelected bodies, quangos, arm's-length government bodies, non-departmental public bodies, non-ministerial government departments",* see Mark Bovens and Thomas Schillemans, "Non-majoritarian Institutions and Representation", in *The Oxford Handbook of Political Representation in Liberal Democracies*, ed. Robert Rohrschneider and Jacque Thomassen (Oxford: Oxford University Press, 2020), 512.
[14] Mark Thatcher and Alec Stone Sweet, "Theory and Practice of Delegation to Non-Majoritarian Institutions", *West European Politics* 25, no. 1 (2002): 2.
[15] Thatcher and Stone Sweet, *op. cit.*, 3.
[16] art. 26-28 EPPO Regulation.
[17] art. 36 EPPO Regulation.
[18] cf. art. 6 (Independence); art. 14-17 (appointment) EPPO Regulation.

Furthermore, the establishment of the EPPO was an act of delegation in accordance with the abovementioned definition. It was established through a regulation, which is a formalised decision of public law and which transferred investigative and prosecutorial powers away from the Member States, governed by elected politicians, to the EPPO as NMI.

This sub-chapter is structured twofold: After a short review of existing literature about the creation of the EPPO from a political science perspective, the theoretical framework of this thesis will be presented in detail. First, based on the rich literature about delegation to NMIs, Principle-Agent Theory (**P-A Theory**) will be used to explore functional reasons for the "whether" and "how" of delegation. This will then be contrasted by a different approach, which draws on the concept of "core state powers" to explain how questions of sovereignty influence delegation, especially in the AFSJ. By drawing on functional and sovereignty-related aspects, this theoretical framework is especially well suited for the purposes of this dissertation because it reflects the ever-present tension in the negotiations between sensitivities regarding national sovereignty and the need to ensure the practical functioning of the EPPO in a highly fragmented European criminal justice area.[19] Following the presentation of the theoretical framework, a series of independent variables and hypothesis will then be introduced.

2.1.1 Literature Review about the EPPO

The EPPO has been extensively studied from a legal point of view. Contributions from a political science perspective, however, are very rare. What may seem surprising at first glance given the novel nature of the EPPO, reflects a broader trend of NMIs in the AFSJ attracting comparatively little scholarly attention.[20] The EPPO is no exception. While some issues have approached the EPPO in a descriptive manner,[21] only the contribution by Schmeer has attempted to open up "the black-box of Council negotiations" to understand the political processes of the negotiations leading to the creation of the EPPO.[22]

To this end, Schmeer conducts a discourse analysis of the EPPO negotiations by "combining the integration of core state powers framework [by] Genschel and Jachtenfuchs

[19] Frédéric Baab, "Le parquet européen: un projet entre audace et réalisme politique", *eucrim* no. 1 (2021): 45.
[20] Christian Kaunert, Sarah Léonard and John Occhipinti, "Agency Governance in the European Union's Area of Freedom, Security and Justice", *Perspectives on European Politics and Society* 14, no. 3 (2013): 275.
[21] cf. Laura Schmeer, "The establishment of the European Public Prosecutor's Office: integration with limited supranationalisation?", *Journal of European Integration* (2023): 2.
[22] *Ibid.*

with Börzel's typology of negotiation strategies".[23] Basing her analysis on several semi-structured interviews and institutional documents, she argues that "the Council was divided regarding how far-reaching the authority of this new body vis-à-vis member states should be or, on the contrary, to what extent member states should retain control over the body."[24] According to Schmeer, during the negotiations, Member States fell into four different categories depending on their willingness to give up sovereignty in the field of criminal law, a core state power, to the EPPO:[25] "Supranational pace-setters"[26], "Intergovernmental pace-setters"[27], "Foot-dragging states"[28] and "Fence-sitting Member States".[29] She concludes that "the reluctance of some states to cede core state powers resulted in the establishment of a complex and ambiguous body" and that "notably France and Germany formed an influential coalition to change the EPPO's design according to their more intergovernmental preferences", thereby "demonstrating how sovereignty concerns play out at the EU level".[30]

While Schmeer's contribution offers valuable empirical insights, the implied mono-causal link between "sovereignty concerns" and "intergovernmental" or "supranational" positions is problematic. A Member State may favour an institutional design, which is formally more intergovernmental, but the state may do it for different reasons than concerns about losing sovereignty. Schmeer herself mentions that the so-called "intergovernmental pace-setters" France and Germany also used functional arguments, e.g. that the design proposed by the Commission would "be less effective"[31] or that changes would be necessary "for the EPPO to work".[32] This challenges her claims that France and Germany primarily acted to ensure "EPPO's sovereignty-friendliness".[33]Apparently, functional aspects of delegation form part of

[23] *Ibid.* According to Genschel and Jachtenfuchs, Member States integrate core state powers "through either rulemaking or capacity-building". Depending on whether the rules and operational capacities are being kept on national or EU level, a state can be on a spectrum between a very supranational or intergovernmental position. Börzel argues that "member states compete at the European level for policy outcomes compliant with their own preferences and may therefore adopt one of three strategies: (1) *pace-setting*, that is, actively push preferred policies at EU level; (2) *foot-dragging*, that is, 'block or delay' unwanted policies 'to prevent them altogether or achieve at least some compensation' (ibid., 194); or (3) *fence-sitting*, that is, 'neither systematically push [. . .] policies nor try [. . .] to block them at the European level but build [. . .] tactical coalitions with both pace-setters and foot-draggers'", see for the whole footnote Schmeer, *op. cit.,* 7-8.
[24] *Ibid.*
[25] See Schmeer, *op. cit.,* 9-14.
[26] Belgium, Italy, and Luxembourg.
[27] Germany and France.
[28] Malta, the Netherlands, Hungary, Poland, Sweden, Great Britain, Denmark, and Ireland.
[29] Bulgaria, Estonia, Spain, Greece, Croatia, Lithuania, Latvia, Portugal, Romania, Slovakia, Slovenia, Austria, Czech Republic, Cyprus, and Finland.
[30] Schmeer, *op. cit.,* 14-15.
[31] Schmeer, *op. cit.,* 10.
[32] Schmeer, *op. cit.,* 12.
[33] Schmeer, *op. cit.,* 10.

the equation and must be considered to get a clear picture about the "why" and "how" of EPPO's creation.

2.1.2 Principal-Agent-Theory and the reasons for delegation to Non-Majoritarian Institutions

This dissertation will primarily rely on P-A Theory to analyse the creation of the EPPO. Originating in U.S. rational choice institutionalism in the 1970s,[34] P-A Theory seeks to explain the reasoning and processes behind the delegation of powers from a "Principal" to an "Agent". In Europe, P-A Theory has been used to study power delegation from Member States to the EU level[35] or to NMIs in general.[36] Given that P-A Theory was precisely created to explain and understand delegation processes, it cannot surprise that the P-A Framework "dominates research on the topic of delegation to nonmajoritarian institutions".[37] Remembering the research question of this thesis, P-A Theory thus seems especially well suited to study the "why" and "how" of the creation of the EPPO. According to P-A Theory, principals delegate powers to agents because they expect the agent "to deliver better outcomes than the Ps could produce on their own"[38] (in P-A Theory terms, principals seek to "lower the transaction costs of policy-making"[39]). P-A Theory therefore follows a decisively functionalist approach.[40] The concrete reasons for delegation can be numerous. However, P-A Theory has identified common rationales that usually motivate principals to delegate powers to an agent.[41] Two of these rationales will be discussed here: credible commitment and overcoming information asymmetries and complexity.

2.1.2.1 Credible Commitment

When principals (e.g. politicians) face policy problems, they often deem it beneficial to publicly commit themselves to solving the problem in a certain way towards another group of people (e.g. investors, consumers or more generally: potential voters).[42] However, sometimes principals cannot *credibly* promise to stick to a certain policy, either because they

[34] Tallberg, *op. cit.*, 24.
[35] Notably Pollack has performed seminal works on this topic, e.g. Mark Pollack, "Delegation, agency, and agenda setting in the European Community", *International Organization* 51, no.1 (1997): 99; *idem.*, "Delegation and discretion in the European Union", in *Delegation and Agency in International Organizations*, ed. Darren Hawkins, David Lake, Daniel Nielson and Michael Tierney (Cambridge: Cambridge University Press, 2006), 165.
[36] E.g. Thatcher and Stone Sweet, *op. cit.*, 1.
[37] Thatcher and Stone Sweet, *op. cit.*, 3.
[38] Mark Thatcher, Alec Stone Sweet and Bernardo Rangoni, "Reversing delegation? Politicization, de-delegation, and non-majoritarian institutions", *Governance* 36, no. 1 (2023): 8.
[39] Pollack, *op. cit.*, 166.
[40] Thatcher and Stone Sweet, *op. cit.*, 4.
[41] *Ibid.*
[42] Pollack, *op. cit.*, 168; Bovens and Schillemans, *op. cit.*, 516.

cannot guarantee that their course of action will not be overturned by their successors[43] or because the problem requires action by multiple actors which the principals cannot control ("collective-action problems").[44] To overcome this dilemma and *credibly* commit themselves to solving the problem, principals delegate their powers to an agent to find a solution in their stead. As for the EPPO, it seems intuitive that Member States delegated prosecution powers to the EU level to credibly commit themselves to fighting PIF-crimes. Many of these offences concern cross-border cases, which under the system in place before the EPPO meant that one Member State relied on the cooperation of another Member State. Since a state can only influence its own prosecution system, it cannot credibly promise its citizens to effectively protect the EU budget in cross-border cases. But even in purely national cases, issues of credible commitment arise when *other* states do not efficiently investigate and prosecute PIF crimes on their territory. PIF offences affect the EU budget and thus harm all EU citizens alike. Therefore, prosecution shortcomings in one Member State also affect other Member States, because it damages their collective credibility to protect the EU taxpayers' money. Before the EPPO, the Member States therefore faced a classical collective-action problem. Delegating prosecution powers to the EU level seemed like a viable way to credibly promise the EU taxpayers an effective protection of the EU budget.

2.1.2.2 Overcoming information asymmetries and complexity

Another reason for delegation is the increasing technical and legal complexity of many policy areas.[45] Governing these areas requires expertise and access to information that principals, who are often generalists (e.g. politicians, national civil servants), usually don't possess.[46] Hence, they delegate power to an agent, which they expect to develop the expertise and gather the necessary information to govern a problem in a more efficient way[47] (in P-A terms: the agent helps the principal "to overcome information asymmetries"[48]). As for the EPPO, one can imagine two benefits from its creation. First, the advancing economic integration and notably the Schengen agreement facilitated the increase of cross-border crime, which created the urge for police and criminal justice cooperation between the EU Member States.[49] However, despite the progresses in the past (e.g. the creation of Europol and Eurojust or the European Arrest Warrant), cooperation between the national law enforcement and

[43] Pollack, *loc cit*.
[44] Sabine Saurugger, *Theoretical Approaches to European Integration* (Basingstoke: Palgrave Macmillan, 2014), 83, 85.
[45] Bovens and Schillemans, *loc. cit*.
[46] *Ibid.*
[47] Pollack, *op. cit.*, 168.
[48] Thatcher and Stone Sweet, *op. cit.*, 4.
[49] See Brenninkmeijer, *op. cit.*, 196 for the example of VAT fraud.

justice systems remains cumbersome and complicated.[50] Thus, creating the EPPO to gather the necessary information and coordinate operations from a central level might have seemed a more efficient way to fight PIF crimes in the EU. Second, according to the Commission, PIF-crimes did not always lie in the centre of attention for national prosecution organs before the EPPO was created. The lack resources dedicated to national prosecution bodies may have made it difficult for national prosecutors to develop the necessary expertise to handle the often very complex cases. Therefore, creating a specialized body solely dedicated to the investigation and prosecution of PIF-crimes might have provided for a much higher level of expertise and knowledge.

2.1.2.3 Principal-Agent Theory and Control: The Agency Loss-Problem

P-A Theory focusses not only on the reasons for delegation (the "why"), but especially on questions of institutional design (the "how").[51] This is not surprising given the fact that the "why" and the "how" of delegation belong together and cannot be regarded completely separately from each other.[52] The first dimension of institutional design is rather obvious and refers to the basic assumption of P-A Theory explained above. Since principals only delegate to NMIs if they expect a functional benefit from delegation, they need to set up an institutional design that will enable the agent to deliver a real added value in practice.

However, there is another underlying dimension to the institutional design question. When principals delegate powers to an agent, they face a dilemma. How do they ensure that their expectations of the agent's behaviour will not be disappointed? Agents tend to establish a life of their own and develop own preferences over time that do not necessarily match with the principal's interests.[53] P-A Theory describes this phenomenon as the principal's fear of "agency loss".[54] A standard assumption of P-A Theory is that principals are very much aware of the dangers of delegation. Therefore, when they delegate to an NMI, principals seek to minimize agency loss by retaining as much control over the NMI as possible. However, maintaining control is costly for the principals. Furthermore, the agent still needs to have the necessary discretion to perform its functions. Principals usually cannot retain total control over

[50] See for the following Chapter 3.1.
[51] Pollack, Delegation, agency, and agenda setting, *op. cit.*, 102; Thatcher and Stone Sweet, *op. cit.*, 8.
[52] See already above Chapter 1.
[53] Pollack, Delegation, agency, and agenda setting, *op. cit.*, 108; Thatcher and Stone Sweet, *op. cit.*, 4; Tallberg, *op. cit.*, 32.
[54] Thatcher and Stone Sweet, *loc. cit.* P-A Theory usually differentiates between agency losses by "shirking" (the agent's preferences diverge from the principal's) or "slippage" (the institutional design itself offers incentives for the agent to pursue interests contrary to the principal's), Pollack, Delegation, agency, and agenda setting, *loc. cit.*; Mark Thatcher, "Delegation to Independent Regulatory Agencies: Pressures, Functions and Contextual Mediation", *West European Politics* 25, no. 1 (2002): 130.

the NMI without endangering the functional purpose of delegation.[55] Thus, principals find themselves in another dilemma: How "to delegate just the amount of power to enable agents to achieve desired outcomes with minimal agency loss"[56]?

How much control the principals can retain depends on the function the NMI is expected to fulfil. Some tasks require more discretional freedom than others. P-A Theory expects the "zone of discretion"[57] granted by principals to be greater if the delegation is motivated by credible commitment issues.[58] In these cases, the very purpose of delegation for the principals is to collectively tie their own hands by transferring powers to an NMI.[59] This purpose would be undermined if the principals were to keep extensive ex-post control over the NMI.[60] Therefore, P-A Theory expects that "the greater the commitment problem, the more likely the principals will grant relatively more discretion to an agent, and the more likely ex post controls will be relatively weak".[61] In the case of EPPO, it can be expected that the Member States faced substantial commitment problems, since they cannot influence the prosecution shortcomings in other states (see above). Accordingly, it is likely that they granted the EPPO a broad discretion with little national control, which *prima-facie* seems to be confirmed by the EPPO's independence.[62]

2.1.3 The sensitivity of criminal justice and the reluctance of states to give up core state powers

It has been shown that P-A Theory is a common and useful framework to approach the creation of the EPPO. However, its purely functional character cannot explain every aspect of delegation to NMIs.[63] For instance, in Western Europe, the pattern of delegation over time and policy areas has varied considerably, despite similar functional needs.[64] Before the 1980s and 1990s, there was hardly any delegation to NMIs, although pressing issues of credible commitment and increasing complexity already existed at the time.[65]

[55] Thatcher and Stone Sweet, *op. cit.*, 14.
[56] Thatcher and Stone Sweet, *op. cit.*, 5.
[57] *Ibid.*
[58] Thatcher and Stone Sweet, *op. cit.*, 14-15.
[59] Cf. Tallberg, *op. cit.*, p. 26.
[60] Kathleen McNamara, "Rational Fictions: Central Bank Independence and the Social Logic of Delegation", *West European Politics* 25, no. 1 (2002): 50; Thatcher and Stone Sweet, *op. cit.*, 14.
[61] Alec Stone Sweet, "Constitutional Courts and Parliamentary Democracy", *West European Politics* 25, no. 1 (2002): 82.
[62] art. 6 EPPO Regulation.
[63] Thatcher and Stone Sweet, *op. cit.*, 9.
[64] Thatcher and Stone Sweet, *op. cit.*, 10.
[65] Thatcher, *op. cit.*, 134.

The AFSJ in general and the EPPO specifically are good examples to show the limitations of a rational-choice approach. In the AFSJ, including criminal justice, Member States are very reluctant to delegate competences,[66] regardless of functional needs for delegation. For instance, the failure to reform the EU asylum system after the refugee crisis in 2015 shows that Member States are able to withstand even extreme functional pressures without delegating powers to the EU level. This trend can be observed since the beginning of the integration process in the AFSJ following the Maastricht Treaty (1992). Cooperation in "Justice and Home Affairs" (JHA) was not communitarised but established as a "third pillar" with firmly intergovernmental character.[67] Although the provisions on JHA were implemented into the TFEU with the Lisbon Treaty, the chapter on what is now called AFSJ still has an "intergovernmental bias".[68] This is further exemplified by the three most prominent examples of supranational bodies in the area of criminal justice (Europol, Eurojust, and OLAF), which are intergovernmental in nature and do not possess real operational powers.[69] Evidently, in the AFSJ, political actors do not always behave 'rational' understood in a functional way. The history of the EPPO seems to confirm this argument. The functional need to protect the EU budget against criminal activities emerged since the creation of the EU's own resources with the Treaty of Luxembourg in 1970. Already in 1976, the Commission called upon the Council to allow for common rules of criminalizing and prosecuting offenses affecting the EU's financial interests.[70] However, for decades and despite the increasing need for cooperation regarding cross-border crimes, Member States jealously protected their national prerogatives in the criminal justice sector.[71] Since the publication of the *Corpus Juris* in the late 1990s, it took the Member States another almost 20 years, including 4 years of extremely difficult negotiations, and enhanced cooperation to transfer (limited) operational powers to the EPPO.

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[66] John A.E. Vervaele," The European Public Prosecutor's Office (EPPO): Introductory Remarks", in *Shifting Perspectives on the European Public Prosecutor's Office*, ed. Willem Geelhoed, Leendert H. Erkelens, and Arjen W.H. Meij (The Hague: T.M.C. Asser Press, 2018), 13.
[67] Florian Trauner and Ariadna Ripoll Servant, "The analytical framework: EU institutions, policy change and the Area of Freedom, Security and Justice", in *Policy Change in the Area of Freedom, Security and Justice: How Eu Institutions Matter*, ed. Florian Trauner and Ariadna Ripoll Servant (London: Routledge, 2015), 11.
[68] Sarah Wolff, "Integrating in Justice and Home Affairs: A Case of New Intergovernmentalism Par Excellence?", in *The New Intergovernmentalism : States and Supranational Actors in the Post-Maastricht Era*, ed. Christopher Bickerton, Dermomt Hodson and Uwe Puetter (Oxford: Oxford University Press, 2015), 133. See e.g. art. 67 TFEU ("with respect for (…) the different legal systems and traditions of the Member States").
[69] European Commission, "Impact Assessment Accompanying the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office", SWD (2013) 274 final, Brussels, 17 July 2013 ("**Impact Assessment**"), 14.
[70] Csonka, Juszczak and Sason, *op. cit.*, fn. 1.
[71] Marianne Wade, "The European Public Prosecutor: Controversy Expressed in Structural Form", in *EU Criminal Justice*, ed. Tommaso Rafaraci and Rosanna Belfiore (Cham: Springer, 2019), 166.

The reason for this reluctance to delegate is that Member States perceive matters of law enforcement, prosecution, and criminal justice as "core state powers".[72] Following Genschel and Jachtenfuchs, core state powers are defined as "key functions of sovereign government, including money and fiscal affairs, defence and foreign policy, migration, citizenship and internal security."[73] Sovereignty shall be defined as "a state's power over territory, jurisdiction, and people."[74] Delegation of powers to an NMI in the area of criminal justice as core state power thus touches upon the very heart of national sovereignty, potentially questioning the status as an autonomous nation state.[75]

From the onset, this approach and P-A Theory are very similar because they start from the shared assumption that the fear to 'lose control' is a powerful influencing factor of delegation. However, there is also a tension. While P-A Theory assumes that the Member States' decision of whether and how to delegate is primarily based on functional benefits, a more sovereignty centred approach would assume that Member States are reluctant to delegate core state powers *even if it means to not choose the most efficient solution*. It will be seen in the analytical part of this dissertation which of the two aspects prevailed in the EPPO negotiations.

2.1.4 Independent Variables and Hypothesis

In accordance with the theoretical framework set out above, a series of independent variables and hypothesis can be formulated to make sense of the puzzle of the EPPO's creation.

Based on P-A Theory, the following independent variables are expected to influence the Member States' decision to (not) join the EPPO (dependent variable).

IV1: The expected functional added value of the EPPO

IV2: Issues of credible commitment to the collective-action problem of investigating and prosecuting PIF crimes

[72] Philipp Genschel,and Markus Jachtenfuchs, "More Integration, Less Federation: The European Integration of Core State Powers", *Journal of European Public Policy* 23, no. 1 (2016): 43; see also Trauner and Ripoll Servant, *op. cit.,* 11: "core functions of statehood".
[73] Genschel and Jachtenfuchs, *loc. cit.*
[74] Michiel Luchtman, Anthonie Van den Brink and Miroslava Scholten, "Sovereignty in a Shared Legal Order: On the Core Values of Regulation and Enforcement" in *Sovereignty in the Shared Legal Order of the EU. Core Values of Regulation and Enforcement*, ed by Anthonie Van den Brink, Michiel Luchtman, and Miroslava Scholten (Cambridge: Intersentia, 2015), 3, cited in Schmeer, *op. cit.,* 1.
[75] Genschel and Jachtenfuchs, *loc. cit.*

IV3: Information asymmetries and complexities of the regulated policy area of investigating and prosecuting PIF crimes

IV4: The acuteness of the mentioned credible commitment issues

Accordingly, the following P-A Theory based hypothesis are defined:

H1: The Member States' decision to participate in the EPPO depended on to what extent they expected the EPPO to deliver a functional added value.

H2: The Member States agreed to the establishment of the EPPO because they wanted to credibly commit themselves to fighting crimes against the financial interest of the EU.

H3: The Member States agreed to the establishment of the EPPO because they wanted to overcome information asymmetries and complexities related to the investigation and prosecution of PIF crimes.

H4: The more acute the perceived commitment problem, the more likely Member States will delegate more discretion to an NMI and the less likely control mechanisms will be strong.

In contrast, the independent variable and the hypothesis drawn from a sovereignty centred core state powers approach are as follows:

IV5: Perceived intrusiveness of delegation into national sovereignty

H5: The more Member States perceive delegation as intrusive in their national sovereignty, the less likely they will delegate and the more likely control mechanisms will be strong.

2.2 Methodology

Given the complexity of the negotiations and the EPPO Regulation, it is impossible to cover every aspect of its creation. Therefore, the research is focussed on the general approach of the Member States to the EPPO and key elements of its design. With regards to the latter, the research has concentrated on two aspects: the structure and the competence of the EPPO. These points are especially well suited to study the mechanisms behind delegation because they represent the most contentious issues of the whole negotiations.

The timeframe of the research is the time between the publication of the Commission proposal in July 2013 and the adoption of the EPPO Regulation in October 2017, including the immediate aftermath. A special emphasis will be laid on the first year of the negotiations, because the two changes to the EPPO's institutional design which will be analysed in detail were introduced during this time.

The analytical part of this thesis will be based on a variety of sources. First, the study of primary and secondary sources, notably the text of the EPPO-regulation, publicly available Council documents and written accounts by participants of the negotiations, but also academic and press articles. Second, seven semi-structured interviews have been performed to – using Schmeer's words – open the "black-box of Council negotiations".[76] The interviewees were composed of five national officials representing four Member States in the negotiations (among others the Czech Republic), one EU official and one academic researcher. Together, these sources will allow for an in-depth impression of the negotiations and for an analysis of the Member States' motivation.

However, there are also important caveats which need to be borne in mind. The "official" position of Member States as stated in Council documents or elsewhere does not necessarily reflect their actual motivation. It can also be a pretext to conceal the true reasons, which cannot be openly admitted.[77] As one interviewee emphasized, it was often impossible to know the true reasons for a delegation's behaviour.[78] Furthermore, the opinions of participants in the negotiations, whether expressed in an interview or a written source, may be biased or based on an inaccurate memory of the negotiations that took place several years before the interviews. Also, the interviewees were mainly national officials on the expert level, who may have different preferences or views than actors on the political decision-making level. However, it is at least likely that the experts' opinions largely reflect the Member State's

[76] Laura Schmeer, *op. cit.*, 2.
[77] Cf. Schmeer, *op. cit.*, 14.
[78] Interview_5.

political position, since during negotiations, there is a constant communication and feedback between both levels.[79]

Finally, it must be considered that this qualitative research is based on an in-depth case study of the EPPO, which can be broken down to even more case studies as the Member States' positions diverged considerably. The findings on one Member State therefore do not have to necessarily hold true for the others and the analytical results on the EPPO do not automatically extrapolate to other cases or areas.

[79] Interview_6.

3 Empirical and Analytical Part: The EPPO Negotiations

The analysis of the negotiations will be based on two pillars. First, it will be explored why many Member States agreed to the establishment of the EPPO, while a few others did not. Afterwards, the second pillar will focus on questions of institutional design. The analysis will assess two substantial design elements in detail which were especially contentious during the negotiations: the structure and the competence of the EPPO.

3.1 The case for and against the EPPO: exploring the "why" of its creation

This first sub-chapter will analyse the reasons why the Member States did (not) agree to the establishment of the EPPO. In accordance with the theoretical framework, arguments of functionality and of sovereignty will be particularly emphasised. In a first section, the Commission proposal will be discussed, and the arguments brought forward by the Commission. Then, the subsidiarity procedure before the national parliaments will be analysed. Numerous parliaments expressed their discontent with the proposal, thereby triggering the "yellow card" mechanism. It will be assessed whether this can be seen as the first proof of how sovereignty concerns played out in the legislative procedure. Afterwards, the position of the Member States' governments will be analysed. Unsurprisingly, the positions of the different Member States were quite diverse in the beginning. However, most Member States joined the EPPO in the end. This thesis will try to explore the reasons for the Member States' approval or rejection.

3.1.1 The Commission Proposal

Following a long consultation period, the Commission published its proposal in July 2013, together with a Communication[80] and an extensive Impact Assessment.[81] Given the technical character of the Commission and in view of the subsidiarity principle (see below), it is not surprising that the presented arguments focused on the functional need to establish an EPPO. According to the Commission, the financial interests of the EU were not sufficiently protected by the national authorities of the Member States. Every year, fraud and other criminal activities caused losses to the EU budget amounting to "at least several hundred

[80] European Commission, "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Better protection of the Union' financial interests: Setting up the European Public Prosecutor's Office and reforming Eurojust", COM (2013) 532 final, Brussels, 17 July 2013 ("**Communication EPPO**").
[81] Impact Assessment, *op. cit.*, 1.

million euros".[82] At the same time, overall prosecution and recovery rates for PIF-crimes throughout the EU remained stubbornly low, despite existing means of cooperation like Europol, Eurojust, OLAF or the European Arrest Warrant.[83] The Commission stated that the main reasons why PIF-crimes were not efficiently prosecuted on national level were as follows:

A first set of arguments revolves around the great complexity of investigations regarding PIF-crimes. Both the facts and the legal assessment in these investigations are usually complicated [84] and national prosecutors often lack the necessary expertise. Furthermore, PIF-crimes frequently have a cross-border dimension, which makes the investigation even more cumbersome.[85] Collecting evidence in another state is a lengthy and difficult process.[86] The communication can be challenging because of language barriers[87] and cooperation in general is complicated by the great diversity of national legal systems.[88]

Another argument, closely related to the one above, is that Member States often show a lack of interest in investigating PIF-crimes.[89] Many national prosecutors still have a very national point of view on their prosecution systems.[90] To them, 'Brussels' is far away and the EU budget a somewhat abstract creature, which seems to be confirmed by a general lack of public interest in these crimes. The great lengthiness and complexity of the investigations further exacerbates this trend.[91] Also, the Member States dedicate little of their limited[92] resources to the fight against PIF-crimes, which results in a lack of expertise.[93] Even in Member States with higher conviction rates, prosecutors often limit the investigation from the beginning to their national territory, thus losing the European dimension of the case out of sight.[94] Furthermore, in some countries with "governance problems", the lack of motivation could also be linked to political reasons.[95]

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[82] Impact Assessment, *op. cit.*, 11.
[83] Impact Assessment, *op. cit*., 16 and 24: For fraud, the recovery rate is below 10 %.
[84] Impact Assessment, *op. cit*., 16, 23.
[85] Impact Assessment, *op. cit*., 23.
[86] Impact Assessment, *op. cit*., 16.
[87] *Ibid.*.
[88] Commission proposal, *op. cit.*, 2.
[89] See Impact Assessment, *op. cit*., 19: "Prosecuting offences against the EU budget is generally considered of secondary importance by the authorities in a number of Member States*"* and Francesco De Angelis, "The European Public Prosecutor's Office (EPPO): Past, Present, and Future", *eucrim* no. 4 (2019): 274: "European money is still considered 'res nullius' instead of 'res omnium'".
[90] Impact Assessment, *op. cit.*, 24.
[91] Impact Assessment, *op. cit.*, 19.
[92] Cf. Commission proposal, *op. cit.*, 2.
[93] Communication EPPO, *op. cit.*, 4.
[94] Impact Assessment, *op. cit*., 16, 23.
[95] Impact Assessment, *op. cit*., 20.

Besides the general lack of motivation, the Commission also lamented that the prosecution effectiveness varied greatly among the Member States. While some showed relatively high conviction rates, other Member States performed much more poorly in this regard,[96] resulting in a lack of consistency and coherence across the Union.

Finally, it was argued that the existing means of cooperation on national and EU level were not sufficient to address the problem. Due to the "functional limitations of existing Union bodies and agencies"[97] like Europol, Eurojust or OLAF, cooperation remains slow and flawed. Overall, in cross-border cases, "current levels of information exchange and coordination at national and European level are not sufficient",[98] which is partially due to the national mentality of prosecutors described above.[99] As a result, "fraudsters play on the asymmetry of information within the EU."[100]

In its Impact Assessment, the Commission discussed various policy options to address these problems, reaching from not changing anything over strengthening existing bodies like Eurojust to creating an EPPO with different grades of centralization. The Commission concluded that a decentralized hierarchical EPPO promised to bring the most added-value.

In summary, the arguments of the Commission largely align with the functional logic of P-A Theory and especially its assumption that policy complexity and information asymmetries are driving factors of delegation. However, since the Member States are the principals and not the Commission, it will need further analysis to what extent the Member States agreed with this argumentation.

3.1.2 National Parliaments as First Line of Defence of Sovereignty?

The Commission proposal faced fierce resistance from the very beginning. Even before the actual start of the Council negotiations, numerous national parliaments objected to the proposal in the subsidiarity procedure according to Protocol No. 2 of the Treaties.[101] The subsidiarity procedure gives national parliaments the chance to review legislative proposals in the first eight weeks after their publication for their compatibility with the principle of

[96] Impact Assessment, *op. cit*., 15.
[97] Communication EPPO, *op. cit.,* 2.
[98] Impact Assessment, *op. cit*, 20.
[99] See also the description of a Europol director in Madalina Busuioc and Martijn Groenleer, "Beyond Design: The Evolution of Europol and Eurojust", *Perspectives on European Politics and Society* 14, no. 3 (2013): 293: "It's still an issue (…) facing a certain cultural resistance in the police community to sharing their information with Europol… Many of them are not used to even international police cooperation, let alone police cooperation with an institution within the EU."
[100] Impact Assessment, *op. cit*., 22.
[101] European Union, "Protocol No. 2 on the application of the principles of proportionality and subsidiarity", in *Treaty on European Union and the Treaty on the Functioning of the European Union*, *op. cit.*

subsidiarity. Said principle is laid down in art. 5 (3) Treaty on the European Union.[102] It stipulates that outside of areas of exclusive competence, the Union can only act "if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States (…) but can rather (…) be better achieved at Union level." If a parliament chamber holds that a proposal does not adhere to the principle it can issue a formal reasoned opinion. In the case of the EPPO, the Commission received 14 reasoned opinions from 11 Member States' parliaments,[103] which triggered the so-called "yellow card procedure" (art. 7 Protocol No. 2). As a result, the Commission was obligated to review its proposal. However, in its review, the Commission dismissed the parliaments' arguments and decided to uphold the proposal.[104]

The yellow card for the EPPO was an extraordinary event, being only the second yellow card ever issued. A common narrative to explain the great reluctance of parliaments towards the proposal is that the parliaments "were above all, if not entirely guided by the protection of their respective national systems" and that "the subsidiarity test (…) revealed political national concerns"[105] (author's translation) related to sovereignty.[106] This narrative fits well into the hypothesis that in the field of criminal justice, sovereignty concerns make delegation less likely. However, this assumption seems somehow odd, given the functional nature of the subsidiarity procedure.[107] The very definition of subsidiarity in the Treaties makes clear that parliaments are restricted to reviewing whether EU action is more *effective* than on national level.[108] This friction requires a closer look at the arguments brought forward by the parliaments.

[102] European Union, Treaty on European Union, *op. cit.*
[103] Cyprus, the Czech Republic, France, Hungary, Ireland, Malta, the Netherlands, Romania, Slovenia, Sweden, and UK.
[104] European Commission, "Communication from the Commission to the European Parliament, the Council and the National Parliaments on the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office with regard to the principle of subsidiarity, in accordance with Protocol No 2", COM (2013) 851 final, Brussels, 27 November 2013 ("**Communication Parliaments**").
[105] Kuhl and Panait, *op. cit.*, 63.
[106] Hubert Legal, "EPPO's Raison d'Être: The Challenge of the Insertion of an EU Body in Procedures Mainly Governed by National Law", in *Shifting Perspectives on the European Public Prosecutor's Office*, ed. Willem Geelhoed, Leendert Erkelens and Arjen Meij (The Hague: T.M.C. Asser Press, 2018), 190.
[107] Cf. Fabio Giuffrida, "Cross-Border Crimes and the European Public Prosecutor's Office", *eucrim* no. 3 (2017): 151.
[108] Ester Herlin-Karnell, "The Establishment of a European Public Prosecutor's Office: Between 'Better Regulation' and Subsidiarity Concerns", in *Shifting Perspectives on the European Public Prosecutor's Office*, ed. Willem Geelhoed, Leendert Erkelens and Arjen Meij (The Hague: T.M.C. Asser Press, 2018), 53.

The parliaments gave a wide range of arguments which might be categorized in functional subsidiarity concerns and other non-subsidiarity related issues.[109] Among the subsidiarity-related arguments, it was brought forward that the Commission had not sufficiently demonstrated the need and added value of an EPPO.[110] It was held that the prosecution on national level was sufficiently effective[111] and that the already existing cooperation on EU level (Europol, Eurojust, and Olaf) provided adequate means to address the problem.[112] If a legislative proposal were to be considered it should be strengthening the existing EU structure and not creating a whole new supranational body.[113] These arguments are inherently functional and cast into doubt the assumption that the parliaments were entirely motivated by sovereignty concerns. Of course, it can never be ruled out that the functional reasoning is a mere pretext for the real, political reasons of rejection.[114] But it is also true that the need for an EPPO has not only been contested by political actors.[115] Especially the lack of reliable data makes it indeed very difficult to objectively quantify the shortcomings of national prosecution systems.[116] It would therefore be too easy to dismiss the subsidiarity arguments of the parliaments as merely political.

It is however also true that some of the other non-subsidiarity related arguments did have a political flavour. This concerns the arguments that the powers conferred to the EPPO were generally too far reaching[117] and otherwise disproportionate,[118] the objection that criminal justice as a national competence belonged to the national level[119] or that the EPPO would negatively affect the Member States' "capacity to prioritize prosecution activities within their own criminal justice systems, and how to allocate resources."[120]

In conclusion, it is evident that the national parliaments were at least partially guided by political concerns of losing sovereignty. This is not surprising considering the overall Eurosceptic environment in Europe at a time, in which the continent was still shaken by the

[109] Cf. Irene Wieczorek, "The EPPO Draft Regulation Passes the First Subsidiarity Test: An Analysis and Interpretation of the European Commission's Hasty Approach to National Parliaments' Subsidiarity Arguments", *German Law Journal* 16, no. 5 (2015): p. 1253.
[110] Council of the European Union, 16624/13, Brussels, 28 November 2013, p. 3.
[111] Communication Parliaments, *op. cit.*, 6.
[112] *Ibid*.
[113] Council of the European Union, 16624/13, *loc. cit.*
[114] Cf. Schmeer, *op. cit.*, 14.
[115] See e.g. Fabio Giuffrida, "The European Public Prosecutor's Office: King Without Kingdom?*", Centre for European Policy Studies*, no.3 (2017): 37 f.
[116] Vervaele, *op. cit.*, 15; Giuffrida, King without Kingdom, *op. cit.*, p. 4.
[117] Dutch Senate, French Senate, Hungarian Parliament, see Council of the European Union, 16624/13, *loc. cit*.
[118] See Wieczorek, *op. cit.*, 1253 fn. 33.
[119] Irish parliament, see Council of the European Union, 16624/13, *loc. cit*.
[120] Dutch Senate and Parliament, UK parliament, Wieczorek, *op. cit.*, 1254 fn. 38.

Eurocrisis.[121] However, it is also true that the parliaments largely used functional arguments revolving around the missing need or added value of the EPPO. It is therefore not convincing to generally assume that sovereignty was the clearly dominant or only motivating factor.

It is difficult to quantify the importance of the yellow card procedure for the Council negotiations.[122] One cannot assume the parliament's opinion as the opinion of the state, since the national parliaments don't represent their countries in the Council. It is the governments that are in the driver seat. To what extent the governments need to respect the opinion of their parliaments, is a matter of national law.[123] For instance, while the Dutch minister of justice cannot agree to a proposal without parliament's consent,[124] in the Czech Republic, the voice of the Senate does not have to be considered by the government.[125] Although it is likely that even without a legal obligation, the parliament's voice has political weight, it cannot be taken for granted that governments will respect it. This is already shown by the fact that most Member States whose parliaments were sceptical or even negative towards the proposal joined the EPPO in the end. In the case of the Czech Republic, the Minister of Justice even ignored the explicit request by the Senate not to agree to the proposal.[126] That being said, it is nevertheless likely that the yellow card influenced the negotiations at least to a certain extent into a more sceptical and "national" direction.[127] For instance, the Council Presidency stressed the need to take the parliaments' opinions into consideration.[128] Also, the Commission promised in its review to "take due account of the reasoned opinions of the national Parliaments".[129]

[121] Elias Wirth, *Die Europäische Staatsanwaltschaft* (Baden-Baden: Nomos, 2022), 128.
[122] Kuhl, *op. cit.,* 137-138 holds that the subsidiarity opinions „put a strong political strain on the Council negotiations" and contributed to a more sovereignty-centered approach by the Member States.
[123] Fritz Zeder, "Der Vorschlag zur Errichtung einer Europäischen Staatsanwaltschaft: Große – kleine – keine Lösung?", *Österreichisches Anwaltsblatt* no. 4 (2014): 221.
[124] Jaap van der Hulst, "No Added Value of the EPPO? The Current Dutch Approach", *eucrim* no. 2 (2016): 100.
[125] Interview_6.
[126] *Ibid.*
[127] Kuhl, *loc. cit.*
[128] Council of the European Union, 18120/13, Brussels, 20 December 2013, p. 2. The Polish and French parliament both claimed that the EPPO should have a collegial form, which in the end was implemented in the Regulation. However, this is not due to the parliaments' voices, since the French and German government had already advocated for a College structure before the Commission proposal, see below.
[129] Communication Parliaments, *op. cit.,* 13. Many observers, however, state that the Commission showed little regard, if not even disregard, of the reasoned opinions, Wirth, *op. cit.,* 130-131. According to Wieczorek, *op. cit.,* 1249, this shows the political nature of the subsidiarity procedure.

3.1.3 The general approach of Member States' governments towards the EPPO

The following section will analyse the reasons why Member States in the end joined EPPO and why some did not. The institutional design of the EPPO will be assessed in the next sub-chapter. In the beginning of the Council negotiations, there was a wide range of opinions among the then 28 Member States. Regarding the general approach to the EPPO, i.e. the decision whether to establish it, one can categorize the Member States into three groups. First, the Member States that were supportive from the very beginning. Second, the Member States that were sceptical but in the end decided to join the EPPO. And lastly, the Member States that have not participated so far.

3.1.3.1 Supportive Member States

Many countries had already been supportive of the idea of an EPPO before the Commission proposal.[130] In fact, the Commission only came forward with a proposal after having assured themselves that the EPPO would find the general agreement of certain important Member States.[131] Accordingly, Council documents show that most Member States supported the establishment of the EPPO from an early stage of the negotiations,[132] indicating the minor importance of the yellow card given by parliaments on the general stance of the governments.[133] The key question at this point is: Why did so many Member States support the establishment of a supranational body in such a sensitive area?

3.1.3.1.1 Functional need for delegation

The reasons for a Member States' behaviour are not always easy to assess. Even if an official document contains information about a motivation, the caveat remains if the given content reflects the true reasons for a position. However, there is strong evidence that most Member States supported the EPPO's creation because they agreed with the Commission on the functional need for delegation:

First of all, the information given by the interviewees, who actively participated in the negotiations, strongly points into this direction. According to one Member State

[130] For instance, already in 2008, Spain had advocated for the establishment of an EPPO, Interview_1.
[131] Kuhl, *op. cit.*, 137.
[132] Council of the European Union, 14312/13, Brussels, 2 October 2013, 3: "24 delegations took the floor. The quasi-totality of them preliminarily welcomed the Commission proposal"; Council of the European Union, 15686/13, Brussels, 7 November 2013, 2: "A majority of ministers welcomed the proposal"; Council of the European Union, 18120/13, *op. cit.*, 3: "The great majority of delegations have expressed support for the idea of establishing the EPPO".
[133] One must state, however, that several reasoned opinions came from Member States that were also reluctant in the negotiations, e.g. the Netherlands, Czech Republic, UK, Hungary, Sweden, or Ireland.

representative, it was "convincing what the Commission pointed out that there are deficits in some states in the prosecution of offences against the Union's financial interests."[134] He further stated that there were different opinions about the need of an EPPO in their own countries, which another interviewee described as a North-South divide.[135] However, he also stressed that "all agreed that there are Member States where it doesn't work well, and that's why the opinion prevailed that we should do it."[136] Another Member State official confirmed that "everyone was quite clear on the fact" that in the Member States, there was no efficient criminal policy against PIF offences.[137] An EU official involved in the negotiations stressed that some "overburdened" countries had a "concrete need of assistance", so there was a "very practical need (...) to get rid of these cases and outsource them to a European authority."[138] Finally, another Member State representative described that according to their analysis, there was "quite big of manoeuvre to make criminal investigations more efficient. In this kind of frauds, there is not enough exchange of information among different administrations." Furthermore, the cases in this area could be very complex and handled by small courts. Hence, "having an institution who can deal with a whole investigation from a national perspective, from our point of view, was positive."[139]

The statements of the interviewees are confirmed by practitioners and other Member State officials. For instance, Italian Deputy Prosecutor General Eugenio Selvaggi stated in 2013 that "the protection of the financial interests of the EU is currently not effective, mainly because of the differences in legal systems of MS."[140] As another example, German Senior Public Prosecutor Kai Lohse stated at a conference in September 2013 that "considering the European Union as a whole, there is ground to believe that the creation of EPPO, implementing a supra-national level of prosecution, will enable a better protection of its financial interests by means of criminal law."[141] Also, David Vilas Álvarez, representative of Spain in the negotiations, admitted that the case number of PIF offences in Spain was very low and that "we shared the initial analysis

[134] Interview_2.
[135] Interview_3: "Countries like Sweden, Germany, Poland, well the Northern Europeans… it's a North-South thing that they are more reluctant to go far with European criminal law."
[136] Interview_2.
[137] Interview_4.
[138] Interview_3.
[139] Interview_1.
[140] Council of the European Union, 13863/1/13 REV 1, Brussels, 14 October 2013, 28.
[141] Kai Lohse, "The European Public Prosecutor: Issues of Conferral, Subsidiarity and Proportionality", in *The European Public Prosecutor's Office*, ed. Willem Geelhoed, Leendert Erkelens, and Arjen Meij (The Hague: T.M.C. Asser Press, 2015), 178.

of the Commission that the prosecution of these cases (…) could be improved by the establishment of this novel organ."[142] (author's translation)

In this context, it is interesting to note that according to some interviewees, the concern about prosecution shortcomings in other Member States was especially strong in net contributor countries. One interviewee stressed that "Germany is the largest net contributor and they therefore also have an interest from that point of view that the money is handled properly" in other states.[143] This impression was confirmed by another interviewee representing the Ministry of Justice of the Czech Republic: "I think that for the Member States like France or Germany that actually pay more, it was important that even in the other Member States they could control the European money and whether it is spent according to the law."[144] This is not surprising given the political circumstances in 2013. In midst the Eurocrisis, the question of how European money from net contributor countries is being spent in receiving countries was highly politicized and gathered a lot of public attention. The notion that 'our money' is misspent and affected by corruption in other countries was widespread at the time, which was fuelled by the tabloid press (e.g. BILD in Germany). Accordingly, net contributor countries had a strong interest in assuring their citizens to take action in this regard. Against this backdrop, it must have been especially worrying for them that the lack of interest to prosecute PIF offences in some countries might have been due to political reasons.[145] One interviewee hinted at the fact that some countries may not want an effective prosecution because politicians themselves were involved in these criminal activities or because they feared it could affect the payment from EU funds to their countries.[146] Therefore, it seems justified to say that some net contributor countries had a strong interest in taking the prosecution out of the hand of these countries.

3.1.3.1.2 Other reasons for delegation

Although the functional need seemed to be the main reason, one can identify further motives that influenced the supportive stance of Member States:

Many scholars emphasize the symbolic meaning of the EPPO as a "move towards a single European criminal jurisdiction and (…) a new era of criminal justice cooperation in the

[142] David Vilas Álvarez, "Négociations Du Règlement Vues par Un État Membre : Le Cas De L'espagne", in *La Création Du Parquet Européen Simple Évolution Ou Révolution Au Sein De L'espace Judiciaire Européen?*, ed. Constance Chevallier-Govers and Anne Weyembergh (Bruxelles: Bruylant, 2021), 25.
[143] Interview_2.
[144] Interview_6.
[145] cf. Impact Assessment, *op. cit.,* 20.
[146] Interview_2.

EU."[147] Council documents[148] and the conducted interviews confirm that the symbolic importance was a strong driver for those countries in favour of further European integration. One Member State representative confirmed this explicitly in the case of France: "The first reason for France is very political. France has always been one of the Member States in favour of more European integration. So the EPPO is obviously in the justice sphere a very important step towards more European integration.".[149] An EU official stressed that this "ideological" reason rooted in "a wish to go a step towards a common European criminal law, a first big step. People involved in the negotiations compared it with the Euro being the first step towards the European financial policy."[150] However, the importance of this aspect should not be overstated. As one interviewee put it, the symbolic meaning of the EPPO "would never have been enough, to explain why we indeed accepted such delegation of power".[151] Another interviewee implied that it was rather underlying than actually influencing the negotiations.[152]

Another important reason relates to the nature of PIF-crimes as "genuine European crimes".[153] One interviewee stressed that for many Member States, these crimes were something "external"[154] and did not really belong to their national sphere in the first place: "I mean financial fraud. It was seen that this is a European crime. It's not something that you delegated but something that more naturally belonged at European level because it's European money."[155] Another interviewee confirmed this impression: "The PIF offences are European offences because the victim is the EU budget. So the European level is self-evident for these crimes (…). The fight against PIF offenses has never been in no member state a priority. And having an EPPO meant that we were not taking so much from the member states, from the national judicial authorities. We were creating a new judicial authority that would investigate and prosecute offenses that were not really investigated and prosecuted."[156]

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[147] Katalin Ligeti and Anne Weyembergh, "The European Public Prosecutor's Office: Certain Constitutional Issues, in: *The European Public Prosecutor's Office : An Extended Arm or a Two-Headed Dragon?,* ed. Leendert Erkelens, Arjen Meij and Marta Pawlik (The Hague: T.M.C. Asser Press, 2014), 54, see also Giuffrida, *op. cit.,* 2; Anne Weyembergh and Chloé Briere, "Towards a European Public Prosecutor's Office*", European Parliament Policy Department for Citizen's Rights and Constitutional Affairs,* Study for the LIBE Committee (2016), 9.

[148] E.g. Council of the European Union, 13863/1/13 REV 1, *op. cit.*, 28 regarding the statement of Italian Deputy Prosecutor General Selvaggi: "It is clear that the establishment of the EPPO should be looked at as a step ahead in the construction of a future Europe."

[149] See Interview_4..

[150] Interview_3.

[151] Interview_4.

[152] Interview_3.

[153] Impact Assessment, *op. cit.,* 12.

[154] Interview_3.

[155] *Ibid.*

[156] Interview_4; also another interviewee said that from the point of view of the competent Minister of his country, "federal crimes called for federal prosecution", Interview_5.

Finally, there were influencing factors that only applied to certain countries. For instance, one interviewee stated that new Member States like Bulgaria or Romania wanted to "prove their goodwill to be good Europeans".[157] Particularly interesting is the case of Spain, which among other aspects, also supported the EPPO for internal reasons.[158] Spain is one of the few European countries where the prosecution does not generally lie in the hands of prosecutors, but of special judges. The general prosecutor office had been advocating a change of the criminal procedural law for a long time before the proposal, but without success due to resistance by these judges. It was believed that the EPPO-file, which contained a strong position for national prosecutors, might "help to leverage" a reform in the national system as well.[159]

3.1.3.2 Initially Sceptical Member States

Not every Member States perceived the need for an EPPO from the very beginning. However, in most cases, this scepticism was not set in stone. As one interviewee put it, everyone entered the negotiations with an "open mind".[160] There were some countries that were sceptical in the beginning but agreed to the idea of an EPPO during the negotiations (e.g. Finland, Czech Republic).[161] Other countries (Malta, the Netherlands) only joined the EPPO after conclusion of the negotiations.

The initial concerns of these countries are diverse. Some initially thought they could handle the prosecution better on a national level and were afraid of losing national powers (e.g. Finland, Czech Republic).[162] Other examples were internal constitutional concerns and that the EPPO might negatively affect the cooperation with Eurojust.[163] In the Netherlands, questions of sovereignty were put forward to initially reject the proposal.[164] What finally convinced these countries to participate is difficult to answer. In some countries, internal factors caused the change of opinion. The Netherlands, for instance, only joined after a change of government.[165] Interesting in this regard is the case of the Czech Republic. The country was

[157] Interview_3.
[158] Vilas, *op. cit.*, 24.
[159] Interview_1.
[160] Interview_3.
[161] For Finland: Interview_3; for Czech Republic: Interview_5.
[162] Interview_3; Interview_5.
[163] Interview_5. The fear that Eurojust might be endangered by the existence of the EPPO is not entirely unfounded, cf. Kuhl, *op. cit.* 142: "It is worth reflecting on whether the EPPO should absorb and reinforce Eurojust."
[164] Van der Hulst, *op. cit.*, p. 99.
[165] Cas van der Lee, "The Dutch Accession to the European Public Prosecutor's Office: The Role of Party Politics and Individual Politicians in State Preference Formation", Supervisor: Prof. Westlake, *College of Europe, Department of European Political and Governance Studies*, Bruges, 2019, 48.

initially very sceptical, if not negative towards the proposal.[166] However, this changed when Robert Pelikán became Minister of Justice in March 2015. His entry into office signalled a U-turn in the Czech position which from this moment on did not question the basic approach to the EPPO anymore.[167] What makes this case particularly striking is that Pelikán was from the same political party as his predecessor, meaning that questions of party politics could not have had a strong influence on this change of position. Instead, according to interviewees, Pelikán was a strong supporter of the file due to his personal backgrounds and beliefs.[168] Arguably, his social upbringing had a very European flavour. His mother worked as a judge for the General Court of the European Union in Luxembourg, where also Pelikán himself completed a half-year long internship. Pelikán also studied in France and had friends in Luxembourg.[169] In the impression of interviewees, he therefore was a strong supporter of EU integration and wanted the Czech Republic to participate in the EPPO for this reason.[170] He even ignored a Senate vote explicitly requesting him that the Czech Republic should not join the EPPO,[171] which shows his great determination.

3.1.3.3 Non-participating Member States

Five Member States (six if including the UK) decided not to join the proposal. It seems natural to assume that concerns about sovereignty in these countries had a very strong influence on their position in the negotiations. This section will analyse whether this assumption can be confirmed. The countries Denmark, Ireland and UK are special cases because they enjoy a different status in the AFSJ due to which they usually do not or only occasionally participate in common actions in this field.[172] Hence, their participation was not needed to achieve unanimity. They will therefore not be considered further. Instead, the focus will be laid on Hungary and Poland on the one side and Sweden on the other side.

3.1.3.3.1 Hungary and Poland

Almost all observers agree that the rejection of the EPPO by Hungary and Poland had mainly political reasons born from the desire to retain control and protect national

[166] Interview_5; Interview_6.
[167] Interview_5.
[168] Interview_5, Interview_6.
[169] Interview_5.
[170] *Ibid.*. Although one interviewee stressed that Pelikán also wanted to ensure the independence of the Czech general prosecutor's office, which had been the target of political influence in the past.
[171] Interview_6.
[172] Denmark is generally exempted from participation and can only opt-in for certain areas of the AFSJ, among which was not the EPPO (Protocol No. 22 to the Treaties). Hence, Denmark could not join the EPPO at any point, see EP Study 2019, p. 67. Ireland and UK enjoy(ed) a right of "opt-out" (Protocol No. 21 of the Treaties), for further information see Hartmut Aden, Maria-Luisa Sanchez-Barrueco and Paul Stephenson, "The European Public Prosecutor's Office: Strategies for coping with complexity", European Parliament Policy Department D for Budgetary Affairs, Study for the CONT Committee (2019), 68-71.

prerogatives.[173] They point to the countries' fear that the EPPO could become a 'Trojan horse', which would slowly encroach in more and more areas of their national law.[174] Also, Hungarian and Polish politicians themselves openly admitted that their rejection was due to concerns about sovereignty.[175]

However, it would be too simple to merely attribute the rejection to concerns about national control and sovereignty. All Member States alike perceive the field of criminal justice as particularly sovereignty-sensitive. But why were the concerns about losing sovereignty in the two countries apparently stronger than elsewhere in the Union? This question is even more imminent considering that according to one interviewee, everyone entered the negotiations with an open mind.[176] Another one stated that both Hungary and Poland had been very active and engaged in the negotiations.[177] Apparently, it at least seemed like a real possibility that both countries could participate in the EPPO. This perception is confirmed by the fact that many compromises were negotiated in the hope to achieve unanimity,[178] which would have necessarily included Hungary and Poland. Some observers point out that the Polish and Hungarian rejection is part of the general rule of law backslide in these countries.[179] This is certainly true but rule of law problems alone do not seem like a sufficient explanation. Other countries with known problems in these areas (e.g. Bulgaria, Romania) also decided to join the EPPO. For the same reason, it is not enough to explain the rejection with a traditional scepticism in Eastern European Countries towards 'foreign' control.[180]

Instead, there seems to be another reason for the strong political reluctance: The influence of party politics. Both the Polish PiS and the Hungarian Fidesz are well known Eurosceptic parties and had been in the government at the time of finalizing the EPPO proposal as well as the time after. Their resistance against the EPPO must be seen in the broader context of a conflict between the Commission and the Polish and Hungarian governments about the

[173] See e.g. Aden, Sanchez-Barrueco and Stephenson, *op. cit.*, 71; Interview_2: "In Poland and Hungary you have I think two governments who didn't want it politically and therefore said no" (author's translation)
[174] See Wirth, *op. cit.*, 146 and the statement of Polish Justice Minister Zbigniew Ziobro: "EPPO would slowly take over the area of activity of the National Public Prosecutor… [which] would become a servant of EPPO.", Edit Inotai, Tim Gosling, Edward Szekeres and Claudia Ciobanu, "Democracy Digest: Hungary and Poland refuse to join EU justice league", *BIRN*, 4 June 2021, accessed 4 May 2023, https://balkaninsight.com/2021/06/04/democracy-digest-hungary-and-poland-refuse-to-join-eu-justice-league/.
[175] Inotai, Gosling, Szekeres and Ciobanu, *loc. cit.*
[176] Interview_3.
[177] Interview_2.
[178] Frédéric Baab, "Le parquet européen sera-t-il un coup de poignard en plein coeur ?", *Groupe d'études géopolitiques*, no. 2 (2021): 61.
[179] Wirth, *op. cit.*, 145.
[180] *Ibid.*; cf. also Interview_1: The Easter European Countries were worried due to the "implications of providing these powers to a European prosection".

rule of law and EU competences in general.[181] It is therefore very likely that party politics played a decisive role in the rejection. That is confirmed by the statement of one interviewee who speculated that "Poland was ready to join, but maybe in the end didn't because of PiS."[182] As a consequence, the countries' position regarding the EPPO could change quickly if there was a change in government,[183] as already seen in the case of the Netherlands (see above). And indeed, Hungarian opposition politicians already claimed they would immediately join the EPPO in the case of an election victory.[184]

3.1.3.3.2 Sweden

Sweden was the first country to officially declare it would not join the EPPO, thereby making way for the launch of enhanced cooperation. Unlike in Poland and Hungary, the rejection did not have sovereignty-related, but functional reasons. One interviewee emphasized that for Sweden, the reasons to join were "very practical. (...) Sweden just felt that they don't need it" and that "the Swedish prosecutors had all the resources needed to take care of these cases, and there was no need for any support from central Europe."[185] This was confirmed by another interviewee who spoke of "reservations about the content of the proposal, that could not be resolved even in the final phase of the negotiations."[186]

3.1.4 Summary

Most participating Member States decided to join the EPPO out of functional reasons. They agreed with the Commission that PIF crimes were not efficiently prosecuted in every Member State. The reasons for the shortcomings as described in the Commission proposal and confirmed by interviewees and other Member State representatives, were above all the great complexity of cross-border investigations and a lack of information exchange resulting in severe information asymmetries. Furthermore, another important consideration of establishing the EPPO was the hope to ensure a proper spending of EU funds in countries which showed a lack of interest in prosecution. This aspect was especially significant for net contributor countries from Northern and Central Europe like Germany and France, which often were not ready to admit problems in their own prosecution systems. This points to acute credible commitment issues in these countries which had most likely a strong interest in assuring their

[181] Aden, Sanchez-Barrueco and Stephenson, *op. cit.*, 71.
[182] Interview_5.
[183] Frank Meyer, "§ 3 Aufgaben der EUStA – Rolle im System europäischer Strafverfolgung", in *Europäische Staatsanwaltschaft: Handbuch*, ed. Hans-Holger Herrnfeld and Robert Esser (Baden-Baden: Nomos, 2022), 70.
[184] Inotai, Gosling, Szekeres and Ciobanu, *loc. cit.*
[185] Interview_3.
[186] Interview_2. In this context, it must also be noted that the Swedish Prime Minister declared in 2019 the intention to join the EPPO, Wirth, *op. cit.*, 139

citizens that EU taxpayers' money would be spent in a proper way, especially given the political circumstances at the time.

Concerns about losing sovereignty played out especially in Hungary and Poland, due to strongly Eurosceptic governments. Other identified reasons for delegation were the symbolic importance of the EPPO as first step to a harmonized European criminal law and the notion that PIF crimes concerned "European money" and therefore naturally belonged at "European level". Further influencing factors were the will to be a "good European" (Romania, Bulgaria), the personal beliefs of the responsible minister (Czech Republic), the desire to use the EPPO as leverage for national reform (Spain), and the party politics of the current government (the Netherlands).

3.2 The Institutional Design as Arena for Sovereignty Concerns?

As shown above, the general idea of establishing an EPPO was quickly accepted by most Member States. However, the negotiations about the EPPO's institutional design proved much more difficult and contentious.[187] During and shortly after the negotiations, a powerful narrative emerged, nourished by certain academics and EU officials,[188] to describe the dynamics in the Council during the negotiations. It tells the story of the negotiations as the proverbial fight of good against evil. Here, the Commission, which concentrated on ensuring the functional added value of the EPPO to protect the EU against criminal activities. There, the Member States, to which the protection of their domestic legal systems mattered more than the fight against crimes.[189] The critics allege that the Member States tried to water down the proposal as far as possible and to retain as much control as possible to ensure the EPPO's "sovereignty-friendliness".[190] Thus, the Member States deliberately set up an institutional design that was much more complicated, inefficient, and unambitious than the structure foreseen in the Commission proposal.[191]

What surprises is the fervour of some of these contributions, which seem underpinned by a pessimistic, sometimes even hostile tone. A particularly striking example is an article by Marianne Wade,[192] who had been involved and closely following the negotiations from the beginning.[193] She describes the EPPO as an "institution burdened by the controversy of its own existence".[194] Throughout the article, she claims that the Member States, "guided exclusively by the experiences of their domestic systems",[195] intentionally crippled the EPPO to ensure that it "cannot work easily"[196] and that it "remains permeated by the Member

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[187] Peter Csonka, "Les négociations du règlement vues par la Commission", in *La Création Du Parquet Européen Simple Évolution Ou Révolution Au Sein De L'espace Judiciaire Européen ?*, ed. Constance Chevallier-Govers and Anne Weyembergh (Bruxelles: Bruylant, 2021), 38. Wade argues that after the quick agreement on whether to create an EPPO by most Member States, the discussion about the institutional design became a "surrogate for the former", which allowed the Member States to address their concerns about sovereignty, Wade, *op. cit.*, 169.

[188] See e.g. Kuhl, *op. cit.;* Brenninkmeijer, *op. cit.*, De Angelis, *op. cit.*, Wade, *op. cit.*

[189] cf. Kuhl, *op. cit.*, 137; De Angelis, *op. cit.*, 274.

[190] Alexandre Met-Domestici, "The Hybrid Architecture of the EPPO: From the Commission's Proposal to the Final Act", *eucrim* no. 3 (2017): 148; Weyembergh and Briere, *op. cit.*,; Giuffrida, King without Kingdom, *op. cit.*, 39.

[191] cf. Pim Geelhoed and Luca Pantaleo, "The European Public Prosecutor's Office – can the Member States finally accept their own creation?", *leidenlawblog,* 1 July 2016, accessed 4 May 2023, https://www.leidenlawblog.nl/articles/the-european-public-prosecutors-office-can-the-member-states-finally-accept: "Several other Member States have also ganged up against the Commission's proposal, with the purpose of buying some more time if not sabotaging it altogether."

[192] Wade, *op. cit*.

[193] See e.g. Council of the European Union, 13863/1/13 REV 1, *op. cit.*, 24.

[194] Wade, *op. cit.*, 174.

[195] Wade, *op. cit.*, 171

[196] Wade, *op. cit.*, 178

States."[197] The author seems convinced that the Member States would ruthlessly use the structure they put in place for their personal advantage. For example, without giving any proof or further reasoning, she alleges that Member States might purposively abuse the EU funded EDPs as free labour forces by assigning them to national cases outside the scope of the EPPO.[198] At a later point, she states that the EPPO was "created **to work slowly** and **under Member State control** (…). The EPPO must be described as a severely mutilated birth. Only time will tell whether it can recover from its injuries. It seems fair to remark that the structures created are pretty much **as far from a workable and effective EPPO as one might be able to imagine**. (…) It must be recognised, however, that the structure put in place at the behest of the Council, bears the dangers of playing to all the stereotypes regularly hurled against the EU. If one wanted to create a beurocratic [sic!], expensive and immovable institution achieving little with tax-payers money (…), the structure described above would seem a good concept with which to start. If this ammunition is utilized against it, and proves in any way accurate, there is a danger the Council has—**fatally—set the EPPO up to fail**."[199] (highlights not in original) She then most dramatically concludes: "This Regulation bears witness to an apparent unwillingness to commit fully to what is considered right and to stand up for the need to support and protect the EU and the valuable work it performs."[200]

Another example is an article by Brenninkmeijer, EU official at the Court of Auditors. He describes the EPPO as a "failure foreseen"[201] by the Member States. He criticizes that the Member States, "encouraged by the idea of sovereignty", followed a "cynical" and "nationalistic" approach, which caused the "watering down of the whole construct of EPPO".[202] His frustration culminates in the following words:

"We are constructing, with a lot of energy, an EPPO. However, this office is constructed with many constraints ensuing from the overly nationalistic approach of the Member States. In presenting it, at the end of the day, can we be serious to citizens and say: 'Well, this is a very strong construct.'? Or should we be honest and say: 'It is the best we can get. Please give it a try and we will see whether we can improve it in the future.'?"[203]

[197] Wade, *op. cit.*, 175.
[198] *Ibid*. According to art. 13 (3) EPPO-Regulation, the EDPs are allowed to also work national cases as long as it does not interfere with their European duties.
[199] Wade, *op. cit.*, 177.
[200] Wade, *op. cit.*, 179.
[201] Brenninkmeijer, *op. cit.*, p. 197.
[202] Brenninkmeijer, *op. cit.*, p. 195.
[203] *Ibid.*

The explicitness and underlying bitterness of these contributions is surprising. It almost seems like some scholars and EU officials, visibly disappointed by the changes introduced to the Commission proposal,[204] hold a certain grudge against the Member States, which is only further proof of the intensiveness and emotionality of the overall debate. Against this background, it is even more important to assess the underlying facts calmly and cautiously.

While certainly not all literature contributions share the furore of the examples above, scholars largely accept the idea that the changes introduced during the negotiations to the institutional design made the EPPO more complex and less efficient.[205] In consequence, it only seems logical to assume that the Member States were largely guided by sovereignty concerns. Why else would they produce a text which is worse in terms of efficiency if not to protect their own national prosecutorial systems? This would also correspond to the assumption laid down in the theoretical framework that Member States might even accept a loss of efficiency to protect sovereignty sensitive core state powers.

This dissertation has the ambition to prove that this narrative is if not wrong, then largely overstated. It will be tried to show that, while sovereignty concerns certainly played a role, functional aspects were of much greater importance to the Member States than commonly assumed. The Member States just like the Commission were mainly concerned with finding an institutional design which will work efficiently in practice. Both actors merely disagreed on the means to ensure a proper functioning. The analysis will focus on the two most contentious issues of the negotiations, which were shaped by questions of "intrusion into national sovereignty" (author's translation): the structure and the competence issue.[206]

3.2.1 The Structure issue: a "hostage of the Member States' concerns"?

From the beginning, the EPPO was designed to be a decentralized Union body with a central office on Union level and decentralized 'double-hatted' EDPs in every Member State. The Commission had discussed a fully centralized model in its Impact Assessment but in the end, opted for a less far reaching policy option.[207] The official reason for this decision was that

[204] See also Kuhl and Panait, *op. cit.*, 43: "ambition déçue"
[205] Julian Schutte, "Establishing Enhanced Cooperation Under Article 86 TFEU", in *The European Public Prosecutor's Office : An Extended Arm or a Two-Headed Dragon?,* ed. Leendert Erkelens, Arjen Meij and Marta Pawlik (The Hague: T.M.C. Asser Press, 2014), 198; Shift persp, p. 32; Helmut Satzger, "The Future European Public Prosecutor and the National Prosecution: Potential Conflicts and how They Could be Avoided", in *The European Public Prosecutor's Office: Legal and Criminal Policy Perspectives,* ed. Petter Asp (Stockholm: Juridiska fakulteten vid Stockholms universitet, 2015), 75; Weyembergh, Briere, *op. cit.*, 12; Kuhl, *op. cit.,* 138; Giuffrida, King without Kingdom, *op. cit.,* 14 with further references.
[206] Csonka, *op. cit.*, 37; cf. also Council of the European Union, 14914/13, Brussels, 16 October 2013, 1-2.
[207] Impact Assessment, *op. cit.,* 30 et seq.

the decentralized model promised to be the most efficient.[208] However, it is likely that the Commission accepted the political realities and chose a less 'federal' structure because it would presumably face less resistance from the Member States.[209] Hence, some scholars hold that the decentralized structure served to appease sovereignty concerns of the Member States from the beginning.[210] Although the Commission had already opted for a compromise proposal, the Member States quickly introduced substantial changes to the EPPO's structure. These changes will be described in detail below. Thereafter, it will be analysed what motivated the Member States to such a radical change of the Commission proposal. It remains to be seen whether Wade's assumption that the negotiations on structure became the "hostage of the Member States' concerns"[211] about sovereignty can be confirmed.

3.2.1.1 The structural changes introduced by the Member States

The Commission proposal envisaged a simple, quite straight-forward structure. At central level, one EP, accompanied by 4 deputies, supervised the investigations and prosecutions carried out by the EDPs in every Member State. The EDPs at the decentralized level (at least one in each Member State) wore a 'double hat' meaning that they formed an "integral part of the EPPO"[212] but also kept the status as national prosecutors. The EP could instruct them in their work but could also take over the investigation and even prosecution before national courts by himself/herself.[213] The EP was appointed by the Council with the consent of the European Parliament and himself appointed the EDPs from a list of three candidates, submitted by the respective Member States.

An informal group of 13-14 Member States under the leadership of France and Germany[214] questioned the proposed structure from the beginning.[215] Instead, they advocated a collegial structure, similar to the one of Eurojust. Although some Member States supported the centralized structure of the Commission proposal,[216] it became quickly clear that the College

[208] Impact Assessment, *loc. cit.*
[209] Kuhl and Panait, *op. cit.,* 59.
[210] Wade, *op. cit.,* 170; cf. also Helmut Satzger, "The European Public Prosecutor's Office and Its Coordination with the National Public Prosecutor's Office: The Model of Complementarity", in *The European Public Prosecutor's Office: The Challenges Ahead,* ed. Lorena Bachmeier Winter (Cham: Springer, 2018), 53: „however, their actions may also appear less intrusive on state sovereignty due to their 'double-hatted' nature."
[211] Wade, *op. cit.,* 169.
[212] art. 6 (5) Commission proposal.
[213] art. 18 (5); 27 (2) Commission proposal.
[214] Interview_4; Council of the European Union, 13863/1/13 REV 1, *op. cit.*, 27; Council of the European Union, 18120/13, *op. cit.,* p. 4
[215] France and Germany had already advocated a collegiate structure even before the Commission published its proposal, Interview_2.
[216] See Council of the European Union, 14914/13, *op. cit.,* 2; Council of the European Union, 14312/13, *op. cit.,* 4; Council of the European Union, 10091/14, Brussels, 11 June 2014, p. 13.

model would prevail.[217] After some discussion on working group level, a final agreement was reached on the details.

The new text proposed by the Council, while maintaining the EDPs at decentralized level, added multiple layers to the central level. First, a College was introduced consisting of the supranational (now called) ECP and one EP per Member State. Neither the ECP himself nor the College were envisaged to have operational powers. The ECP was confined to tasks of a more representative and organizational nature, while the College served as the "management body of the EPPO".[218] Instead, the operational powers were concentrated in Permanent Chambers, each consisting of three prosecutors at central level,[219] which can take fundamental decisions like the dismissal of a case or the indictment of a suspect. However, the actual supervision is carried out by the EP who is from the same Member States as the investigating EDP "on behalf of the Permanent Chamber and in compliance with any instructions" it has given.[220] The EP thereby serves as communication channel and 'national link' between the EDP at decentralized and the Permanent Chamber at central level.[221] The appointment procedure for the EPs originally envisaged a selection by the Member States. However, in view of the already existing "national link" between EDPs and the supervising EPs, this was considered too "national" by the Council Presidency.[222] Instead, it was introduced that the Council appointed each EP from a list of three candidates provided by the Member States.[223]

3.2.1.2 The reasons for the design changes

The new structure of the EPPO was heavily criticized by the Commission and some Member States[224] as well as academics.[225] The main criticism focused on two points: the structural changes negatively affected the EPPO's efficiency and threatened its independence.[226] The assumption of these critical voices, whether uttered explicitly or tacitly underlying, was that the reason for the changes were related to concerns of sovereignty.[227]

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[217] See Council of the European Union, 9834/1/14 REV 1, Brussels, 21 May 2014, 1.
[218] Giuffrida, King without Kingdom, *op. cit.,* 13.
[219] One chair (either the ECP, a deputy ECP, or an EP) and two EPs.
[220] art. 12 EPPO Regulation.
[221] Interview_4.
[222] Council of the European Union, 15862/14, Brussels, 28 November 2014, 4.
[223] art. 16 EPPO Regulation.
[224] Council of the European Union, 10091/14, *op. cit.,* p. 13; Commission lead negotiator Csonka, however, praised the permanent chambers and supervision model as "balanced approach", Csonka, Juszczak and Sason, *op. cit.,* 127.
[225] See Zeder,, *op. cit.,* 220; Giuffrida, King without kingdom, *op. cit.,* 14, also for more references.
[226] Council of the European Union, 10091/14, *op. cit.,* 13; Antonio Martínez Santos, "The Status of Independence of the European Public Prosecutor's Office and Its Guarantees", in *The European Public Prosecutor's Office: The Challenges Ahead,* ed. Lorena Bachmeier Winter (Cham: Springer, 2018), 9.
[227] See Met-Domestici, *op. cit.,* 146; Elisavet Symeonidou-Kastanidou, „The Independence of the European Public Prosecutor", in *The European Public Prosecutor's Office: Legal and Criminal Policy Perspectives,* ed. Petter Asp (Stockholm: Juridiska fakulteten vid Stockholms universitet, 2015), 276; Kuhl, *op. cit.,* 138.

And indeed, this explanation seems logical at first sight. As already mentioned above, why else would the Member States behave so irrationally as to intentionally endanger the proper functioning of the EPPO? Drawing on the conducted interviews, Council documents and other written sources, the following section will analyse the reasons for the changes introduced by the Member States.

3.2.1.2.1 Sovereignty-related concerns

In line with the aforementioned assumption, there is evidence that sovereignty-related concerns about keeping national control did play an important role. For Hungary and Poland this has already been shown elsewhere (see above Chapter 3.1.3.3). But also other Member States seemed to worry about these aspects of delegation. For instance, Frédéric Baab, representative of France in the negotiations, stated shortly after the beginning of the negotiations that the "EPPO cannot have all powers as this would be a violation of MS sovereignty."[228] Furthermore, in a different contribution, he explained that the introduction of a College model was also political and "the price to pay to obtain a minimum of support in the JHA Council" (author's translation).[229] This is confirmed by David Vilas Álvarez, who represented Spain in the negotiations. He describes the reason of the structural changes as follows:

"The attention to national interests in a field as linked to sovereignty as the *ius puniendi* and the national systems of criminal investigation called for a different approach, which was more respectful of such national interests and systems."[230] (author's translation) In the same way, one interviewed MS representative stated that "France and Germany had another vision [than the Commission] which was more respectful of the member state sovereignty."[231] Furthermore, Council documents show Member States' anxieties to transfer power to the EU. For instance, Member States objected to the powers given to the central level in the Commission proposal because they were "too extensive."[232] Regarding the supervision of EDPs, they held that "direct interventions by the Central Office in the case work should only occur in exceptional cases" and should "be limited to cross-border cases and cases involving EU officials, and not be possible in purely national cases".[233] Another aspect, which is closely related to concerns of sovereignty, was brought up by one interviewee. He stressed that

[228] Council of the European Union, 13863/1/13 REV 1, *op. cit.*, 30.
[229] Baab, Coup de poignard, *op. cit.*, 61.
[230] Vilas, Négociations, *op. cit.*, 21.
[231] Interview_4.
[232] Council of the European Union, 18120/13, *op. cit.*, 7.
[233] Council of the European Union, 18120/13, *op. cit.*, 6.

Member States did not think it was politically feasible towards their own population to establish an EPPO with a powerful central level as foreseen in the Commission proposal: "The time was not considered ripe to go this far. There were reasons that perhaps are not legal so much as cultural, to bring in a foreign prosecutor in your court to make a prosecution. (...) That would just be too provocative for the citizens."[234]

Some observers claim that one especially significant concern underpinning not only the debate on structure, but the whole negotiations in general, was the fear of 'competence creep'. According to these voices, the Member States were afraid that the EPPO could turn out to be the proverbial 'pandora's box' that once opened, could never be closed again.[235] That once established, the EPPO would encroach more and more into their national turf, finally leading to a fully harmonized criminal justice system on Union level.[236] And indeed, such a fear does not seem far-fetched. The impacts of path dependency and spill-over effects in the EU are well-known. The ECJ is a famous example of how an NMI can acquire more competences over time than originally foreseen and wanted by the Member States. With regards to the EPPO, the later development seems to confirm the plausibility of the 'encroachment fear'. Even before the Regulation was published in October 2017, the French President Macron, the Italian Justice Minister and the Commission's President had already called for an extension of its competences to cross-border terrorism.[237] Furthermore, only recently, the French and German Minister of Justice stated that the EPPO must expand its competences to offences related to EU sanctions.[238]

However, despite the general plausibility, the question remains: How acute was this fear during the negotiations? According to Director General of the Council Legal Service, Hubert Legal, there was no acute 'encroachment fear' of the Member States in the

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[234] Interview_3
[235] Vervaele, *op. cit.*, p. 14.
[236] Vervaele, *op. cit.*, p. 12-13; see also the opinion of German Senior Public Prosecutor Lohse, *op. cit.*, 174: "It should nevertheless be of great importance that the material competence remains limited to PIF crimes, as laid down in the proposal. The establishment of EPPO must not lead to a slippery slope, gradually shifting the competences regarding other offences, such as terrorism or organised crime, from national authorities to this European body, which is neither legally entitled nor prepared to take over such responsibilities. (…) There is a high risk of hampering the functioning of existing structures."
[237] David Vilas Álvarez, "The Material Competence of the European Public Prosecutor's Office," in *The European Public Prosecutor's Office: The Challenges Ahead*, ed. Lorena Bachmeier Winter (Cham: Springer, 2018), 28.
[238] Eric Dupond-Moretti and Marco Buschmann, "L'appel des ministres français et allemand de la justice : Nous souhaitons l'extension de la compétence du parquet européen aux violations des sanctions prises par l'UE", *Le Monde*, 29 November 2022, accessed 4 May 2023, https://www.lemonde.fr/idees/article/2022/11/29/l-appel-des-ministres-francais-et-allemand-de-la-justice-nous-souhaitons-l-extension-de-la-competence-du-parquet-europeen-aux-violations-des-sanctions-prises-par-l-ue_6152070_3232.html.

negotiations, because "if there were any suspicion that such a body could act as a power-grabbing tool in the hands of the Union institutions that would have been the end of it."[239] Instead, the Commission could ultimately convince the Member States that it was the "Union's purpose (...) to strengthen national governments and not (...) [to] make them irrelevant."[240] Despite the singularity of this opinion, it still shows that it is at least questionable to assume the Member States introduced the structural changes due to sovereignty-related fears of encroachment.

3.2.1.2.2 Functional aspects

This section will attempt to show that functional concerns about the EPPO's efficiency and independence were as equally important to the Member States as concerns about sovereignty, if not even more important.

3.2.1.2.2.1 Efficiency

When analysing publicly available Council or Member States sources, it becomes clear that throughout the whole negotiations, the need to ensure the EPPO's efficiency was a consistent leitmotif of the Member States' action.[241] This conviction was already shown early on in the negotiations.[242] It became especially imminent in the discussion about the structure. To put it bluntly:

The majority of Member States did not think that the centralized structure proposed by the Commission would work in practice.

The Commission proposal envisaged that one EP and four deputies on central level would not only supervise the investigations and prosecutions in the Member States, but also take important operational decisions such as the dismissal of a case or even investigate and prosecute before a national court himself/herself. Most Member States, receiving constant feedback from their national practitioners, did not believe that this was feasible. First of all,

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[239] Hubert Legal, "EPPO's Raison d'Être: The Challenge of the Insertion of an EU Body in Procedures Mainly Governed by National Law", in *Shifting Perspectives on the European Public Prosecutor's Office*, ed. Willem Geelhoed, Leendert Erkelens, and Arjen Meij (The Hague: T.M.C. Asser Press, 2018), 190.
[240] *Ibid.*
[241] Vilas, Négotiations, *op. cit.*, 28; cf. also Interview_2: "We have often also made proposals that we did not make because they were similar to our legal system, but because we thought that this is what has to be done for the whole thing to work." (author's translation)
[242] e.g. Council of the European Union, 18120/13, *op. cit.*, 3: "There is general agreement on the need to ensure that the EPPO will be organised in a way that ensures its independence and efficiency"; Council of the European Union, 6490/1/14 REV 1, Brussels, 27 February 2014, 6: "The Presidency invites Ministers to reflect on whether they are in this light in principle in favour of **having in the EPPO a college** of European Public Prosecutors, and - if the reply is affirmative - **how the independence/efficiency of the Office can thereby be safeguarded**. (…) Delegations as well as the Commission have **constantly underlined the need to ensure** that the EPPO will **add value in practice** and that its **efficiency can be guaranteed**" (highlights only here).

according to one interviewee, they doubted that the EP and his deputies, who were supposed to lead half of the investigations by themselves from central level, would be able to handle the workload.[243] But even more importantly, they saw it as unrealistic that the EP at central level would be capable of supervising and conducting investigations in each of the Member States himself/herself, given that each Member State is equipped with a different legal system, a different language, different structures, traditions and cultures. Therefore, the reason for the establishment of a 'national link' between the decentralized EDPs and the central office through a supervising EP from the same country as the investigating EDP was above all a practical one. The Member States saw it as indispensable that the supervision was led by an EP at the central level, who spoke the same language as the EDPs, and who knew their legal system and its national particularities.

There is numerous evidence to support this claim.[244] All interviewees involved in the negotiations stressed the practical problems that the centralized structure by the Commission would have brought in practice.[245] The problems were also described by practitioners,[246]

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[243] Interview_2; see also Zeder, *op. cit.,* 216.

[244] See from academia e.g. Giuffrida, King without Kingdom, *op. cit.,* 13, 16.

[245] **Interview_ 3** (regarding prosecution): "It could probably not work so well because it's not exactly the same profession [as investigating]. How do you lead in a court? It would take a lot of education and which would not only be legal education, but also in a way education, just that it would not work really, which I personally think is true.";
Interview_1: "Not only because of political reason, but for functioning reasons. I mean it was quite difficult to understand how to handle investigations with different laws, with the same office, with the same public servants. It was almost impossible to try to know how that could work. (…) For sure the position of member stage was trying to water down a unique power from the Chief Prosecutor and that was clear, but I mean, it makes sense. It's not only because of political reasons. It is because it was quite difficult to know how all this could be done from Luxembourg."
Interview_6: "My personal opinion was that the criminal investigations will be done by somebody centralized from Brussels, who does not understand the Czech system, so it won't work, it won't be effective (…) and maybe some of the perpetrators of the criminal offenses will not be punished."
Interview_2: „ If you want to conduct investigations from the central level (...) then there must also be decision-makers in the centre who know what national criminal procedure law actually says. And the language. The Commission apparently somehow assumed that if the ECP is conducting an investigation in Italy and he doesn't speak Italian, he just calls some secretary and says. Can you come here a minute, I need to know what is in this letter. (...). And the member states said no, so those who supervise at the headquarters must themselves be familiar with the language, they must be lawyers, otherwise they could not supervise effectively."
Interview_4: "It was a very operational concern. What we said was that a Bulgarian European prosecutor in Luxembourg cannot lead a criminal investigation in France by himself. We need at one point an implication of the French European prosecutor for investigations in France. This is what we call the National Link because we do not have harmonized, criminal procedures (…) so you need to know how it works in the member state concerned by the investigation (…) in order to be efficient. Otherwise, we were convinced that it wouldn't work without that national link."
Interview_5: "We could not have 3 foreign guys deciding on our national files. They needed to know the specificities of the national criminal law system and the language to be efficient. That is why we needed 'our guy' in the Permanent Chambers, because only he could know what was needed on national level. So it was a mainly practical and not political concern."

[246] e.g. Zeder, *loc. cit.;* see also Lohse, *op. cit.,* 171: "The European Prosecutors, irrespective of their level in the hierarchy, will hardly handle a case successfully without knowledge of the language, the legal culture and the mentality of the actors in the Member State affected. Although to a large extent, this challenge might be

Council officials,[247] Member State representatives,[248] or expressed in declarations at highest political level.[249]

While it was already discussed that functional reasons can serve as pretext for underlying political aspects, in this case the argument made by the Member States seems highly credible. Not only because so many interviewees or other Member State representatives explicitly claimed that the (main) concern was a practical and not political.[250] But also because the given arguments are convincing. Especially the idea of the Commission proposal that one EP would be capable of leading a criminal trial in 27 Member States in the absence of a harmonized criminal procedural law and a common language is highly unrealistic. Furthermore, the introduction of Permanent Chambers to "accelerate decision-making"[251] shows that the Member States were concerned to not merely create a second Eurojust College but sincerely cared about reconciling the necessity of a "national link" with an operational efficiency.[252] Another aspect which makes it credible that Member States were not as much concerned about sovereignty has already been mentioned elsewhere (see above Chapter 3.1.3.1). Many Member States believed the EPPO would be competent for 'European crimes' that were not properly prosecuted anyways. Hence, they did not have the impression to lose or delegate powers which did not belong to the European level in the first place. In summary, it can be concluded that there is strong evidence to support the assumption that the Member

mastered by the establishment of EDPs, the central office of EPPO will bear the responsibility for supervising the case-handling by the EDPs and for taking important decisions like the initiation of investigations, the issuance of an indictment or the termination of the case as well as for the coordination of investigating measures in several Member States. Such decisions may include also difficult tactical issues. Therefore, it appears necessary to have national prosecutors from the concerned Member States to take part in the decision-making process at every level of the body."

[247] Legal, *op. cit.*, 190.

[248] See Ivan Korcok, then President-in-Office of the Council in an EP debate in October 2016: "This organisation has been chosen **mainly for practical reasons**, in particular with a view to ensuring the efficiency of the Office. The legal systems and cultures of the Member States still vary to a considerable degree, and it is clear that **only a prosecutor with his or her background in a given legal system will be able to know exactly what actions are most appropriate and efficient in that given state**." (highlights not in original) European Parliament, Protocol of Plenary Debate on 4 October 2016, accessed 4 May 2023, https://www.europarl.europa.eu/doceo/document/CRE-8-2016-10-04_EN.pdf, 588; see Baab in Council of the European Union, 13863/1/13 REV 1, *op. cit.*, p. 30: "The EPPO system should be deeply rooted in the national systems of MS because **otherwise it will not function**." (highlights not in original)

[249] Heiko Maas and Christiane Taubira, Gemeinsame Erklärung der französischen Justizministerin und des deutschen Justizministers: Projekt betreffend die Schaffung einer Europäischen Staatsanwaltschaft, 19 February 2014, p. 2.

[250] Cf. Baab, Projet entre audace et réalisme, *op. cit.*, 45-46: "A collegiate Office. It was on this point that the disagreement had crystallised between the Member States and the European Commission, which believed that it was the silent return of the intergovernmental model. This was not our intention." (author's translation)

[251] Csonka, Juszczak and Sason, *op. cit.*, 39.

[252] See Baab, Coup de Poignard, *op. cit.*, 62: "collégialité rationalisée"; cf. also Council of the European Union, 8999/14, Brussels, 15 April 2014, 3: "The College shall not be involved in operational decisions in individual cases."

States primarily introduced a College model out of concerns for the EPPO's practicability and not due to sovereignty concerns.

3.2.1.2.2.2 Independence

It was a consistently stressed consensus among most Member States that the EPPO needed to be independent.[253] The independence was seen as a functional necessity for the EPPO to be "truly efficient."[254] (author's translation) However, there are also frequent allegations that the Member States changed the EPPO's design precisely to maintain control over it.[255] And indeed, one interviewee explicitly stated that numerous Member States thought that if there was an EP from each Member State, they would keep certain control about what is done at central level.[256] But does this mean that the Member States' statements about their desire to ensure independence were empty words and that they instead sought to keep the EPPO in their national grip? The following section will argue that this assumption is not true and that most Member States were sincerely driven by the motivation to ensure the independence and thereby the proper functioning of the EPPO.

To begin with, it is evident that the structural change, which introduced one EP per Member State at central level and the 'national link' between the EDPs and EPs, indeed increased the risk of Member States potentially influencing the central office.[257] However, when looking closely at the negotiations, it becomes clear that the Member States did not *intentionally* put this structure in place to maintain control.

First of all, such an assumption is illogical. It was shown that one major reason for delegation, especially in important net contributor countries like France or Germany, was to ensure that in certain countries with a lack of interest in prosecuting PIF crimes, money from EU funds was properly spent by taking the prosecution out of their hands (see above Chapter 3.1.3.1). However, this could only be done in an effective and credible way if the EPPO was fully independent and as free as possible from Member States' control.[258] Thus, for these Member States, independence became a functional conditio-sine-qua-non of delegation. Against this background, it does not make sense to assume they put the College structure in

[253] See e.g. Council of the European Union, 18120/13, *op. cit.,* 3, 6; Council of the European Union, 15862/14, *op. cit.,* 4; Baab, Coup de Poignard, *loc. cit.*; Maas and Taubira, *loc. cit.;* Giuffrida, King without Kingdom, *op. cit.,* p. 16; Lohse, *op. cit.,* 169.
[254] Vilas, Négociations, *op. cit.,* 24.
[255] See above and more specifically Symeonidou-Kastanidou, *op. cit.,* 255-256: the College model "demonstrates that the professed goal of an independent EPPO has been essentially abandoned".
[256] Interview_2.
[257] For a critical assessment of the EPPO's independence see Weyembergh and Briere, *op. cit.,* 16 et seq.; Martínez Santos, *op. cit.*.
[258] Lohse, *op. cit.,* 169.

place so that the Member States would maintain control. This argument gains special force when considering that precisely the abovementioned Member States France and Germany were the driving forces behind the design change.

Second, after the general agreement on the College structure and the 'national link', the Member States introduced further changes to make the decision-making more European, thereby strengthening the EPPO's independence. For instance, the Council text initially foresaw that the EPs would simply be nominated by their Member States. Out of the fear "that the decision-making of the Office may *de facto* remain 'national'", a more "European" appointment procedure was introduced.[259] Another example concerns the role of the Permanent Chambers, who were granted with important operational powers, to strengthen the European level of the EPPO.[260] A third example to show the Member States' concerns about independence is the very limited role of national parliaments in the control of the EPPO (unlike in the case of e.g. Europol).[261] As a last example, the Member States introduced a rule according to which in case of a "personal conflict of interest" of an EP, the case can be assigned to another EP.[262]

Furthermore, the interviewee who pointed out the expectations of some Member States to retain a certain control in the College model, also stressed that these expectations were misled, since Germany and other states supported the Commission to set up a structure which at least formally ensured the EPs' independence: that they would not be instructed from their national home country and that they would receive their salary from the EU budget.[263] Also, the Commission itself emphasized that a "collegial structure is not necessarily less centralised than that of the proposal: it is merely a different way of organising the European Public Prosecutor's Office, which would in any event remain an office of the Union".[264] It is indeed not a given that the EPs will remain loyal to 'their' Member State, like some observers

[259] Council of the European Union, 15862/14, *op. cit.*, 4. See now art. 16 EPPO Regulation.
[260] art. 10 (3)-(5) EPPO Regulation; cf. also Council of the European Union, 6419/14, Brussels, 12 February 2014, 2: Regarding supervision of the EDPs, there "seems to be general agreement that there is a need to ensure that the Central Office shall have certain powers in this sense, not the least in order to ensure coherence in the practice of the EPPO"; Council of the European Union, 7381/14, Brussels, 6 March 2014, 3: "For the majority of interveners the Central Office should be granted with strong prerogatives of supervision and therefore be able to instruct an EDP where necessary."
[261] Giuffrida, King without Kingdom, *op. cit.*, 17.
[262] Albeit only at the request of the concerned EP, art. 12 (2) EPPO Regulation.
[263] Interview_2.
[264] Communication Parliaments, *op. cit.*, 10.

imply.[265] However, it can neither be excluded that under the current structure, Member States will find *informal* ways of influencing 'their' EP.[266]

In conclusion, while it may have played a certain role for some Member States, there is no convincing evidence that the majority of Member States primarily set up the College structure to maintain national control at the expense of its independence. For France and Germany, the driving forces behind the structure change, this would have even undermined the very purpose of delegation. Also, this assumption cannot explain the considerable efforts to strengthen the central level by other means, e.g. through different appointment procedures or the Permanent Chambers. Instead, it is more likely that a majority of Member States was sincerely concerned about the EPPO's independence to ensure its proper functioning. However, they found themselves in a dilemma. The functional necessity to include an EP from the concerned Member State at central level as a 'national link' resulted in a structure that necessarily put a strain on the EPPO's independence. The safeguards put in place to compensate for this risk, while still ensuring the efficiency in practice, symbolize the delicate balance the Member States had to strike during the negotiations.

[265] Wade, *op. cit.*, 175.; see e.g. an interview with the German EP Andrés Ritter: "I am not the man for Germany. I am the man from Germany for the European Union and for the European taxpayer. That is an important distinction, because I am not there as a representative of the member state Germany, but as a colleague from Germany." (author's translation), Andrés Ritter and Annette Riedel, "Gute Nachrichten für europäische Steuerzahler", *Deutschlandfunk Kultur,* 15 August 2020, accessed 4 May 2023, https://www.deutschlandfunkkultur.de/oberstaatsanwalt-ueber-betrug-mit-eu-geldern-gute-100.html.
[266] Interview_2.

3.2.2 The Competence Issue

In accordance with art. 86 (1) TFEU, the Commission proposal limited the material competence of the EPPO to PIF crimes, which are defined in the PIF directive. The Commission did not follow the more ambitious approach to extend the competence to other cross-border crimes, which would have been possible under art. 86 (4) TFEU, probably for the same reasons it did not opt for a fully centralized structure (see above Chapter 3.2.1). The proposal further envisaged an exclusive competence of the EPPO for these offences.[267] This provision was accompanied by an "ancillary competence" for other offences which were "inextricably linked" to PIF crimes.[268] The Council was first divided on the question whether the EPPO should be granted an exclusive competence,[269] but soon the common ground gained traction that the concept of exclusive competence should be abandoned.[270] Instead, a shared competence was introduced, meaning that the national authorities are allowed to investigate PIF crimes, until the EPPO has decided to initiate an own investigation or evocate the case from the national authorities.[271] Furthermore, a 10.000 EUR threshold was introduced to exclude the EPPO's competence for minor offences. The EPPO is still competent to investigate inextricably linked offences, however only under certain conditions.[272] Finally, in the case of VAT fraud, which had only been included in the PIF directive after long discussions, the EPPO's competence was limited to cross-border cases, in which the total damage exceeds 10 million EUR.[273] When assessing the reasons for the introduced changes, it makes sense to discuss two topics separately, since they reveal different perspectives: the matter of exclusive competence (including the issue of ancillary competence) and the inclusion of VAT-fraud.

3.2.2.1 The abandonment of exclusive competence

The mainstream explanation for the replacement of exclusive with shared competence is – again – sovereignty.[274] This is hardly surprising, given the complete power loss for the Member States with regards to PIF offences envisaged in the Commission proposal. However,

[267] art. 11 (4) Commission proposal.
[268] art. 13 Commission proposal, e.g. using a forged document to commit a fraud against the EU budget.
[269] Council of the European Union, 14312/13, *op. cit.*, 4.
[270] Council of the European Union, 18120/13, *op. cit.*, 4.
[271] art. 25-27 EPPO Regulation.
[272] art. 22 (3), 25 (3) EPPO Regulation.
[273] art. 22 (1) EPPO Regulation.
[274] Weyembergh and Briere, *op. cit.*, 19; Valsamis Mitsilegas, "European prosecution between cooperation and integration: The European Public Prosecutor's Office and the rule of law", *Maastricht Journal of European and Comparative Law* 28, no. 2 (2021):, 249; Katalin Ligeti and Anne Weyembergh, "The European Public Prosecutor's Office: Certain Constitutional Issues, in *The European Public Prosecutor's Office : An Extended Arm or a Two-Headed Dragon?*, ed. Leendert Erkelens, Arjen Meij and Marta Pawlik (The Hague: T.M.C. Asser Press, 2014), 61.

at a second glance, a different picture emerges. While it is still possible to find evidence hinting at the importance of sovereignty concerns,[275] it is much more probable that the deletion of exclusive competence had mainly practical reasons:

Not only has this assumption been explicitly confirmed by some interviewees.[276] Also, Council documents show that already at an early stage, the Member States were concerned about whether exclusive competence "would produce the most appropriate and efficient system." [277] These concerns are further exemplified by the 2014 joint Franco-German declaration, according to which a shared competence should be introduced to ensure the "operational efficiency".[278] More concretely, the Member States were convinced that it would not be efficient to let the EPPO handle all PIF offences exclusively.[279] Most cases of e.g. EU fraud are "every day offences", which are minor in scope and have a local character.[280] The Member States believed that in these minor cases, the EPPO would not deliver a practical added value or would even be less efficient in comparison to the national authorities.[281]

Another issue, which was problematic from a practical point of view, concerned the exclusive ancillary competence for inextricably linked offences. While it may be true that this provision was also politically sensitive because it allowed the EPPO to investigate offences

[275] e.g. Interview_4: "There was both a political reason, but also a very pragmatic reason. (…) The political reason was that (…) it was going quite far regarding our sovereignty."; cf. also art. 25 (6) EPPO regulation, according to which in case of disagreement between the EPPO and the national authorities about the competence over inextricably linked offences, the higher national authority decides, cf Council of the European Union, 9478/1/14 REV 1, Brussels, 14 May 2014, fn. 56: "Some delegations would prefer to refer to the College or to the Court of Justice for these decisions."

[276] Interview_3: "I think it was to a large extent practical considerations that it would just not work. We had prosecutors in the room who had long experience from prosecution, and they thought it would not work."; Interview_5: "We wanted to limit the competence to the maximum because we didn't want to overburden the EPPO and kill it from the beginning (…). We thought it wouldn't work from central level."

[277] Council of the European Union, 15686/13, *op. cit.*, 2.

[278] Maas and Taubira, *loc. Cit.*.

[279] In this sense from academia also Petter Asp, "Jeopardy on European Level : What is the Question to which the Answer is the EPPO?", in *The European Public Prosecutor's Office: Legal and Criminal Policy Perspectives*, ed. Petter Asp (Stockholm: Juridiska fakulteten vid Stockholms universitet, 2015), 63; see also Lohse, *op. cit.*, 176: "From a practitioner's perspective (…) the introduction of concurring competences (…) seems to be preferable. (…) In such a model, a more flexible and smooth handling could be achieved. (…) EPPO would (…) benefit from the expertise of national authorities in a better way. (…) An additional advantage (…) would be the motivation for the national prosecutors to act responsibly."

[280] Asp, *op. cit.*, 62.

[281] Interview_3: "They thought it would not work. It would just be too difficult with small cases at local level to bring in a European body."; see also Council of the European Union, 6490/1/14 REV 1, 6: "Delegations as well as the COM have constantly underlined the need to ensure that the EPPO will add value in practice and that its efficiency can be guaranteed. Some delegations have thereby noted that it may be **more efficient** to let **national investigators** and/or prosecutors handle **minor cases of fraud locally**" (highlights only here) and Council of the European Union, 7095/14, Brussels, 3 and 4 March 2014, 17: "Most Member States do not agree with giving the EPPO exclusive competence for all offences against the Union's financial interests and consider that it should be possible to prosecute **at least minor offences at national level**." (highlights only here); see in this sense also Lohse, *op. cit.*, 176: "It allows for a more efficient division of resources to concentrate on more important criminal cases."

outside the material scope of the Regulation,[282] the interviewees expressed largely practical concerns. One interviewee pointed out that due to the procedural rule of double jeopardy, both PIF crime and linked offence needed to be prosecuted by the same authority.[283] However, the Commission proposal had envisaged that under certain conditions, also the Member States would be competent to prosecute the linked offence and in consequence the PIF crime.[284] Another interviewee described the problems of this construction: "We very quickly identified situations where things would not be that clear and where you would have other offenses linked to the PIF offences and you didn't know, which offense would take the lead, so you needed to have also a national authority that could investigate." In conclusion, it can be said that again, it was rather functional than sovereignty aspects, which motivated the Member States to introduce changes to the EPPO's institutional design.

3.2.2.2 The rules on VAT fraud

When it comes to VAT fraud, the picture becomes more blurred. The Member States had been extremely reluctant to include VAT fraud in the PIF directive and only did so after the Taricco-judgment of the ECJ,[285] which had ruled that VAT fraud was an offence against the financial interest of the Union.[286] Their unwillingness to give up powers relating to this offence is shown by the very high threshold of 10 million EUR and the limitation to cross-border cases. Apparently, the Member States, even though forced by the ECJ judgment to include it into the PIF directive, still believed that VAT fraud should not be investigated and prosecuted by the EPPO.[287] The high resistance to give up prosecutorial powers over VAT fraud to the EPPO is puzzling because it cannot be explained by functional aspects. VAT fraud is an offence where the functional need to delegate investigation and prosecution to the EPPO is clearly visible:

VAT fraud has by nature a cross-border dimension which makes it very difficult for Member States to individually prosecute.[288] Also, the information asymmetry is especially high, since Member States usually do not report their cases to OLAF.[289] As a result, there is a

[282] Weyembergh and Briere, *op. cit.,* 25; cf. also Lohse, *op. cit.,* 175: "These instances (…) are of high practical relevance, because of the fact that such dependency can frequently occur."
[283] Interview_2.
[284] art. 13 (1) Commission proposal.
[285] Judgment of 8 September 2015, Taricco, C-105/14.
[286] Interview_4..
[287] cf. Interview_1: „We didn't want to introduce the tax crimes, even when we were talking about coverage of frauds, because that was something that, and **we still believe is not part of the resources of the European Union as such**." (highlights by the author)
[288] Impact Assessment, *op. cit.,* 84; Giuffrida, Cross-Border Crimes, *op. cit.,* 151.
[289] Impact Assessment, *op. cit.,* 79.

"strong enforcement deficit in the Member States",[290] while VAT fraud causes massive damage to the Member States and the EU every year.[291] P-A Theory expects that both information asymmetry and credible commitment issues towards their massively harmed taxpayers, as well as the evident benefits[292] of a supranational body investigating VAT fraud as 'European crime by nature' would create a pressing functional need for delegation, even more so since the financial loss caused by the crimes is largely carried by the Member States and not the EU.[293] Against this background, the "nationalistic approach"[294] of the Member States regarding VAT fraud is surprising because it seems to contradict the preliminary findings of this thesis that the Member States were less concerned about their sovereignty and more focused on functional aspects of delegation than commonly assumed.

To make sense of this puzzle, it is useful to briefly return to a previous section of this thesis. It has already been argued that one of the reasons for delegation was that Member States did not believe to lose much power by establishing an EPPO because PIF crimes as "genuine European crimes" naturally "belong at European level because it's European money."[295] The latter point seems decisive. Only a small percentage of VAT goes into the EU budget, while the rest belongs to the national budget. In other words, the reason why Member States generally regard VAT fraud as national crimes[296] despite the evident European dimension seems to be because in their perception, it belongs much more to their national sphere of sovereignty. This aspect becomes even more acute, when considering that budgetary power, just as controlling the criminal justice system, is a core state power[297] and thus touches upon the very heart of national sovereignty. In consequence, regarding VAT fraud, there are two core state powers 'at stake' for the Member States which would explain very well the high reluctance to delegate in this area. The Member States do not want to lose the freedom to decide about their budget, even if it is the freedom to not protect it against fraudsters.

[290] Vervaele, *op. cit.*, 11.
[291] Estimates on the total annual damage caused by VAT fraud range from 20-100 billion EUR, Impact Assessment, *op. cit.*, 85.
[292] Cf. Impact Assessment, *op. cit.*, 84-85: „It is generally considered that an EPPO (…) could help overcome barriers relating to Member States' reluctance to initiate investigations and judicial proceedings against perpetrators of VAT fraud."
[293] Only a very minor percentage of VAT income is reserved for the EU budget (generally 0.30%), IA 84.
[294] Brenninkmeijer, *op. cit.*, 196.
[295] See above Chapter 3.1.3.
[296] Impact Assessment, *op. cit.*, 79.
[297] Genschel and Jachtenfuchs, *op. cit.*, 43.

4 Conclusion

The EPPO constitutes a landmark in the history of criminal justice integration. This dissertation has embarked on a journey through the EPPO negotiations to answer the research question posed in the introduction about the "why" and "how" of the EPPO's creation. The deployed theoretical framework expected functional aspects of delegation to play a major role in the negotiations (H1-H4), but also reluctance to delegate in the highly sensitive field of criminal justice (H5).

The first part of the analysis has assessed the reasons why some Member States supported the EPPO Regulation from the beginning, how sceptical Member States could be finally convinced to join, and why others have never joined the EPPO. It has been shown that most Member States shared the conviction of the Commission that PIF crimes were not efficiently investigated and prosecuted throughout the Union and that they believed an EPPO would make the prosecution of PIF offences more efficient in the Union as a whole. Sweden on the other side did not join the EPPO because it was not convinced of its functional added value. The expected functional benefit of the EPPO was therefore a decisive factor for most Member States' decision whether to participate in the EPPO, which confirms the hypothesis H1.

When looking at the functional aspects of delegation more specifically, the Commission had argued that one major reason for the inefficiency of national prosecution was the great legal and factual complexity of many PIF cases as well as the lack of cooperation in cross-border cases, resulting in severe information asymmetries. Interviewees have confirmed that this was a concern present in the Member States (e.g. Spain) and that indeed, overburdened countries felt a practical need to delegate PIF offences to the EPPO, thereby verifying hypothesis H3.

Credible commitment issues (H2) were another driving factor of delegation, especially for those countries that were not convinced of prosecutorial shortcomings in their own territory. Instead, these Member States believed that there were problems in other countries which needed to be addressed. This was especially significant for important net contributor countries like France and Germany, which had a natural interest that EU money was properly spent in the whole Union. Since they could not control the prosecution in other countries by themselves, they saw collective delegation of PIF crimes to the EPPO as a way to ensure a more efficient prosecution in those countries that they deemed problematic. This credible commitment issue was further exacerbated by two factors. First, many Member States

suspected that certain countries with good governance problems were not interested in efficient prosecution out of political reasons, e.g. because national politicians or officials were themselves involved in criminal activities against the EU budget. Thus, they saw it as desirable to take away control from these countries. Second, due to the Eurocrisis, questions of misuse of common 'European money' in certain countries were highly politicized and gathered a lot of public attention in net contributor countries like Germany. It is highly plausible that against this background, these countries had a great interest to assure their citizens that EU funds were properly spent elsewhere in the Union.

Sovereignty concerns (H5), however, played a minor role with regards to the question whether to participate in the EPPO. Only Hungary and Poland can be identified as a clear case where questions of national sovereignty influenced the decision not to join the EPPO. As for the rest of the Member States, the "yellow card" given by the 14 national parliament chambers in the subsidiarity procedure can be seen as (also) motivated by the desire to protect national prerogatives. However, the yellow card arguably did not have a major influence on the Member States' governments, which is already shown by the fact that most Member States, whose parliaments had objected against the proposal, joined the EPPO in the end.

The second part of the analysis has explored the negotiations on the institutional design of the EPPO. The Council introduced numerous changes to the EPPO's design which was heavily criticized by academics and EU officials alike. A common narrative emerged, which would verify hypothesis H5. According to this narrative, there was a clear-cut contrast between the Commission and the Member States in the negotiations. While the Commission fought to preserve the efficient functioning of the EPPO, the Member States, at the expense of the EPPO's efficiency, deliberately watered down the proposal to retain as much control as possible in order to protect their sovereignty. However, the analysis has shown a different picture. While it is indeed true that sovereignty concerns did play an important role (H5), accounts of the Member States being exclusively guided by sovereignty concerns are largely overstated. Instead, strong evidence has been presented that for most Member States, functional aspects of delegation were at least on an equal footing, if not more important than sovereignty issues.

Regarding the introduction of the College model, numerous sources give proof that the Member States were primarily worried that the supervision from central level as envisaged by the Commission would not work in practice. They held with convincing arguments that the supervision of the investigations at decentralized level by the EDPs required a 'national link' to the central level, embodied by EPs from the same Member State as the investigating EDP.

This confirms hypothesis H1, which has – as shown in the theoretical part – also a dimension of institutional design: The Member States were only willing to join the EPPO, after the desired change in the structure had convinced them that the EPPO would have a functional added value in practice.

However, the introduction of the College structure also casts into doubt hypothesis (H4). As shown above, Member States like Germany and France faced pressing credible commitment issues. P-A Theory would therefore expect them to design an EPPO with a great zone of discretion and minimal control mechanisms. Instead, precisely Germany and France were the main driving forces behind the College model, which arguably increased Member State control possibilities over the EPPO. To make sense of this friction, it is useful to remember that according to P-A Theory, the primary goal of principals is to set up a design which is functional even if it results in agency loss. Against this background, a possible explanation is that the Member States faced a dilemma. They could either accept the Commission proposal, which envisaged a great zone of discretion and very little control possibilities, or implement the College model, which promised a better operationality in practice, but opened the possibilities for Member State to influence the central level through 'their' EP. Either option would have entailed a loss of functional value. Therefore, they chose the College model because the functional benefits of a 'national link' outweighed the abstract risk of Member States influencing the supervision at central level through disloyal EPs. Hence, the College model does not falsify hypothesis H4. On the contrary, the Member States' sincere concern about the EPPO's independence and the efforts to implement safeguards for independence in the design (e.g. the Permanent Chambers or the appointment procedures) within the given College framework seem to verify the hypothesis.

As regards competence, the Member States quickly abandoned the concept of exclusive competence. However, this does not verify H5 because most likely and contrary to a common assumption in the literature, most Member States were not decisively guided by sovereignty concerns. Instead, similarly to the structure issue, they believed that an exclusive competence even for minor offences would not be functional in practice, thereby again verifying H1.

One could end the conclusion at this point by stating that the functional hypothesis H1-H4 have been consistently confirmed while there has been much less evidence to support hypothesis H5. It could then be concluded that apparently and contrary to common scholarly assumptions, concerns about sovereignty loss did not play a major role in the EPPO negotiations. One might even be tempted to raise the question whether these findings could

signal a ‘functional turn’ in the whole AFSJ, meaning that in the AFSJ, sovereignty concerns might not matter as much anymore as they used to.

However, the controversy around the inclusion of VAT fraud in the EPPO’ scope shakes this seemingly stable edifice. The fierce reluctance by the Member States to open VAT fraud to EPPO investigations, despite a pressing functional need for delegation, seems to question the functional P-A hypothesis H1-H4 and to verify hypothesis H5. How to make sense of this apparent contradiction? There are two possible explanations. The first one refers to the special nature of PIF crimes. This thesis has presented evidence that several Member States saw PIF crimes as ‘genuine European crimes’ which naturally belonged at EU level because they concerned the EU budget. It could be concluded that therefore, the Member States did not see the EPPO as an intensive encroachment on their sovereignty, unlike in the case of VAT fraud where the damage is predominantly caused to the national budget. The consequence of this view might be that sovereignty still matters a great deal, thereby verifying hypothesis H5. Accordingly, the only reason why sovereignty did not play out as much in the negotiations could be that for the Member States, there was not that much at stake in this regard. The other explanation refers to the special nature of VAT fraud. The control over the national budget is a core state power, just as prosecution of crimes directed against it. It is plausible that the delegation of two core state powers at the same time had a different quality of sovereignty loss for the Member States. Conversely, the findings of this thesis would still allow the conclusion that the concerns about sovereignty in the AFSJ have indeed lost force, with VAT fraud being a singular exception. More research will be needed to answer these questions.

In conclusion, the research question of this thesis can be answered to the effect that in line with the expectations of P-A Theory (H1-H4), functional concerns of efficiency and independence were a key driver behind the actions of most Member States, both in terms of delegation and institutional design. Sovereignty issues (H5), however, although present, played a much minor role than generally assumed.

These findings are not only relevant because they contradict the common narrative that the Member States were primarily guided by sovereignty concerns in setting up the EPPO’s institutional design. They also potentially question the conventional wisdom that in the AFSJ, Member States rarely behave according to functional logics when they delegate to NMIs. Whether the findings signal a ‘functional turn’ in the AFSJ, remains to be seen, especially considering the puzzle posed by the case of VAT fraud. In any case, more research will be needed to verify the results of this thesis, since space precluded to study more aspects of the

highly complex negotiations. It cannot be ruled out that in other areas (e.g. the abandonment of the concept of a 'single legal area'[298]), sovereignty concerns were much more present. Furthermore, this thesis has revealed other aspects of delegation beyond functional or sovereignty related issues, which are worth studying further: the importance of symbolism for delegation,[299] the influence of charismatic leadership, personal beliefs or party politics, or the influence of the ECJ on delegation. One way or another, the EPPO negotiations offer rich material for scholars to study the problem of delegation from many angles.

Returning to the title of this thesis, it has been shown that the narrative of the negotiations as a saga of "*The Good, the Bad and the Ugly*" should be reserved for Hollywood. Life is usually not black and white, but different shades of grey. And so were the negotiations.

[298] cf. Art. 25 Commission proposal
[299] See Stephen Wilks and Ian Bartle, "The Unanticipated Consequences of Creating Independent Competition Agencies", *West European Politics* 25, no. 1 (2002): 157; McNamara, *op. cit.*, p. 59-60.

Bibliography

Articles

Baab, Frédéric. “Le parquet européen: un projet entre audace et réalisme politique”, *eucrim* no. 1 (2021): 45-46.

Baab, Frédéric. “Le parquet européen sera-t-il un coup de poignard en plein coeur ?” *Groupe d’études géopolitiques,* no. 2 (2021): 56-64.

Busuioc, Madalina and Martijn Groenleer. “Beyond Design: The Evolution of Europol and Eurojust.”, *Perspectives on European Politics and Society* 14, no. 3 (2013): 285-304.

Csonka, Peter, Adam Juszczak and Elisa Sason. “The Establishment of the European Public Prosecutor’s Office – The Road from Vision to Reality.” *eucrim* no. 3 (2017): 125-135.
De Angelis, Francesco. “The European Public Prosecutor’s Office (EPPO): Past, Present, and Future.” *eucrim* no. 4 (2019): 272-276.

Genschel, Philipp, and Markus Jachtenfuchs. “More Integration, Less Federation: The European Integration of Core State Powers.” *Journal of European Public Policy* 23, no. 1 (2016): 42–59.

Giuffrida, Fabio. “Cross-Border Crimes and the European Public Prosecutor’s Office.” *eucrim* no. 3 (2017): 149-155.

Kaunert, Christian, Sarah Léonard and John Occhipinti. “Agency Governance in the European Union's Area of Freedom, Security and Justice.” *Perspectives on European Politics and Society* 14, no. 3 (2013): 273–284.

Kuhl, Lothar. “The European Public Prosecutor’s Office – More Effective, Equivalent, and Independent Criminal Prosecution against Fraud?” *eucrim* no. 3 (2017): 135-143.

Kuhl, Lothar, and Romana Panait. “Les Négociations Pour Un Parquet Européen Un Organe D'enquête Et De Poursuite Européen Pour La Lutte Antifraude Dans L'union Européenne, Ou Un Deuxième Acteur De Coordination Judiciaire ?” *Revue de science criminelle et de droit pénal comparé*, no. 1 (2017): 41-79.

Ligeti, Katalin and Angelo Marletta. “Accountability and Judicial Review *vis-à-vis* the EU Citizen.” *New Journal of European Criminal Law* 7, no. 2 (2016): 175-189.

Ligeti, Katalin, and Michele Simonato. “The European Public Prosecutor's Office: Towards a Truly European Prosecution Service?” *New Journal of European Criminal Law* 4, 1-2 (2013): 7–21.

McNamara, Kathleen. “Rational Fictions: Central Bank Independence and the Social Logic of Delegation.” *West European Politics* 25, no. 1 (2002): 47–76.

Met-Domestici, Alexandre. “The Hybrid Architecture of the EPPO: From the Commission’s Proposal to the Final Act.” *eucrim* no. 3 (2017): 143-149.

Mitsilegas, Valsamis. “European prosecution between cooperation and integration: The European Public Prosecutor’s Office and the rule of law.” *Maastricht Journal of European and Comparative Law* 28, no. 2 (2021):,245-264.

Pollack, Mark. “Delegation, agency, and agenda setting in the European Community.” *International Organization* 51, no.1 (1997): 99-134.

Schmeer, Laura. “The Establishment of the European Public Prosecutor’s Office: Integration with Limited Supranationalisation?” *Journal of European Integration,* 2023, 1–25.

Sweet, Alec Stone. “Constitutional Courts and Parliamentary Democracy.” *West European Politics* 25, no. 1 (2002): 77–100.

Tallberg, Jonas. “Delegation to Supranational Institutions: Why, How, and with What Consequences?” *West European Politics* 25, no. 1 (2002): 23–46.

Thatcher, Mark. “Delegation to Independent Regulatory Agencies: Pressures, Functions and Contextual Mediation.” *West European Politics* 25, no. 1 (2002): 125–47.

Thatcher, Mark, and Alec Stone Sweet. “Theory and Practice of Delegation to Non-Majoritarian Institutions.” *West European Politics* 25, no. 1 (2002): 1–22.

Thatcher, Mark, Alec Stone Sweet, and Bernardo Rangoni. “Reversing Delegation? Politicization, De-delegation, and Non-majoritarian Institutions.” *Governance* 36, no. 1 (2023): 5–22.

van der Hulst, Jaap. “No Added Value of the EPPO? The Current Dutch Approach.” *eucrim* no. 2 (2016): 99-104.

Wieczorek, Irene. “The EPPO Draft Regulation Passes the First Subsidiarity Test: An Analysis and Interpretation of the European Commission's Hasty Approach to National Parliaments’ Subsidiarity Arguments.” *German Law Journal* 16, no. 5 (2015): 1247–1270.

Wilks, Stephen, and Ian Bartle. “The Unanticipated Consequences of Creating Independent Competition Agencies.” *West European Politics* 25, no. 1 (2002): 148-172.

Zeder, Fritz. “Der Vorschlag zur Errichtung einer Europäischen Staatsanwaltschaft: Große – kleine – keine Lösung?” *Österreichisches Anwaltsblatt* no. 4 (2014): 212-221.

Books

Asp, Petter. “Jeopardy on European Level : What is the Question to which the Answer is the EPPO?”. In *The European Public Prosecutor’s Office: Legal and Criminal Policy Perspectives,* edited by Petter Asp, pp. 51-68. Stockholm: Juridiska fakulteten vid Stockholms universitet, 2015.

Bovens, Mark, and Thomas Schillemans. “Non-majoritarian Institutions and Representation.” In *The Oxford Handbook of Political Representation in Liberal Democracies,* edited by Robert Rohrschneider and Jacque Thomassen, pp. 510-525. Oxford: Oxford University Press, 2020.

Brenninkmeijer, Alex. “The European Public Prosecutor’s Office: A Chronicle of a Failure Foreseen.” In *Shifting Perspectives on the European Public Prosecutor’s Office*, edited by Willem Geelhoed, Leendert H. Erkelens, and Arjen W.H. Meij, pp. 193-197. The Hague, The Netherlands: T.M.C. Asser Press, 2018.

Csonka, Peter. “Les négociations du règlement vues par la Commission.” In *La Création Du Parquet Européen Simple Évolution Ou Révolution Au Sein De L'espace Judiciaire Européen ?*, edited by Constance Chevallier-Govers and Anne Weyembergh, pp. 35-42. Bruxelles: Bruylant, 2021.

Herlin-Karnell, Ester. “The Establishment of a European Public Prosecutor’s Office: Between ‘Better Regulation’ and Subsidiarity Concerns.” In *Shifting Perspectives on the European Public Prosecutor’s Office*, edited by Willem Geelhoed, Leendert Erkelens and Arjen Meij, pp. 41-58. The Hague: T.M.C. Asser Press, 2018.

Legal, Hubert. “EPPO’s Raison d’Être: The Challenge of the Insertion of an EU Body in Procedures Mainly Governed by National Law.” In *Shifting Perspectives on the European Public Prosecutor’s Office*, edited by Willem Geelhoed, Leendert H. Erkelens, and Arjen W.H. Meij, pp. 189-192. The Hague, The Netherlands: T.M.C. Asser Press, 2018.

Ligeti, Katalin, and Anne Weyembergh. “The European Public Prosecutor’s Office: Certain Constitutional Issues.” In *The European Public Prosecutor's Office : An Extended Arm or a Two-Headed Dragon?*, edited by Leendert Erkelens, Arjen Meij and Marta Pawlik, pp. 53-78. The Hague: T.M.C. Asser Press, 2014.

Lohse, Kai M. “The European Public Prosecutor: Issues of Conferral, Subsidiarity and Proportionality.” In *The European Public Prosecutor’s Office*, edited by Willem Geelhoed, Leendert H. Erkelens, and Arjen W.H. Meij, pp. 165–82. The Hague: T.M.C. Asser Press, 2015.

Luchtman, Michiel, Anthonie Van den Brink and Miroslava Scholten. “Sovereignty in a Shared Legal Order: On the Core Values of Regulation and Enforcement.” In *Sovereignty in the Shared Legal Order of the EU. Core Values of Regulation and Enforcement*, edited by Anthonie Van den Brink, Michiel Luchtman and Miroslava Scholten, pp. 1-7. Cambridge: Intersentia, 2015.

Martínez Santos, Antonio. “The Status of Independence of the European Public Prosecutor’s Office and Its Guarantees.” In *The European Public Prosecutor’s Office: The Challenges Ahead*, edited by Lorena Bachmeier Winter, pp. 1-24. Cham: Springer, 2018.

Meyer, Frank. “§ 3 Aufgaben der EUStA – Rolle im System europäischer Strafverfolgung.” In *Europäische Staatsanwaltschaft: Handbuch*, edited by Hans-Holger Herrnfeld and Robert Esser, pp. 49-71. Baden-Baden: Nomos, 2022.

Pollack, Mark. “Delegation and Discretion in the European Union.” In *Delegation and Agency in International Organizations*, edited by Darren G. Hawkins, David A. Lake, Daniel L. Nielson and Michael J. Tierney, pp. 165–196. Cambridge: Cambridge University Press, 2006.

Satzger, Helmut. “The European Public Prosecutor’s Office and Its Coordination with the National Public Prosecutor’s Office: The Model of Complementarity.” In *The European*

Public Prosecutor's Office: The Challenges Ahead, edited by Lorena Bachmeier Winter, pp. 43-58. Cham: Springer, 2018.

Satzger, Helmut. "The Future European Public Prosecutor and the National Prosecution: Potential Conflicts and how They Could be Avoided." In *The European Public Prosecutor's Office: Legal and Criminal Policy Perspectives,* edited by Petter Asp, pp. 69-87. Stockholm: Juridiska fakulteten vid Stockholms universitet, 2015.

Schutte, Julian. "Establishing Enhanced Cooperation Under Article 86 TFEU." In *The European Public Prosecutor's Office : An Extended Arm or a Two-Headed Dragon?,* edited by Leendert Erkelens, Arjen Meij and Marta Pawlik, pp. 195-208. The Hague: T.M.C. Asser Press, 2014.

Symeonidou-Kastanidou, Elisavet. „The Independence of the European Public Prosecutor." In *The European Public Prosecutor's Office: Legal and Criminal Policy Perspectives,* edited by Petter Asp, pp. 255-278. Stockholm: Juridiska fakulteten vid Stockholms universitet, 2015.

Trauner, Florian, and Ariadna Ripoll Servant. "The analytical framework: EU institutions, policy change and the Area of Freedom, Security and Justice." In *Policy Change in the Area of Freedom, Security and Justice: How Eu Institutions Matter*, edited by Florian Trauner and Ariadna Ripoll Servant, pp. 11-31. London: Routledge, 2015.

Vervaele, John A.E. "The European Public Prosecutor's Office (EPPO): Introductory Remarks." In *Shifting Perspectives on the European Public Prosecutor's Office*, edited by Willem Geelhoed, Leendert H. Erkelens, and Arjen W.H. Meij, pp. 11-20. The Hague, The Netherlands: T.M.C. Asser Press, 2018.

Vilas Álvarez, David. "Négociations Du Règlement Vues par Un État Membre : Le Cas De L'Espagne." In *La Création Du Parquet Européen Simple Évolution Ou Révolution Au Sein De L'espace Judiciaire Européen?*, edited by Constance Chevallier-Govers and Anne Weyembergh, pp. 19-33. Bruxelles: Bruylant, 2021.

Vilas Álvarez, David. "The Material Competence of the European Public Prosecutor's Office." In *The European Public Prosecutor's Office: The Challenges Ahead,* edited by Lorena Bachmeier Winter, pp. 25-42. Cham: Springer, 2018.

Wade, Marianne L. "The European Public Prosecutor: Controversy Expressed in Structural Form." In *EU Criminal Justice*, edited by Tommaso Rafaraci and Rosanna Belfiore, pp. 165–180. Cham: Springer International Publishing, 2019.

Wirth, Elias. Die Europäische Staatsanwaltschaft. Baden-Baden: Nomos, 2022.

Studies

Aden, Hartmut, Maria-Luisa Sanchez-Barrueco and Paul Stephenson. *The European Public Prosecutor's Office: Strategies for coping with complexity*. European Parliament Policy Department D for Budgetary Affairs. Study for the CONT Committee, 2019.

Giuffrida, Fabio. *The European Public Prosecutor's Office: King Without Kingdom?* CEPS research report no. 2017/03. Brussels: Centre for European Policy Studies, 2017.

Weyembergh, Anne, and Chloé Briere. "Towards a European Public Prosecutor's Office." *European Parliament Policy Department for Citizen's Rights and Constitutional Affairs,* Study for the LIBE Committee, 2016.

Electronic Sources

Dupond-Moretti, Eric, and Marco Buschmann. "L'appel des ministres français et allemand de la justice : Nous souhaitons l'extension de la compétence du parquet européen aux violations des sanctions prises par l'UE." *Le Monde*, 29 November 2022. https://www.lemonde.fr/idees/article/2022/11/29/l-appel-des-ministres-francais-et-allemand-de-la-justice-nous-souhaitons-l-extension-de-la-competence-du-parquet-europeen-aux-violations-des-sanctions-prises-par-l-ue_6152070_3232.html

Geelhoed, Pim, and Luca Pantaleo. "The European Public Prosecutor's Office – can the Member States finally accept their own creation?" *leidenlawblog,* 1 July 2016. https://www.leidenlawblog.nl/articles/the-european-public-prosecutors-office-can-the-member-states-finally-accept

Inotai, Edit, Tim Gosling, Edward Szekeres and Claudia Ciobanu. "Democracy Digest: Hungary and Poland refuse to join EU justice league." *BIRN*, 4 June 2021. https://balkaninsight.com/2021/06/04/democracy-digest-hungary-and-poland-refuse-to-join-eu-justice-league/

Ritter, Andrés, and Annette Riedel. "Gute Nachrichten für europäische Steuerzahler." *Deutschlandfunk Kultur,* 15 August 2020. https://www.deutschlandfunkkultur.de/oberstaatsanwalt-ueber-betrug-mit-eu-geldern-gute-100.html

Council Documents

Council of the European Union, 14312/13, Brussels, 2 October 2013.

Council of the European Union, 13863/1/13 REV 1, Brussels, 14 October 2013.

Council of the European Union, 14914/13, Brussels, 16 October 2013.

Council of the European Union, 15686/13, Brussels, 7 November 2013.

Council of the European Union, 16624/13, Brussels, 28 November 2013.

Council of the European Union, 18120/13, Brussels, 20 December 2013.

Council of the European Union, 6419/14, Brussels, 12 February 2014.

Council of the European Union, 6490/1/14 REV 1, Brussels, 27 February 2014.

Council of the European Union, 7095/14, Brussels, 3 and 4 March 2014.

Council of the European Union, 7381/14, Brussels, 6 March 2014.

Council of the European Union, 8999/14, Brussels, 15 April 2014.

Council of the European Union, 9478/1/14 REV 1, Brussels, 14 May 2014.

Council of the European Union, 9834/1/14 REV 1, Brussels, 21 May 2014.

Council of the European Union, 10091/14, Brussels, 11 June 2014.

Council of the European Union, 15862/14, Brussels, 28 November 2014.

Other EU and National Documents

European Commission, "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Better protection of the Union' financial interests: Setting up the European Public Prosecutor's Office and reforming Eurojust." COM (2013) 532 final, Brussels, 17 July 2013.

European Commission, "Communication from the Commission to the European Parliament, the Council and the National Parliaments on the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office with regard to the principle of subsidiarity, in accordance with Protocol No 2." COM (2013) 851 final, Brussels, 27 November 2013.

European Commission, "Impact Assessment Accompanying the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office." SWD (2013) 274 final, Brussels, 17 July 2013.

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

European Parliament, Protocol of Plenary Debate on 4 October 2016. https://www.europarl.europa.eu/doceo/document/CRE-8-2016-10-04_EN.pdf.

European Union, "Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO')." *Official Journal of the European Union,* L283/1, 31 October 2017.

European Union, "Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union of 13 December 2007." *Official Journal of the European Union,* C115, 9 May 2008.

Heiko Maas and Christiane Taubira. Gemeinsame Erklärung der französischen Justizministerin und des deutschen Justizministers: Projekt betreffend die Schaffung einer Europäischen Staatsanwaltschaft. 19 February 2014

Interviews

Interview with a Member State official, Bruges, 30 March 2023 ("**Interview_1**").

Interview with a Member State official, Bruges, 30 March 2023 ("**Interview_2**").

Interview with an EU official, Bruges, 31 March 2023 ("**Interview_3**").

Interview with a Member State official, Bruges, 4 April 2023 ("**Interview_4**").

Interview with a Member State official, Brussels, 5 April 2023 ("**Interview_5**").

Interview with an official representing the Ministry of Justice of the Czech Republic, Bruges, 14 April 2023 ("**Interview_6**").

Interview with a Researcher, Bruges, 5 April 2023 ("**Interview_7**").

Thesis

van der Lee, Cas. "The Dutch Accession to the European Public Prosecutor's Office: The Role of Party Politics and Individual Politicians in State Preference Formation." Supervisor: Prof. Westlake, *College of Europe, Department of European Political and Governance Studies,* Bruges, 2019.