Embedding the European Public Prosecutor's Office in Jurisdictions with a Wide Scope of Prosecutorial Discretion: the Dutch Example

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CHAPTER VII

EMBEDDING THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE IN JURISDICTIONS WITH A WIDE SCOPE OF PROSECUTORIAL DISCRETION: THE DUTCH EXAMPLE

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1. Introduction

Whether there will ever be a European Public Prosecutor's Office (EPPO) is highly uncertain, but that is not the question that this article discusses. Suppose that such an EPPO will be established, it can be asked how it would function in the Member States that will participate in it. The more specific question that this article does discuss is how the EPPO would function in the Member States in which the national Prosecution Service enjoys a considerable scope of discretion in the execution of its duties. That question is particularly important against the background of the proposal to establish an EPPO, based on a supposed ineffectiveness of national criminal justice systems in fighting criminal offences that harm the European Union's financial interests[1]. This ineffectiveness could be partly related to an element of the criminal justice system which is

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[1] See the Impact Assessment Accompanying the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, SWD(2013)274.

strikingly dissimilar across the Union: the scope of prosecutorial discretion of the Public Prosecution Service[2]. A wide scope of discretion could lead the Public Prosecution Service to attach low levels of priority to European fraud cases, whereas a restricted scope of discretion or rather a system of mandatory prosecution might lead to high levels of prosecution and conviction because of the fact that the Prosecution Service is simply unable to refrain from deciding to prosecute.

In this article, I will focus on the possible questions that arise relating to the embedding of a future EPPO in a country with a wide scope of prosecutorial discretion. The basic thought is clearly that the EPPO would be in the position to ensure that a case of EU fraud is prosecuted in such a Member State[3]. Coupled to the fact that the EPPO itself will be bound to a principle of mandatory prosecution[4], the effect on the actual decision-making is considerable. Another thing is how the institution of the EPPO would operate within a legal environment that is adjusted to a Prosecution Service of quite a different nature, enjoying much scope for discretion. Criminal justice systems with such a Public Prosecution Service have found other ways to steer the execution of its duties in the right direction than to introduce mandatory prosecution.

The question as to how this EPPO might be embedded in such a system will however not be answered here in such a general sense. Instead, I will direct the attention to what is perhaps the prime example of a criminal justice system that bestows on its Public Prosecution Service a wide scope of discretion: the Dutch system. Theoretically, the Dutch Public Prosecution Service enjoys an almost unlimited discretion[5]. While it was recognized that such a scope of discretion might

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[2] J. FIONDA, *Public Prosecutors and Discretion*, Clarendon, 1995; J.-M. JEHLE - M. WADE (eds.), *Coping with Overloaded Criminal Justice Systems. The Rise of Prosecutorial Power Across Europe*, Springer, 2006; E.G. LUNA - M. WADE, *The Prosecutor in Transnational Perspective*, Oxford University Press 2012; M. CAIANIELLO - J. S. HODGSON, *Discretionary Criminal Justice in a Comparative Context*, Carolina Academic Press, 2015.

[3] As explained in the explanatory memorandum to the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM(2013) 534 (hereafter: the proposal), p. 2.

[4] Recital 20 to the proposal.

[5] W. GEELHOED, *Het opportuniteitsbeginsel en het recht van de Europese Unie. Een onderzoek naar de betekenis van strafvorderlijke beleidsvrijheid in de geëuropeaniseerde rechtsorde* (diss. Leiden), Kluwer, 2013.

produce results that can be seen as undesirable, the system was not adapted in a way that restricted discretion, but rather its use was organised in such a way that most of the adverse consequences could be prevented: a complex system of checks and balances evolved.

These checks and balances can be divided in elements relating to judicial control and elements relating to democratic accountability. This article will try to analyse potential difficulties in the embedding of the EPPO in the Dutch criminal justice system (and perhaps in other systems sharing its characteristics) along the lines of these two elements of control.

Therefore, the article proceeds as follows. Firstly, I will make some preliminary remarks as to the nature of the envisaged EPPO and more specifically to certain particularities that hamper its functioning in a system which is geared to controlling discretion. Secondly, I will introduce the Dutch way in which the Public Prosecution Service is organised and functions. That part centres on the crucial concept of the expediency principle. Thirdly, I will investigate the connections of a future EPPO with the system of democratic accountability and the influence of political officials in the functioning of the prosecution. Fourthly, I will do the same with the system of judicial control and review of decision-making. In the end, this analysis leads to some considerations on the possible embedding of the EPPO in a system which is designed to counterbalance prosecutorial discretion. In these considerations I will also reflect on reasons why such an EPPO might be hard to reconcile with structural characteristics of this particular type of a criminal justice system.

2. The rationale behind the European Public Prosecutor's Office

The reasons behind the move to establish an EPPO seem straightforward. Quantitative analysis points out that actions to fight offences against the financial interests of the European Union are not impressive and, moreover, show significant differences across Member States.[6] This analysis could be

[6] Impact Assessment Accompanying the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, SWD(2013)274.

viewed, perhaps from the point of the European anti-fraud agency OLAF, as showing a lack of ambition from the side of national prosecutors and investigators when it comes to fighting European fraud cases. OLAF keeps at least a close watch on Member States' actions following up on OLAF investigations.[7] From the point of view of national prosecutors, the fairly low track record could also be seen as being caused by a less-than-adequate implementation of criminalisation requirements, by insufficient case reports that are sent from OLAF to national prosecution services for a follow-up or simply by unwillingness by judges to come to a conviction or to impose substantial penalties.

The question which shortcomings hinder or even obstruct the fight against EU fraud the most is a difficult one, and one that will not be answered here. The fact is that the proposal for a regulation on the establishment of the EPPO clearly departs from the idea that the use of criminal law in the fight against fraud is ineffective in some Member States because of limited priority-setting from the side of the national Public Prosecution Services. The proposed legislative framework does not contain detailed provisions on offence definitions, as these are left to the proposed directive that is supposed to replace the PIF Convention and its protocols.[8] The proposed legal framework also refrains from laying down detailed rules on investigative measures, leaving these to national law while only requiring some basic standards.[9] Practically the only section where the proposed EPPO regulation directly overlaps national provisions on criminal procedure and presents some self-standing rules, is the decision to prosecute, which includes rules on non-prosecution, on choosing the place to prosecute, on transaction and choice of indictment.[10]

The original proposal coupled these provisions with a principle of mandatory prosecution, since that principle would ensure legal certainty and a policy of zero tolerance towards

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[7] See the OLAF Report 2014, Luxembourg: Publications Office of the European Union, 2015, p. 23-24.

[8] Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law, COM(2012)363.

[9] Compare article 26 of the proposal to article 25 of Council doc. no 11045/15.

[10] Council doc. no 11045/15, art. 29-30 and 33-34.

offences affecting the Union's financial interests[11]. The rules on non-prosecution and transaction therefore limit the strictness of the principle of mandatory proceedings. Another element of the proposed legislative framework concerns the division of competences between the EPPO and national authorities. While the original proposal envisioned an exclusive competence of the EPPO for all offences that would be harmonised in the PIF Directive[12], during the negotiations the Council changed this into a priority competence of the EPPO, which also enjoys a right of evocation vis-à-vis the national Public Prosecutor's Office[13]. The proposal initially explained its choice for an exclusive competence by claiming it would ensure consistency and provide steering of investigations and prosecutions at Union level[14].

These reasons clearly show that the EPPO was proposed to take a strong lead in the fight against EU fraud, ensuring that investigations and prosecutions would be carried out while improving equality and consistency at the same time.

Negotiations in the Council changed the apparent rationale behind the EPPO to a considerable degree. The exclusive competence was not the only victim, but also the structure of the Office was adapted. The proposed legislative framework has moved away from a strong and independent office, executing its duties independently from national prosecutors, towards a collegial, multi-level body acting for some purposes in close cooperation with national prosecutors[15]. As a result, it can be said that the Member States are in a better position to somehow influence the functioning of the EPPO, and consistency and effectiveness are perhaps less secured. Naturally, at the time of writing of this article it remains to be awaited what the eventual setup of the EPPO and the rules for its functioning will be.

However, there is not much left of the starting point that the EPPO would provide a structure to force Member States to investigate and prosecute cases of EU fraud. Nevertheless, in the legislative framework as it stands after serious deliberations within the Council, the EPPO retains strong elements that reveal its nature as an Office which is designed to overrule low levels

[11] Proposal, recital 20.
[12] Proposal, art. 11, par. 4.
[13] Council doc.nr. 11045/15, art. 20.
[14] Proposal, recital 23.
[15] Council doc.nr. 10264/15, art. 7-12.

of priority-setting by national Public Prosecution Services. These characteristics show that it is, by its nature, a prosecutorial body which has to exercise its functions with a limited scope of discretion, and bound to take a strong stand against EU fraud offences. It is therefore strikingly dissimilar to some of the national Public Prosecution Services in the Union that enjoy a wide scope of prosecutorial discretion. Hereafter I will try to analyse which difficulties arise when such an EPPO has to function within a legal environment which is not directly fit to receive it.

3. The expediency principle

One of the central elements that define the prosecutorial task is the scope of discretion that is bestowed upon prosecutors, which, as mentioned above, varies significantly across Member States.

Some countries, like the Netherlands, offer the Public Prosecutor's Office a wide scope of discretion in deciding about the prosecution of criminal offences[16], while others restrict the available choices to a large extent. The latter are said to have accepted the principle of mandatory prosecution, or the legality principle, which obliges the prosecutor to instigate prosecutions in case he can prove that a certain criminal offence took place. Countries that do not accept such an obligation generally provide in their codes for the possibility that a case be dismissed when prosecution is not in the public interest. This is called the expediency principle.

More specifically, criminal law theory distinguishes between two variants of the expediency principle and uses the term 'negative interpretation of the expediency principle' when it is held that dismissing a case should be the exception to the rule that all cases should be prosecuted. Conversely, the term 'positive interpretation of the expediency principle' means that some country's law holds that prosecution should only take place when an offence can be proven and, additionally, it would be in the public interest to start a prosecution[17].

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[16] Code of Criminal Procedure, art. 167, 242.

[17] See W. GEELHOED, *Het opportuniteitsbeginsel en het recht van de Europese Unie. Een onderzoek naar de betekenis van strafvorderlijke*

Usually, the expediency principle is not defined in such a black-or-white manner, reflecting instead elements from both interpretations. That is also the case in the Netherlands, where the expediency principle can best be interpreted as enabling prosecutors to use the public interest as a criterion in prosecutorial decision-making, as opposed to the legality principle in which they cannot do so.

Granting the Public Prosecution Service a wide scope of discretion causes that Service to set up its own standards and policy documents, in order to maintain a consistent and equal functioning within its jurisdiction. At least, this happened in the Netherlands, where the Prosecution Service started to issue guidelines for prosecutors, initially mainly for smaller crimes and misdemeanours for which this unifying policy was much needed. Later, also more serious crimes were included[18]. Prosecution guidelines were also published in the Government Gazette, which made the public and, more importantly, defence lawyers aware of the policy that the Prosecution Service wished to pursue for a certain type of crime. Courts then started to accept complaints against prosecutorial decision-making which diverted from the published guidelines, and declared the prosecution in these cases inadmissible[19]. The legal value of these guidelines became therefore very significant, almost to the point that they could be qualified as delegated law-making. It is also argued that these guidelines facilitate a transparent, efficient and centralised priority-setting in criminal law enforcement.

The operation of these guidelines was further strengthened and simplified by the introduction of a computer-aided system of case processing, which indicated the desired decision in the case on the basis of the applicable guidelines[20]. Clerks working for the Public Prosecution Service operated this system and made the decisions it indicated or prepared them for the prosecutor. This system is now in the process of being

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beleidsvrijheid in de geëuropeaniseerde rechtsorde (diss. Leiden), Kluwer, 2013.

[18] J.P. HUSTINX, *De ontwikkeling van het Openbaar Ministerie tot beleidvoerend orgaan*, in W. C. VAN BINSBERGEN et al (eds.), *Handhaving van de rechtsorde*, Zwolle: W.E.J. Tjeenk Willink, 1988, p. 95-112.

[19] Supreme Court of the Netherlands, 19 June 1990, *Nederlandse Jurisprudentie* 1991, 119.

[20] This system was called 'BOS-Polaris'.

abolished, with the reason that a non-automated set of guidelines will offer prosecutors more possibilities to take all particularities of a case into account.

4. Structure and hierarchy in the Prosecution Service

While the Dutch Code of Criminal Procedure offers prosecutors a wide scope of discretion, individual members of the Public Prosecution Service cannot always use this discretion as they like. This Service is a strictly hierarchical body, in which higher-ranking prosecutors can issue binding decisions to lower-level prosecutors[21]. There is a College of Procurators-General on top of the hierarchy, which issues the guidelines and is, additionally, competent to issue instructions on any subject matter to the members of the Service[22]. One special part of the Service that should be named here is the so-called Functional Public Prosecutor's Office, which is especially tasked to handle fraud and environmental cases[23]. Doing so, the Prosecution Service sets these cases apart from regular cases because there is a risk that these cases receive low levels of attention and priority because of their time-consuming nature.

This legal environment in which the Dutch Public Prosecution Service operates is characterized by the wide scope of discretion that the expediency principle offers to the Service. When an EPPO is introduced which is bound by a principle of mandatory prosecution (in other words: the legality principle), its setup is pervaded by a completely different philosophy. The choice between legality and expediency as leading principles is not an insignificant detail but has far-reaching consequences.

As explained above, the wide scope of discretion that the Dutch Public Prosecution Service enjoys is kept in check because the Service is constituted as a hierarchical body that, moreover, limits its own decision-making by issuing guidelines that have a binding nature for its task fulfilment. The centralised prosecutorial policy that is produced as a result of this setup is however vulnerable for outside influence, which could endanger its consistency and the effectiveness in which it tailors

[21] Judicial Organization Act, art. 136-138.

[22] Judicial Organization Act, art. 130 par. 4; Code of Criminal Procedure, art. 8.

[23] Code of Criminal Procedure, art. 9 par. 3.

investigatory and prosecutorial capacity towards certain types of criminality. When the EPPO sets other priorities than the national Prosecution Service does, it will intrude on the consistency of the prosecutorial policy. To be sure, it could be said that the safeguarding of the Union budget is in fact the general interest that the EPPO aims at. And if it is the case that the national Public Prosecution Service already attaches much value to this interest, it cannot be expected that the introduction of the EPPO changes much. Conversely, if the national prosecution policy does not prioritise the fight against EU fraud, it would be perfectly justified if the EPPO would strengthen the efforts in that field.

On a more practical level, other problems may arise. With the establishment of the EPPO, there is an additional hierarchical structure introduced. The Central Office of the EPPO, which is itself a complex body, is placed hierarchically above the European Delegated Prosecutors who carry out the duties of the EPPO in the national courts and act as prosecutors[24]. These European Delegated Prosecutors will most probably be national prosecutors who are granted the additional European capacity, and therefore possess a so-called 'double hatted' nature. If that is the case, they will have to give priority to their European mandate in cases in which national and European priorities diverge. That these priorities will diverge is the basic assumption behind the proposal. These prosecutors will thus be placed in a double chain of command in which the priorities pursued by the different hierarchical structures produce a conflict of interests. It is necessary to provide for a solution for this conflict and that solution is a procedural one, according to the proposed legislative framework. The rather complex procedure involves the, centrally located, European Prosecutor who, in consultation with the national authorities, shall determine whether the European Delegated Prosecutor will have to give priority to his European mandate[25].

This method could be appropriate to solve difficult conflicts at the prosecutorial level. However, there is currently no provision foreseen that enables the EPPO to not only overrule national prosecutorial policy-setting, but also priority-

[24] Council doc. nr. 10264/15, art. 12 par. 1.
[25] Council doc. nr. 10264/15, art. 12 par. 3.

setting at the investigative level[26]. The idea apparently is that the European Delegated Prosecutor possesses the competence to steer investigations and to direct investigative capacity to predetermined cases or types of cases. This might become the more difficult part of the practical development of the EPPO. Will it be possible for the Delegated European Prosecutor to allocate the resources that it considers necessary or advisable in order to fulfill its task of fighting fraud effectively? How will eventual struggles for investigative capacity be settled? Will it perhaps be more effective to conclude agreements with national investigative authorities as to the number of personnel available for EPPO investigations? Or, if that all proves too difficult, will there in the end be a strengthening of the investigative function at the European level, for instance at OLAF? These questions require serious consideration before a legislative framework for the EPPO is concluded, because the effectiveness of the body may depend on the solutions for this problem.

5. Democratic accountability

The Dutch Public Prosecution Service is not only internally structured in a hierarchical manner, which causes difficulties in reconciling it with a future EPPO. It is also subordinated to the Minister of Security and Justice, who has the power to give general guidelines and instructions to the Service, but who is also competent to instruct the Service regarding specific criminal cases. The Minister can issue both instructions to start prosecutions, as well as instructions to refrain from prosecution[27].

In the first case, the instruction must be entered into the case file, in order for it to become known to the judge handling the case and, if a trial is held, to become publicly known as well[28]. In the second case, that result is logically impossible if the instruction would be entered into prosecution records only. Therefore, in cases where the Minister instructs the Public

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[26] Council doc. nr. 10264/15, art. 5 par. 6 refers to the principle of loyal cooperation which will guide the action of investigative authorities. As these loyal cooperation duties already exist in art. 4 par. 3 TEU and art. 325 TFEU, it is unclear what this provision exactly adds.

[27] Judicial Organization Act art. 127.

[28] Judicial Organization Act art. 128 par. 5.

Prosecution Service to refrain from prosecuting, he has to inform Parliament of his decision.[29] This will make his instructions publicly known, and will also enable Parliament to hold the Minister accountable for his actions and, if it is dissatisfied with these actions, force his removal from office. This is a possibility, since the Ministry of Security and Justice's accepted superiority over criminal law enforcement is not excluded from the general rule that Parliament can remove the entire cabinet or an individual minister if it is dissatisfied with its functioning and ceases to entrust the powers of government to the cabinet or the minister[30]. Criminal law enforcement is generally considered to be so intrusive in individual lives and so crucial to the daily functioning of society, that office-holders in this field should be subjected to democratic control.

Here, the envisaged legal framework for the EPPO also shows a different philosophy. The European Chief Prosecutor will be appointed by the European Parliament and the Council[31], the other European Prosecutors will be nominated by the Member States and selected by the Council.[32] No European institution, including the European Commission will be competent to instruct the EPPO on general matters or in individual cases[33]. If serious problems arise, the Commission may submit a request to the Court of Justice asking for a dismissal of a European (Chief) Prosecutor. The same competence is given to the Council and the European Parliament[34]. Therefore, there is no arrangement for democratic accountability for the EPPO's actions at the European level which is comparable to the one on the national level. This could lead the Dutch Parliament to question the legitimacy of the EPPO, as there is no government official who can be questioned and held accountable for its functioning.

An alternative would be that the Minister of Security and Justice will be held accountable, although he does not possess the power to issue instructions to the European Delegated

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[29] Judicial Organization Act art. 128 par. 6.

[30] This is an unwritten rule in Dutch constitutional law. The government does not need a vote of confidence before it is able to take up its duties, but it may be removed if a parliamentary motion of non-confidence is carried.

[31] Council doc.nr. 10264/15, art. 13.

[32] Council doc.nr. 10264/15, art.14.

[33] Council doc.nr. 10264/15, art. 6.

[34] Council doc.nr. 10264/15, art. 13 par. 4, art. 14 par. 5.

Prosecutor. A lack of powers of instructions normally is a complete obstacle to parliamentary accountability for the Prosecution Service's acts, but it has to be awaited whether Parliament can resist the temptation to call the Minister to account when problems with the EPPO arise. From a Dutch point of view it is therefore not very desirable that no government official can be held accountable for EPPO's functioning, and that there are only limited possibilities for political control over it.

This could lead to reluctance when the Dutch government has to decide on whether to participate in the EPPO or not, and as well to uncomfortable situations when the Office will be set up as proposed. But perhaps these objections can be overcome if, in addition to a limited system of political control, a solid system of judicial control is set up.

6. Judicial control

The wide scope of discretion that the Dutch Public Prosecution Service enjoys is not only held in check by the fact that it forms its decisions within a hierarchical system under political control. Another very important element in the system of checks and balances surrounding prosecutorial decision-making is the way in which judicial control over these decisions is possible. This system provides for two methods of review, dependent on the type of decision.

A decision not to prosecute may be challenged in court by any directly interested party[35]. This also counts for a decision to impose a penal order and a decision to offer a transaction, because these all lead to out-of-court settlements[36]. The directly interested party may lodge its complaint at the Court of Appeal of the region where the decision not to prosecute was taken. This Court of Appeal has to decide on questions of fact and law and on expediency as well[37]. It can order the Prosecution Service to instigate proceedings or start a preliminary investigation, it can indicate the offence that must be used for the indictment and it can indicate the factual elements of the

[35] Code of Criminal Procedure, art. 12.
[36] Code of Criminal Procedure, art. 12k.
[37] Code of Criminal Procedure, art. 12i par. 2.

offence that should be included therein[38]. If it rejects the complaint of the directly interested party, it the Court of Appeal may do so because of the reason that prosecution would not be in the general interest. That means that the Court may refer to any ground of expediency that it may find in the case.

A decision to start a prosecution may also be challenged in court. That possibility is only open for the defendant and can be used in the form of a plea for inadmissibility of the case. The grounds for inadmissibility essentially amount to general principles of law: the equality principle, the principle of legitimate expectations, the prohibition of arbitrariness and the prohibition of disproportionality. However, some of these are quite strong while others are not. For instance, a case can theoretically be declared inadmissible if the prosecutor decided to start proceedings against the defendant while not prosecuting a co-suspect in comparable circumstances[39]. This type of appeal to the equality principle hardly ever succeeds.

The fact that trial courts can declare the prosecution inadmissible is related to the wide scope of discretion the Prosecution Service enjoys: courts tend to marginally check the way in which the prosecutor employs his discretion, to prevent abuses and improper action. One of the most powerful tools in this respect is the above-mentioned practice that courts accept complaints about prosecutorial decision-making which diverts from the Prosecution Service's own guidelines. The basis for this is found in the principle of legitimate expectations, which entails that an individual may expect not to be prosecuted if his case is qualified in the guidelines as not worthy of prosecution[40]. Because of this state of affairs, the guideline system can be seen as a tool for further specification of criminal liability. Reliance on the guideline system is not absolute, however. Prosecutors may divert from settled prosecutorial policy if they have good reasons and state these on trial[41].

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[38] Supreme Court of the Netherlands, 25 June 1996, Nederlandse Jurisprudentie 1996, 714, Court of Appeal of Amsterdam, 21 January 2009, ECLI:NL:GHAMS:2009:BH0496.

[39] Supreme Court of the Netherlands, 22 October 1991, *Nederlandse Jurisprudentie* 1992, 282.

[40] Supreme Court of the Netherlands, 13 September 1994, *Nederlandse Jurisprudentie* 1995, 31.

[41] Supreme Court of the Netherlands, 5 March 1991, *Nederlandse Jurisprudentie* 1991, 694.

This system of judicial review was developed in a long process and reflects the desire to seriously control the application of the expediency principle. That does not necessarily mean that it is irreconcilable with an EPPO that possesses striking differences in comparison with the Dutch Public Prosecution Service. Some questions may arise however and these will merit attention. The possibilities for complaints against non-prosecution are for instance open for any directly interested party. Mostly this is the victim of the crime. For all cases for which the EPPO will be competent, this interested party will be the European Union. Could the Union, represented by the European Commission, be admissible when it files a complaint with a Dutch Court of Appeal against a decision of the EPPO not to prosecute a case of EU fraud in the Netherlands? For the Court of Appeal to be able to process such a complaint, it is not necessary that there is a formal decision on prosecution. Simply not starting proceedings can also be seen as a decision against which a complaint is admissible. An offer for a transaction or the issuing of a penal order is a decision against which a complaint is admissible as well. If the European Commission would be regarded as a directly interested party and its complaints would be admissible, it would lead to a remarkable accumulation of capacities of the Union, which could be seen as the victim, the investigator and the prosecutor in one.

Another issue relates to the binding nature of prosecutorial guidelines. The EPPO is probably going to formulate a policy document[42], or a yearly report stating its intentions for the fulfilment of its tasks[43]. The question is whether these publications could be viewed by the court as containing statements of a self-binding nature from which a defendant could derive legitimate expectations with regard to the decisions the EPPO will make in his case. A negative answer to this question could be based on the fact that the EPPO, contrary to the national Public Prosecution Service, does not enjoy a very wide scope of discretion and therefore cannot restrict itself in the exercise of its policy freedom. That line of approach emphasizes the European nature of the EPPO. This however does not clearly reflect recent developments in Council

[42] Proposal, recital 31.
[43] Council doc. nr. 10264/15, art. 6 par. 2 and art. 6a.

negotiations which tend to accentuate the national nature of EPPO actions, the applicability of national law and the involvement of the national judiciary. The logical consequence seems to be that the EPPO, or rather the European Delegated Prosecutor, will be seen by the court as a national prosecutor and therefore subjected to national law and national standards for judicial review. If these standards imply that policy documents receive a relatively strong force in reviewing prosecutorial decision-making, then that is something that the EPPO will have to consider when starting a prosecution in the Netherlands. According to this line of reasoning, the EPPO will be confronted with the particularities of the participating Member States, each receiving it in its own manner and applying its own standards with regard to its actions. That state of affairs could seriously hamper its effectiveness, the predictability of its actions and the equality of the outcomes.

7. Considerations on embedding the EPPO

If the basic thought behind the establishment of the EPPO is that Member States are not actively combating offences affecting the financial interests of the Union, there is one suspicious element of criminal procedure that could facilitate a reserved approach by the Prosecution Service. That element is the expediency principle. Enabling prosecutors to fulfil their tasks with a wide scope of discretion, this principle gives rise to other problems as well when the consequences of the establishment of the EPPO are thought through. In order to assess what problems may arise, this article used the Dutch criminal justice system as an example of a system offering a wide scope of discretion for prosecutorial decision-making.

The choice between legality and expediency is a starting point for designing the rules relating to prosecution, and has significant consequences for the system of judicial and political review, for the room for policy-making and for the internal and external structure of a prosecution service. The design of the EPPO is markedly different from the characteristics of the Dutch Public Prosecution Service, which enjoys ample freedom in its decision-making. As these systems are destined to coexist and even to converge in the person of the European Delegated Prosecutor, tensions will arise there and possibly also elsewhere

in the composite system of prosecution that results from the introduction of the EPPO. Possibly decreasing the consistency of a centralised prosecution policy, European priorities for criminal law enforcement set by the EPPO will draw particular attention to EU fraud. Due to the limited scope of this policy field, the resulting incoherence in criminal law policy will naturally be negligible. That will no longer be the case if the competence of the EPPO in the future is extended to other forms of serious crime.

Receiving an EPPO in a system that is used to control its prosecution service in both the political and judicial context is perhaps more difficult than acknowledging its deviating policy choices. Two extremes are possible. The EPPO may be seen as a purely national Prosecution Service for purposes of political accountability and judicial review. In that case, the Minister of Security and Justice could be held accountable for any failure of the EPPO. Courts would use their national standards for review of prosecutorial decision-making, including the rules on the prosecutors' compliance with its own policy documents and guidelines. The other possibility is that the EPPO is viewed as a truly European body which is bound only by European law. In that case, it would be impossible to hold any national official to account for its functioning, and courts will probably show considerable deference to its European background and not impose national rules and standards upon it. The deliberations on the EPPO proposal have shown a clear development towards the first option: the EPPO should be regarded a national entity as much as possible. At the same time, it should retain its revolutionary characteristics, having the power to enforce that offences against the financial interests of the European Union will be prosecuted. That combination is undoubtedly causing theoretical but also practical problems which will most probably be encountered when the first prosecutions ensue. The fact that it is quite predictable which problems the embedding of the EPPO might cause, could however also lead the governments of certain Member States to seriously consider their involvement in the project. The problems relating to the specific nature of the criminal justice systems that offer considerable prosecutorial discretion merit serious attention.