The establishment of the European Public Prosecutor's Office: integration with limited supranationalisation?

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Abstract: *In 2017, member states established the European Public Prosecutor's Office (EPPO), an EU body investigating and prosecuting offences against the EU financial interests. This article analyses the relation between the institutional design of the EPPO and sovereignty concerns of member states. Combining the core state powers framework with literature on Council negotiation dynamics, it argues that the Council was divided on the question of how far-reaching the authority of this new body vis-à-vis member states should be or to what extent member states should retain control over the body. A qualitative discourse analysis shows that the competition between states sharing a supranational position regarding the EPPO and those sharing an intergovernmental position resulted in the creation of a complex and ambiguous body. These findings contribute to the literature on agencification of Justice and Home Affairs as well as, more broadly, to scholarship on the construction of new types of authority.*

Keywords: European Union; Justice and Home Affairs; criminal justice; differentiated integration; core state powers; sovereignty

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Introduction

In recent decades, the European Union (EU) has increasingly engaged in areas of core state powers (Genschel & Jachtenfuchs, 2016), including Justice and Home Affairs (JHA), that is, policies regulating the access to national territory, police matters, and judicial policies. The fact that JHA touches upon competences at the core of conventional conceptions of national sovereignty – understood as a state's power over territory, jurisdiction, and people (Luchtman et al., 2015, p. 3) – bears a high potential for contestation around the integration of those competences. These characteristics of JHA make the integration of this area of activity particularly difficult. Conflicts may erupt about the level of governance where decisions should be taken and how the sovereignty of member states can be respected while strengthening the supranational institutions of the EU (Brack et al., 2019, p. 826).

The establishment of new EU bodies and agencies has played an important role in this context. Some scholars see *de novo* bodies as a way to continue close cooperation between member states without transferring extensive powers to supranational institutions: they present those bodies as cases of "integration without supranationalization" (Bickerton et al., 2015b, p. 706) and as operational expert bodies aimed at supporting cooperation between states (Wolff, 2015). However, the extent of operational tasks delegated to those bodies may amount to the exercise of "joint sovereignty" between the EU and member states (Freudlsperger et al., 2022).

Against this backdrop and as an illustration of this trend, in 2017, twenty member states established the European Public Prosecutor's Office (EPPO), an EU body investigating and prosecuting offences against the EU budget. Criminal justice is part of national sovereignty because it is linked to states' monopoly on the legitimate use of force. Did member states, by establishing the EPPO, delegate sovereign powers to a European body? I claim that, while establishing the EPPO does amount to the construction of supranational authority, the reluctance of member states to delegating core state powers resulted in a complex and hybrid institutional design of the body and a certain dilution of sovereignty between the national and European levels: the EPPO constitutes an example of "integration *with limited* supranationalisation" – not "without supranationalisation" as underlined by Bickerton and colleagues (2015b).

Extensive previous literature has conceptualised the notion of supranationalism, defined as "[t]he development of authoritative institutions of governance and networks of policy-making activity above the nation-state" (Rosamond, 2000, p. 204). There is broad agreement on two criteria in particular to assess whether an institution is supranational (rather than intergovernmental or international): the autonomy from member states in its functioning and composition and the binding effect of its powers vis-à-vis national authorities (Dehousse &

Weiler, 1990, pp. 249–250; Öberg, 2021, pp. 166–167; Pescatore, 1974, pp. 50–51; Stone Sweet & Sandholtz, 1997, pp. 302–304; Walker, 2004, pp. 16–17).[1] In a supranational setting, states may therefore "be obliged to do things against their preferences and their will because they do not have the power to stop decisions" (Nugent, 2010, p. 428).

This article assesses to what extent the EPPO entails the establishment of supranational authority, with a focus on its institutional design. The institutional design of the EPPO is not the only element to determine its degree of supranationalisation, but certainly the most outstanding one.[2] Whereas descriptive assessments of the supranational versus intergovernmental character of the EPPO have been undertaken elsewhere (Mitsilegas, 2021; Öberg, 2021), this article uncovers the political processes leading to the establishment of this highly complex body. A critical examination of how conflicting norms and interests were accommodated, elucidating what allowed all involved actors to agree on a result and why the EPPO looks the way it does, is so far missing from the literature. This article therefore opens up the black-box of Council negotiations on the Regulation establishing the EPPO[3] to address the question of what the relation is between the complex and ambiguous institutional design of the EPPO and positions of member states, especially regarding national sovereignty. Whereas other accounts have compellingly theorised recent advances in EU integration (Stone Sweet & Sandholtz, 1997), new intergovernmentalism and the core state powers framework explicitly address new areas of EU activity that are particularly sensitive regarding national sovereignty and the specificities this entails. Based on a theoretical framework combining the integration of core state powers (Genschel & Jachtenfuchs, 2016) with Börzel's typology of negotiation strategies (2002), I therefore argue 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. The qualitative discourse analysis reveals that an influential group of states, reluctant to far-reaching transfers of power to EU institutions, agreed to the EPPO Regulation only under the condition that the body would be more "sovereignty-friendly" (Met-Domestici, 2017, p. 148).

The contribution of this study to EU integration literature is threefold. First, while there is a considerable body of legal literature on the EPPO, including studies that have addressed some of the above aspects (Bachmaier Winter, 2018; Harding & Öberg, 2021; Mitsilegas, 2016, 2021), a systematic analysis of the political dynamics within the Council during EPPO

[1] The autonomy criterion comprises other more specific criteria, like majority voting and exclusive competence.

[2] Other elements are the extent of its competence or the degree of harmonisation of national law.

[3] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), OJ L 283 [hereafter: "EPPO Regulation"].

negotiations is still lacking. Drawing on original interview material and official documents, this article makes this empirical contribution. Second, I go beyond the analysis of rationales or driving factors for JHA integration (Monar, 2016; Trauner & Ripoll Servent, 2015) by examining the transformative power of supranational, pro-EU integration discourses compared to intergovernmental, sovereignty-based discourses. This helps us understand what makes member states give up parts of their core state powers and how conflicts of sovereignty play out at the EU level. I show how diverging views are accommodated within new institutions, and what consequences this has for their shape and concrete functioning. Third, analysing the EPPO as an "EU agency plus"[4] contributes to the EU agencification literature. Especially the EPPO's governance structure differs from the usual "mini-Council formations" (Wolff, 2015) of JHA agencies' management boards (Freudlsperger et al., 2022, pp. 1986–1987). While new intergovernmentalist literature has presented *de novo* bodies as decision-makers' favourite policy instruments aimed at mere operational coordination and cooperation (Wolff, 2015; see also Trauner & Lavenex, 2015, p. 226), the EPPO as a true European law enforcement body challenges this perspective.

Drawing on previous literature, the following two sections present the EPPO and show that, during negotiations, member states transformed the structure initially proposed by the Commission into a complicated and hybrid design. The article then combines the core state powers framework with a typology of negotiation strategies in the theoretical section. I then outline my methodological choices before presenting the results of the research. The final section discusses the findings and their implications.

The EPPO – a difficult birth

The Council has established the EPPO to strengthen the protection of the EU financial interests through means of criminal law.[5] This matter is called "PIF", from French *protection des intérêts financiers*. The Lisbon Treaty had provided a legal basis for establishing the EPPO to fight PIF crime, like fraud, corruption or money-laundering involving the EU budget (Conway, 2017, pp. 177–181): according to Article 86 TFEU, the Council must decide unanimously to establish the EPPO with the consent of the European Parliament (EP). This special legislative procedure is proof that empowering a European body with sensitive penal powers was controversial (Wade, 2019, p. 166). In default of unanimity, minimum nine member states could also establish the EPPO through enhanced cooperation (Art. 86(1) subpara. 3 TFEU).

[4] The EPPO falls under the most common definitions of EU agencies (e.g. Chamon, 2016, p. 10) although many legal scholars and the EPPO itself contest this label. I prefer the term "body" in this article.

[5] The EU's financial interests are notably "[a]ll revenues, expenditures and assets covered by, acquired through, or due to the European Union budget" (Art. 2(3), EPPO Regulation).

The Commission presented a Proposal[6] on establishing the EPPO in July 2013 which quickly met opposition: in October 2013, national parliaments in eleven member states[7] expressed concerns regarding the respect of the subsidiarity principle, triggering a "yellow card" (Fromage, 2016). The Commission nevertheless maintained its Proposal, arguing that the subsidiarity principle was not breached.

After almost four years of negotiations, the Council announced in February 2017 that it could reach no consensus on the text. The willing member states then launched an enhanced cooperation: twenty participating states adopted the Regulation in October 2017. The Netherlands and Malta later joined the cooperation. The member states not participating in the EPPO today are Denmark and Ireland (holding opt-outs/-ins in JHA), Hungary, Poland, and Sweden. The establishment of the EPPO through differentiated integration – a situation where not all member states participate in a legal instrument – demonstrates its high sensitivity and is the "result of Member State efforts to protect their sovereignty" (Winzen, 2016, p. 101).

The EPPO has started its work in June 2021: an EU body now conducts criminal investigations in member states and acts as prosecutor in national courts. Although the types of crime the EPPO can handle are limited, this intervention of a supranational authority in national justice systems is a major step in EU history (Monar, 2013, p. 354; Öberg, 2021). According to Wade (2019, p. 166), the reluctance of states to relinquish their prerogatives is expressed in the EPPO's institutional design: national concerns during the negotiations have led to the creation of a complex institution. The comparison in the following section between the structure of the EPPO suggested in the Commission Proposal and the one defined by the final Regulation demonstrates this outcome.

From the Proposal to the Regulation: a complex and ambiguous result

The ultimately adopted Regulation differs significantly from the Commission Proposal: the Council transformed the exclusive competence of the EPPO for PIF offences proposed by the Commission into a competence shared with national authorities (Öberg, 2021, pp. 171–172), and extensive references to national law in the Regulation limit the harmonisation of substantive and procedural law (Giuffrida, 2017, p. 40). The most outstanding changes, however, concern the structure of the EPPO. The Council transformed the supranational, monocratic model (where a single person monopolises power) favoured by the Commission into a complex, more "intergovernmental" structure (Harding & Öberg, 2021, p. 209). According

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

[7] Cyprus, Czech Republic, France, Hungary, Ireland, Malta, Romania, Slovenia, Sweden, Netherlands, and UK.

to the conceptualisation used in this article, supranationalism is characterised by the extent to which EU institutions "are capable of constraining the behavior of all actors, including the member states" whereas intergovernmentalism is characterised by the centrality of the national dimension (Stone Sweet & Sandholtz, 1997, p. 303). This change is striking because the rationale for establishing the EPPO was to remedy the insufficient protection of EU financial interests by member states through EU centralisation of prosecutions. The EPPO's final structure raises the question whether this provides "a sufficient level of Europeanisation and verticalisation and thus guarantee[s] a real added value" (Weyembergh & Brière, 2016, p. 16). The complexity of the EPPO's structure is the "result of the requirements put forward by the Member States, which thoroughly amended the original proposal of the Commission into a more 'sovereignty-friendly' direction" (Met-Domestici, 2017, p. 148) to have "a stronger influence over the operation of the EPPO" (Harding & Öberg, 2021, p. 209).

The figures below represent, in simplified form, the structure of the EPPO according to the Commission Proposal and the EPPO Regulation, respectively. Both models are organised decentrally, that is, they have a central EU-level office and a decentral level of European Delegated Prosecutors (EDPs) in the member states. The Commission (Figure 1) proposed a vertical structure with a steep hierarchy: the authority lies within a slim central office and especially in the hands of a single person, the European Public Prosecutor (called "European Chief Prosecutor" now). He/she has far-reaching powers, including directing and supervising investigations and, if necessary, exercising investigative and prosecutorial authority him-/herself. The EDPs – forming "an integral part of the EPPO" (Art. 6 Commission Proposal) while remaining members of their national prosecution service – conduct the investigations and prosecutions in the member states.

[Figure 1. EPPO structure (Commission Proposal).]

Today's structure of the EPPO (Figure 2) foresees a bigger central office and a flatter hierarchy. This is the result of three main changes made during negotiations. First, the Council transformed a European Public Prosecutor with extensive – strategic, operational, and administrative – powers into a European Chief Prosecutor with more limited – representative and managerial – powers (Öberg, 2021, p. 177). New actors within the central office now assume strategic affairs (the College) and the "operational chain-of-command" (the Permanent Chambers) (Herrnfeld et al., 2021, p. 88). Second, the Council chose a collegial structure. The College consists of one European Prosecutor per participating state, plus the European Chief Prosecutor. It is the "management body" of the EPPO, "has no operational powers in individual cases and […] deals only with strategic matters and general issues" (Giuffrida, 2017, p. 13). Third, the Permanent Chambers represent "the beating heart of the EPPO, since they adopt the most relevant operational decisions" subsequently executed by the EDPs (ibid.). Each

Chamber brings together two European Prosecutors plus the European Chief Prosecutor, a Deputy, or another European Prosecutor. European Prosecutors supervise the cases handled by the EDPs in their state of origin. They present case summaries and proposals for decisions to the Permanent Chambers and, thereby, act as a link between the Chambers as operational decision-making bodies and the EDPs executing decisions on the ground.

[Figure 2. EPPO structure (Regulation).]

The negotiated outcome is not only more complex than the Commission Proposal by introducing additional layers of actors and a "cumbersome" prosecution system (Giuffrida, 2017, p. 14) with vague divisions of responsibility (Weyembergh & Brière, 2016, p. 15), characterised as "clear case of too many chiefs and not enough Indians" (Csúri, 2016, p. 146). It is also ambiguous because it blends authority between the national and European levels (Conway, 2017, pp. 192–194). The European Prosecutors entail a certain national representation in the central office; and the EDPs are part of the EPPO – but operate on the national level, emanate from national prosecution services, and can even wear a "double hat" (that is, work as national prosecutors when not working on EPPO cases). The EPPO therefore features a certain "hybridization of prosecution" (Mitsilegas, 2021, pp. 262–263).

As argued in the introduction, two relevant criteria for determining the supranational character of an institution are its autonomy from member states and the binding nature of its powers. The Council has left intact the binding powers of the EPPO. However, the EPPO's autonomy from member states is clearly diminished, first, through the replacement of exclusive with shared competence for PIF crimes and, second, above all through the new governance structure. The negotiations have resulted in "further dilution of the (already limited) features of supranationality" (Rafaraci, 2019, p. 158) or even a "renationalisation" of the EPPO (Weyembergh & Brière, 2016, p. 51). Before analysing this process in detail, the following section outlines the theoretical framework.

Shaping the integration of core state powers

EU integration has increasingly progressed into areas of core state powers, that is, key resources of sovereign governments linked to coercive power, public finance, and public administration (Genschel & Jachtenfuchs, 2016, pp. 42–43). Core state powers include monetary and fiscal affairs, foreign and defence policy, migration, citizenship, and maintaining law and order (ibid.). Establishing the EPPO represents a double encroachment on core state powers: it not only involves an EU authority in national criminal justice systems, one key

expression of a state's monopoly on coercive power; establishing the EPPO also means establishing new administrative capacity at the EU level.[8]

State elites may support core state power integration if this benefits their government institution or bureaucracy and/or "making the policies work" for which they are responsible (ibid., p. 51). Member states can integrate core state powers at EU level through either rulemaking or capacity-building: soft or hard EU law governs the national exercise of core state powers; material, financial, or administrative capacity-building establishes resources (bodies, staff, competences) at the EU level for exercising those powers centrally (Genschel & Jachtenfuchs, 2016, pp. 43–46). We could therefore expect governments to adopt positions in favour of roughly four different institutional solutions along the intergovernmental-supranational continuum to address the insufficient protection of EU financial interests (Table 1). The option most respectful of national sovereignty preserves both rulemaking and capacity at national level: member states would establish no EPPO and fight PIF crime through existing cooperation mechanisms, like the European Arrest Warrant (EAW).[9] Another option harmonises national legislations in the field of PIF crime at EU level but preserves capacities at national level, for example by only adopting the PIF Directive[10] – harmonising the definitions and sanctions of offences – instead of establishing the EPPO. A third option builds EU capacity through actors at EU level – either by extending the mandate of Eurojust based on Article 85 TFEU[11] or by establishing the EPPO – while retaining national control of the body (for example through national representation in a fully collegial structure). The most far-reaching option establishes a fully supranational EPPO, for example with a monocratic structure as the Commission suggested: a supranational EPPO would produce both supranational rules and capacity and, thereby, amount to positive state-building at EU level.

[Table 1 near here]

To see what role these options played during the negotiations of the EPPO Regulation, I combine the core state powers framework with Börzel's (2002) argument[12] 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

[8] Moreover, the EPPO's competence for serious cross-border value-added tax fraud indirectly affects fiscal affairs.

[9] It is most respectful of sovereignty because it preserves the status quo, but existing mechanisms like the EAW already represent a certain intrusion on sovereignty (Lavenex, 2007; Mitsilegas, 2006).

[10] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, OJ L 198/29.

[11] Article 85 TFEU allows the co-legislators to give Eurojust limited binding powers vis-à-vis national authorities (Weyembergh, 2013, pp. 178–179). The latest Eurojust reform did not exploit this possibility.

[12] For a previous example of such a combination, see Zaun (2022).

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., p. 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" (ibid.). Börzel's framework is a fitting tool for describing the member states' approaches to the EPPO. By providing a clear and concise distinction between types of member state behaviour, the framework enables us to analyse the complex interactive dynamics of Council negotiations in a pertinent way.

I claim that, because of diverging positions regarding the integration of core state powers, the Council was divided regarding how far-reaching the authority of the EPPO vis-à-vis member states should be or to what extent member states should retain control over the body. The negotiations were characterised by states competing for their preferred institutional setup of the EPPO: some states engaged in pace-setting in favour of an either supranational or intergovernmental design of the EPPO. Others engaged in foot-dragging to prevent the establishment of the EPPO altogether. A last group of fence-sitting states only punctually engaged in coalition-building with either pace-setters or foot-draggers. Because of the competition especially between supranational and intergovernmental pace-setters, member states established a highly complex and ambiguous institution to accommodate reluctances to delegating core state powers. The particularly strong sovereignty concerns of some states also explain their non-participation in the project – which was realised through enhanced cooperation among only twenty-two member states. Before demonstrating this argument through the results of this research, the following section lays out the methodology adopted.

Studying the integration of core state powers through discourse

To explain the outcome of negotiations on the EPPO Regulation, it matters greatly how member state representatives have problematised the modalities of the EPPO. I therefore conduct a discourse analysis (Crespy, 2015; Larsen, 1997) to reveal how states competed at the EU level for their preferred institutional setup. I collected two types of data: official documents issued by EU institutions[13] and interviews with decision-makers. I conducted interviews with 29 persons between March and December 2021, including representatives of fourteen member states, officials of the Commission (including the anti-fraud office OLAF) and the General Secretariat of the Council, and EP parliamentary assistants (see Table A2 in the Appendix). I manually coded the data via the software MAXQDA for analysis, attributing codes

[13] They include 182 speeches and statements, communications, press releases, outcomes of Council meetings, European Council conclusions, and Presidency documents, published between June 2001 and September 2018; see Table A1 in the Appendix.

to segments of the analysed text following a directed coding strategy which combines predetermined, deductive codes with inductive codes arising from the data.

I applied a frame-analytical technique (Goffman, 1974) to generate deductive codes. Frame analysis breaks down discourse into frames consisting of (up to) four interrelated elements: (1) problem definitions, (2) diagnoses of underlying causes, (3) proposed solutions, and (4) underlying values or moral judgments (Entman, 1993, p. 52). These four elements served as deductive top-level codes. I therefore searched problem definitions regarding the insufficient protection of the EU's financial interests. Based on the typology of core state power integration (Table 1), the proposed solutions concerned the establishment of the EPPO *per se* (that is, the question of whether to establish EU capacity), but also different institutional setups. Regarding underlying values, I paid special attention to the expression of sovereignty concerns. I inductively added subcodes depending on the references to concrete problems, causes, solutions, and underlying values discovered in the texts. I conducted two rounds of coding, ensuring data saturation and consistent application of the final code system. Table A3 in the Appendix provides a quantitative overview of the sum of coded segments for each code.

I, then, analysed the relationships between codes to reveal different actors' positions regarding the design of the EPPO and their underlying values. This exposed groups of actors who shared similar strategies and discourses: "supranational pace-setters" pushed their preferred policy option (corresponding to the model presented in the Commission Proposal) while cultivating a supranational discourse. "Intergovernmental pace-setters" pushed their preferred options while cultivating an intergovernmental discourse: they supported the EPPO's establishment in principle, but were reluctant to cede far-reaching powers, and therefore introduced an alternative model. "Foot-draggers" also cultivated an intergovernmental discourse but coupled with blocking/delaying strategies: they also proved reluctant to cede core state powers and, on those grounds, opposed the establishment of the EPPO altogether. "Fence-sitters" were marked by the absence of systematic negotiating strategies and/or clear discourses. I triangulated information on member states' strategies and discourses throughout different data sources to double-check their classification. A cross-checking with a selection of interview participants confirmed the overall accurateness of the classification. Below, I embed those findings in the timeline of Council negotiations to retrace how different groups of member states competed for different institutional setups of the EPPO, leading to a complex and ambiguous design.

Negotiating the EPPO's institutional design

During the EPPO negotiations, the discussions on the body's institutional design were the most striking example of competition between different conceptions of the body. Those discussions

revolved above all around the question of how supranational or intergovernmental the EPPO should be: the design of the EPPO determines who controls its activities and, therefore, how far-reaching its impact is for national systems. Roughly four groups of states delineated themselves during the negotiations of the EPPO's structure with opposite positions regarding the supranational versus intergovernmental nature of the EPPO.

Supranational pace-setters, defending the Commission Proposal

The pace-setting member states in the Council, defending a supranational vision of the EPPO's structure, included notably Belgium, Italy, and Luxembourg, and their positions were close to the ones of the Commission.[14] Those states have supported for a long time the principle of establishing the EPPO and that it should have binding powers in the member states whereby "the decision to investigate, the decision to prosecute will be taken by an authority that is not national" (Interview_Belgium1; also Interview_Italy1; Interview_Netherlands1).[15]

Those states favoured an institutional model with a steep hierarchy and extensive authority at the European level as suggested by the Commission. They expressed a conviction that the EPPO must respond to the need for a vague European "added-value" (Interview_Italy2) or "dimension" (Interview_Belgium1). They claimed that a supranational EPPO would be more effective in fighting PIF crimes compared to more intergovernmental solutions. They rejected far-reaching involvement of member state actors in the functioning of the EPPO, which should be "detached from the influence of the member states" (Interview_Italy2). This translated notably in the "principle of independence" of the EPPO. On these grounds, they criticised alternative concepts for the EPPO's structure with a (purely) collegial organisation and a (strong) "national link" between European Prosecutors and EDPs of their countries of origin. However, many member states immediately rejected the model favoured by the Commission, Belgium, Italy, and Luxembourg, resulting in the emergence of a rival group of pace-setting states.

Intergovernmental pace-setters, ensuring the EPPO's "sovereignty-friendliness"

A second group of states was led by France and Germany, who also supported the principle of establishing an EPPO with enforcement powers but defended a different model for the body's governance structure. France and Germany were still ambiguous about the project in the early 2000s but expressed public support in the months before the Commission published its Proposal. However, they claimed that the monocratic model proposed by the Commission would centralise too much power in the hands of a single person at the EU level and be less

[14] On certain points, Bulgaria and Romania also supported this coalition.

[15] I translated quotes from interviews conducted in languages other than English.

effective. They quickly put forward an alternative model for the EPPO. Already in March 2013, four months before the Commission published its Proposal, the French and German ministers of justice addressed a joint letter to the Commission, expressing their preference for setting up the EPPO with a collegial structure.

The fully collegial model supported by the intergovernmental pace-setters envisioned a College of one European Prosecutor per participating state in the central office of the EPPO, with European Prosecutors either taking operational decisions alone on cases in their states of origin – or collectively in the College (today, the College deals with general/strategic matters only, while Permanent Chambers take operational decisions). Moreover, intergovernmental pace-setters promoted a "national link" between European Prosecutors and handling EDPs in their member states of origin. Negotiators of thirteen to fourteen "like-minded" states supporting a College structure held informal parallel discussions from the beginning of negotiations in September 2013.[16] On 24 October 2013, several delegations[17] signed a non-paper in favour of a collegial structure (Herrnfeld et al., 2021). It quickly became clear that the College model had more supporters than the model proposed by the Commission, and justice ministers definitively confirmed the choice to modify the EPPO's structure accordingly at the JHA Council in June 2014.[18]

In their discourse, intergovernmental pace-setters referred to several interlinked "national" values: the idea that national sovereignty, "sensitivities", and (legal) systems must be respected; the wish to leave sufficient room for manoeuvre to national actors; and the idea that the EPPO must rely on national expertise. Besides the question of "who decides", sovereignty concerns of member states also included fears of the EPPO being a "Trojan horse" (Csúri, 2016) which may gradually expand its powers in the future. Generally, intergovernmental pace-setters expressed certain mistrust towards establishing supranational authority. They therefore wished to uphold a presence of member states in the EPPO.[19] Correspondingly, they promoted the idea of the "national link" between European Prosecutors and handling EDPs in member states. Intergovernmental pace-setters largely shared those ideas but prioritised differently. French representatives underlined national sovereignty more explicitly than German ones, for

[16] Council of the EU, *European Public Prosecutor's Office: A Constructive Approach towards the Legal Framework*, 13863/13, Brussels, 20 September 2013, p. 24.

[17] Cyprus, Malta, France, Poland, Finland, and Slovenia.

[18] Council of the EU, *3319th Council meeting (Justice and Home Affairs)*, Press Release, 10578/14, Luxembourg, 5 and 6 June 2014, p. 21.

[19] Earlier Council documents referred to a College outright "representing" member states (Council of the EU, *3298th Council meeting (Justice and Home Affairs),* 7095/14, Press Release, Brussels, 3 and 4 March 2014, p. 16). As of the June 2014 JHA Council, this is expressed more cautiously as "originating from" member states.

example. They claimed that France only consented to the "abandonment of national sovereignty" implied by the EPPO's establishment under the condition that it would have a collegial structure (Interview_France1; Interview_France2).[20] One German representative, more cautiously, highlighted the difference in German between *Souveränität* (sovereignty as overarching feature of a nation-state) and *Hoheitsrechte* (particular sovereign powers). In their interpretation, establishing the EPPO implies indeed transferring certain sovereign powers (*Hoheitsrechte*) to the EU level – which would not encroach upon German sovereignty globally, however (Interview_Germany1). Nonetheless, whereas France and Germany built a strong coalition during the EPPO negotiations, interviewees perceived France somewhat closer to the Commission compared to Germany's slightly more nationally-oriented stances. Table 2 presents a comparative summary of the discourses of supranational and intergovernmental pace-setters.

[Table 2 near here]

The outcome of negotiations shows that France and Germany could influence the text according to their preferences and succeeded in giving the EPPO a collegial structure. Interviewees unanimously agreed that France and Germany – assisted by the Council General Secretariat – were the key actors behind the change from the monocratic model proposed by the Commission to a collegial model and generally among the most important actors during negotiations. They were notably seen as vital for reaching a "critical mass" of member states for an enhanced cooperation to make sense. Since the French and German support for the project was crucial, they were in a privileged position to implement their preferences and, therefore, had a deep impact on the outcome. This impact was not unlimited, however, as the following section shows.

Neither nor: the negotiation of a compromise

Today's institutional design of the EPPO does not correspond entirely to the "fully collegial" model preferred by intergovernmental pace-setters either. Rather, it is to a certain extent a compromise between the two competing conceptions of the EPPO – thanks notably to the continued activism of supranational pace-setters. Although the decision in favour of a collegial model was definitive, the Commission, supported by the supranational pace-setters, subsequently tried to attenuate this choice so that the EPPO would not become too intergovernmental.

[20] The French position in the EPPO negotiations generally illustrates "France's relationship with the EU in terms of a long-standing ambiguity between support for integration and the wish to preserve national sovereignty" (Balme & Woll, 2005, p. 97).

The supranational pace-setters argued that collegial decision-making would be ineffective, time-consuming, and "too cumbersome" (Interview_Luxembourg1; also Interview_Italy1). This is problematic when decisions on investigative measures, for example, must be taken swiftly in order not to jeopardise investigations. Supranational and intergovernmental pace-setters therefore disagreed over how to achieve the EPPO's effectiveness. The former claimed that collective decision-making on investigations cannot work in practice – whereas the latter claimed that, for the EPPO to work, decision-makers must know national languages and legal systems (Interview_France1; Interview_Germany1). Moreover, supranational pace-setters claimed that a fully collegial EPPO and the "national link" between European Prosecutors and EDPs compromise the principle of independence of the EPPO: "we saw a risk in the European Prosecutors having a degree of loyalty vis-à-vis national authorities and therefore may be able to stop this European impetus" (Interview_Commission2). This concerns notably fraud cases where prosecutors might be under undue political pressure not to pursue a case.

Hence, the Commission suggested inserting another element in the EPPO's architecture that would strengthen its efficiency and independence and embody the EPPO's "European dimension" (Interview_Belgium1): the Permanent Chambers. Instead of the College, it is now the (smaller) Chambers that take operational decisions on cases. Moreover, the "national link" is attenuated: European Prosecutors consult and report on cases handled in their countries of origin, but the Chamber takes ultimate decisions.

The second means through which the EPPO's independence should be guaranteed were the appointment procedures for the European Chief Prosecutor and the European Prosecutors. Especially Italy lobbied for diminishing the role of national governments in the appointments. To this end, Italy adopted a strikingly activist strategy during its Council Presidency – compared to the traditional role of the Presidency as honest broker.[21]

The other member states accepted the arguments of supranational pace-setters, with one interviewee acknowledging for example as justified the critique of a fully collegial EPPO being inefficient (Interview_France1). The Permanent Chambers were part of the different draft texts as of May 2014. Discussions on the exact powers of the Chambers continued at least until late 2016, however.

Thanks, but no thanks: foot-dragging member states

In addition to the two pace-setting groups of states – one supranationally-oriented, one intergovernmentally-oriented –, I distinguish a third group of "foot-dragging" states. The role of foot-draggers was different in the EPPO negotiations compared to the ordinary legislative

[21] See notably Council of the EU, *Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office - Orientation debate*, 15862/1/14 REV 1, 28 November 2014.

procedure (OLP): the obligation to establish the EPPO under either unanimity or enhanced cooperation ensured that no state was forced to participate in an unwanted instrument. States opposing the establishment of the EPPO altogether therefore had less incentive to block the negotiations than under OLP.[22]

The three countries that had opt-outs (Denmark) or opt-ins (United Kingdom – before Brexit – and Ireland) in the JHA domain clearly opposed the establishment of the EPPO. Hungary and Poland ultimately also strongly opposed the EPPO, but openly expressed this position only towards the end of negotiations.[23] Some states did not decide definitively whether to participate in the EPPO until late in the negotiations, either to wait for the outcome of negotiations or because of strategic considerations. Until then, the negotiators of those states supported the efforts of the intergovernmental pace-setters which were closer to their own preferences. Both groups of states shared values, like national sovereignty or the mistrust towards establishing supranational authority. Whereas both groups referred to such intergovernmental themes, the sovereignty claims of foot-dragging states were much stronger: one respondent explained that Sweden had always been "strongly against the whole idea" because "prosecution is considered to be […] a core element of state powers" (Interview_Sweden2); another interviewee summarised the narrative of their government as "sovereignty, independence", and "protecting our full autonomy" (Interview_Poland1). Those states were discontent that "decision-making powers are not left at the national level" (Interview_Hungary1; also Interview_Sweden1) and, by extension, proved unwilling to consent to an EU body with enforcement powers.[24] Ultimately, foot-draggers were also less active and successful in shaping the outcome of negotiations compared to France and Germany because "why would you give concessions on the text to a country that wasn't going to be part of it?" (Interview_Poland1).

Among the states that were in principle opposed to the EPPO, the Netherlands and Malta nevertheless joined the project in the end. The Swedish prime minister also expressed this intention in March 2019. These states would have preferred not to establish the EPPO at all; however, once an important number of states had joined the enhanced cooperation, they preferred not to remain outside of the project. As one respondent explained, "when you are

[22] This is not to say that the presence of highly reluctant member states at the negotiating table has not complicated the process.

[23] Both countries co-signed drafting proposals earlier in the negotiations that demonstrate their reluctance towards delegating powers to a supranational body, but also show they at least formally participated constructively in the discussions.

[24] See also those states' general preference for solutions based on Eurojust or Hungarian Chief Prosecutor Péter Polt's alternative proposal for a cooperation-based "network model of EPPO" (Polt, 2019, p. 518).

taking part in something, you know that you have at least some influence whilst, when you stay on the side-lines and refuse to engage, you will be confronted with the EPPO anyway" (Interview_Netherlands1). This confirms the significant "spillover effect" of enhanced cooperation in criminal matters (Weyembergh, 2018, p. 617).

Interviewees raised an additional reason for those states to join, namely "that it was politically sensitive to be isolated within a group of member states that generally were not considered as like-minded" (Interview_Sweden2). Accordingly, many respondents saw the decision of Poland and Hungary not to join as part of the general rule of law backsliding in those countries (see Fazekas & Tóth, 2016; Pech et al., 2021). As big net-receivers of EU money with lax prosecution of corruption and misuse of funds committed by politicians – especially in Hungary (Karsa, 2021) –, they would not wish any outside control of how that money is spent. According to interviewees, the sovereignty arguments used by both governments would be a smokescreen for the fact that the EPPO is a foreign structure for politicians that they cannot control. This shows how the discursive construction of sovereignty claims may be linked to other political interests.

Unclear, uninvolved? – Fence-sitting member states

Besides the two types of pace-setters and the foot-draggers, there were many relatively uninvolved states: they were "neither systematically pushing" their preferences on the EPPO Regulation "nor trying to block" it, but rather took "a neutral or indifferent stance" or "buil[t] changing coalitions with pace-setters and footdraggers, depending on the issue involved" (Börzel, 2002, pp. 194, 207). The high number of less involved states was confirmed by a Council official describing the dynamics in the working group as "always the same in criminal law. So, you will have […] a few […] who are active and many who are not active on any file" (Interview_CouncilGenSec1).

A first sub-group of fence-sitters includes Bulgaria, Croatia, Estonia, Greece, Lithuania, Portugal, Romania, Slovakia, and Spain. Some of those states appeared truly indifferent towards the establishment and most modalities of the EPPO.[25] Others, like Spain, were favourable to establishing the EPPO, but did not have a leadership role regarding the EPPO's structure.[26] In Slovakia, for example, before taking over the Presidency, "there was no interest. Not on the side of the government, neither from our parliament" (Interview_Slovakia1). Others, like Estonia, had selective priorities in the negotiations,[27] but the structure of the EPPO "was

[25] This is supported by the lack of clearly expressed positions during negotiations through non-papers, statements, et cetera and the fact that they are rarely mentioned in interviewees' accounts of the negotiations.

[26] Overall, sources were contradictory regarding Spain's position on the EPPO's structure.

[27] Estonia, where the judicial system is highly digitalised, did not want the EPPO to lead to additional

not [a] crucial topic" (Interview_Estonia1). Generally, this group of fence-sitting states would tend to support the positions of the supranational pace-setters since they "didn't share the concerns of other member states regarding the autonomy or independence of a country" (Interview_Estonia1; also Interview_Romania1) and "the issue of sovereignty was not so much brought into the discussions" (Interview_Slovakia1).[28]

A second sub-group includes Austria, Cyprus, the Czech Republic, Finland, Latvia, and Slovenia. In this group, some states were reluctant and, in principle, maybe even against establishing the EPPO (like Cyprus, the Czech Republic, or Slovenia, where national parliaments raised a "yellow card" against the Commission Proposal), but ultimately joined the enhanced cooperation. I consider those states as fence-sitters in the negotiation of the EPPO's structure because their positions were not entirely clear and/or because they did not actively push their preferences. However, their overall positions were rather nationally-oriented; some of those states therefore supported the initiative for a more intergovernmental structure of the EPPO. Table 3 provides an overview of how member states positioned themselves during the EPPO negotiations.

[Table 3 near here]

Conclusion

This article engaged with institution-building in one of the most sovereignty-sensitive fields of the EU – criminal justice –, demonstrating how sovereignty concerns play out at the EU level. The case study of the EPPO showed that the reluctance of some states to cede core state powers resulted in the establishment of a complex and ambiguous body and a certain dilution of sovereignty between the national and European levels. It is also this ambiguity that may have allowed the agreement of member states to delegate powers so close to national sovereignty.

Notably France and Germany formed an influential coalition to change the EPPO's design according to their more intergovernmental preferences. This reaffirms the continued relevance of the Franco-German couple in EU decision-making (Schild, 2013). Similarly, the study has confirmed the existence of a well-known hardcore "federalist front", led by Belgium, Italy, and Luxembourg (Brack & Crespy, 2019; Harmsen & Högenauer, 2020; Quaglia, 2007). In this case, diverging government positions regarding national sovereignty and European integration – rather than divisions between net contributing/receiving states – shaped the lines of conflict

bureaucracy (Interview_Estonia1). Romania was worried about the cost of the EPPO and ensuring a decent budget for its operations (Interview_Romania1).

[28] A notable exception is the strong stance of Portugal in favour of giving extensive room for manoeuvre to the EDPs to ensure the constitutionally enshrined independence of the prosecutor in Portugal.

and resulted in a complex compromise between supranational and intergovernmental conceptions of the EPPO.

Regarding the question whether member states, by establishing the EPPO, delegated sovereign powers to a European body, we must conclude that the power of conducting criminal investigations and prosecutions is supranationalised, but to a limited extent. Despite the removal of exclusive competence, the binding nature of prosecutorial decisions taken by the EPPO was never seriously put into question. However, the complicated rules on exercise of competence and the inclusion of a strong "national link" in the EPPO's governance structure pose certain limits to the EPPO's autonomy from member states. Those limits to supranationalisation allow member states with sovereignty concerns to retain some control over the body. Whereas the EPPO has in principle priority over PIF offences (Öberg, 2021, p. 174), the complex and ambiguous system of shared competence is prone to conflicts between the EPPO and national authorities and may result in a certain difficulty for the EPPO to assert its competence – which has already provoked calls for amending the EPPO Regulation in that respect (Gut, 2023). Moreover, although European Prosecutors and European Delegated Prosecutors are formally independent, including from national authorities, national governments are involved in their appointment and may ensure that persons versed in the workings of their respective national systems are present at the central and decentral levels of the EPPO. The fact that European Prosecutors and EDPs emanate from national prosecution services or judiciaries and will most likely return to them after their mandate may also foster a certain loyalty to national authorities. Time will tell whether the EPPO's structure indeed "preserve[s] national interests and hamper[s] the independence of the EPPO" or, on the contrary, a "supranational 'European mindset' […] develop[s] over the years" among European Prosecutors (Elholm, 2021, p. 218). European Prosecutors and, even more so, European Delegated Prosecutors are hybrid actors: part of a European body but with certain links to national authorities. How supranational the EPPO really is will therefore partly depend on how those actors define their roles – but also if member states are willing to actively constrain the EPPO in its activities where possible. Evidence from the EPPO's first months of activity indicates a clear loyalty of European Prosecutors and EDPs to the supranational level. And, a recent conflict of competence between the EPPO and Spanish authorities demonstrated the EPPO's willingness to go beyond the interests of member states.[29]

These findings support JHA literature that has diagnosed an "important blend of supranationalisation and intergovernmentalisation in post-Lisbon JHA governance" (Maricut, 2016, p. 541). The EPPO bears several characteristics of the JHA domain, like a "restrained

[29] European Public Prosecutor's Office, *EPPO's statement on competence adjudication in Spain*, 28 March 2022, https://www.eppo.europa.eu/en/news/eppos-statement-competence-adjudication-spain.

Community method" through the use of unanimity and differentiated integration or the use of EU bodies and agencies as preferred policy instrument (Wolff, 2015). But although the EPPO indeed corresponds to a broader trend of "agencification" of the JHA domain, it stands out regarding the extent of its authority. The establishment of the EPPO is in line with the usual outcome of core state power integration as highlighted by Genschel and Jachtenfuchs (2016, pp. 46–48), that is, institutional fragmentation (through a proliferation of EU institutions and dispersion of control) and territorial differentiation, whereby individual states opt out of EU instruments and the borders of the EU become "increasingly fuzzy". Overall, however, the EPPO is unique and novel in terms of deep and legally binding integration of core state powers (Trauner & Lavenex, 2015). It clearly goes beyond other EU agencies under direct member state control and with largely non-binding powers (Freudlsperger et al., 2022; Wolff, 2015). Ultimately, in terms of degree of integration the EPPO resembles the European Central Bank in banking supervision – "arguably the most powerful *de novo* body created in the post-Maastricht period" (Bickerton et al., 2015a, p. 309) – more than other EU agencies. With the nuance that certain intergovernmental reflexes of member states were observable during negotiations, the EPPO therefore represents a shift from the cooperation and coordination logic in JHA towards a hierarchical governance with centralised instruction and oversight. In conclusion, the EPPO suggests that the EU is emancipating itself from its intergovernmental legacy in JHA.

The EU now not only has its own money and – with Frontex – its own uniformed and armed officers, but with the EPPO, the EU also brings people to court. The EPPO adds a significant state-like feature to the EU, and tasking the EPPO with other types of crime in the future, as is already being discussed, would bring it even closer to the fully-fledged prosecution bodies of nation-states. But this also gives new relevance to debates about the legitimacy of public power at the EU level and invites to further reflect on the social contract underlying the European polity.

Disclosure statement

The author reported no potential conflicts of interest.

Data availability statement

The data that support the findings of this study are available upon reasonable request from the corresponding author, L.S. The data are not publicly available due to their containing information that could compromise the privacy of research participants.

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Appendices

Table A1. Overview of documentary data.

Table A2. Overview of interview participants.

Table A3. Quantitative overview of coding results.