To which Prosecution Service?

Analyzing the way the Union Resolves Criminal Conflicts of Jurisdiction

# Introduction

Conflicts of jurisdiction occur the moment there is the possibility of two different jurisdiction having the ability to exercise their ‘power’ over a situation. These conflicts exist in both civil and criminal law and can be of a positive or negative nature (*in concreto* and *in abstracto*).[[1]](#footnote-1) A positive conflict exist when there are two different jurisdictions that are competent to handle a criminal situation, whereas a negative conflict arises when a jurisdiction is unwilling or unable to have competency. The terms of *in concreto* (actual, verifiable situation) and *in abstracto* (theoretical situations) are applied to further explain the nature of a positive or negative conflict. An *in concreto* positive conflict is when two (or more) jurisdictions both are (or want to) investigate and prosecute an offence, whereas an *in abstracto* positive conflict exist when it is possible that two (or more) States are capable of prosecuting an offence. An *in concreto* negative conflict is when at least one State (out of at least two) refuses to exercise its competency over a situation despite having the jurisdiction to do so, whereas an *in abstracto* negative conflict exists when a State could theoretically establish jurisdiction but has not done so.[[2]](#footnote-2)

When it comes to resolving criminal conflicts of jurisdiction, the European Union [EU or Union] is required to ‘adopt measures to […] prevent and settle conflicts of jurisdiction between the Member States [MS].’[[3]](#footnote-3) When understanding this provision (or its earlier version ‘preventing conflicts …’) it is important to remember that resolving conflicts of jurisdiction does not only include actual conflicts arising between jurisdictions; it is also about ensuring that jurisdictions are capable of handling a situation to begin with.[[4]](#footnote-4) Thereby, while it may seem that the Union is meant to resolve only positive conflicts (*in concreto* and *in abstracto*) it is also meant to resolve negative conflicts (both *in concreto* and *in abstracto*).

The EU history with resolving conflicts of jurisdiction was to prevent *in abstracto* negative conflicts from occurring; in other words ensuring that at least one jurisdiction will be able to have criminal judication over accused person for certain types of criminal activity.[[5]](#footnote-5) The EU continues to legislate in the same manner to this day; ensuring that if the crime is committed on the territory (in whole or in part) of a MS or is committed by a national of the MS, the concerned MS must ensure that they will be able to have criminal jurisdiction over the accused.[[6]](#footnote-6) While it can be argued that the Union is only creating conflicts of jurisdiction,[[7]](#footnote-7) this is not necessarily the case. What has occurred is preventing *in abstracto* negative conflicts of jurisdiction, at least by mandating that MS must ensure that their criminal jurisdiction – within EU criminal law – covers criminal activity committed on its territory or by its nationals (regardless of where the crime took place). While the ability of the EU to legislate in criminal law is limited,[[8]](#footnote-8) it has used its competency to ensure that there will not be a case ‘well I do not have jurisdiction’ when committed in the Union or by a Union citizen.[[9]](#footnote-9) This has the benefit that when it comes to resolving conflicts by Union citizens or crimes committed in the EU there will be a MS that can have jurisdiction.

In 2002, the EU created Eurojust which has as one of its tasks to provide a non-binding opinion or decision on which MS should exercise its jurisdiction.[[10]](#footnote-10) This advice can be on either positive or negative conflicts of jurisdiction between the MS.[[11]](#footnote-11) However, there is no obligation to request assistance from Eurojust, thereby it depended upon MS to actively request Eurojust involvement.[[12]](#footnote-12) Eurojust continues to provide the same assistance, in a non-binding manner, to this day.[[13]](#footnote-13) This was the first time that the EU actively attempt to help MS resolve conflicts of jurisdiction. However, the first time that the EU mandated that MS come together to resolve conflicts of jurisdiction was with the adoption of Council Framework Decision 2009/948/JHA.

The adoption of Framework Decision 2009/948/JHA mandated that MS must contact each other and genuinely attempt to resolve positive conflicts of jurisdiction, as long as there was a potential for violations of the *ne bis in idem* principle.[[14]](#footnote-14) In other words, when there are parallel proceeding taking place based on the same facts and concerning the same person. This method of resolving conflicts of jurisdiction between the MS is called the Horizonal Mechanism. It currently is one of the strongest pieces of legislation by the EU that resolves positive conflicts of jurisdiction; the other being the EPPO Regulation.

The EPPO Regulation established the European Public Prosecutor’s Office [EPPO] to investigate and prosecute PIF Offences: offenses concerning fraud, corruption, money laundering, and misappropriation.[[15]](#footnote-15) Due to this competency, the regulation also address the issue of resolving (positive and negative) conflicts of jurisdiction arising both between itself and the MS. The conflicts that arise in itself refers to issues of which MS will serve as the forum for the prosecution, in other words, which MS will EPPO prosecute an individual.[[16]](#footnote-16) In cases of conflicts with MS, the EPPO will need to determine whether the case at hand must or should be handle by it instead of by the MS. Thereby, the EPPO Regulation is meant to determine whether the MS or EPPO should handle the case and the MS of forum for EPPO.[[17]](#footnote-17) In this regard, the method used to resolve both of theses conflicts under the EPPO Regulation will be called the EPPO Mechanism.

The Horizonal and EPPO Mechanisms are the primary way that conflicts of jurisdiction are resolved. This is due to the obligation that exist that mandates MS (and EPPO) to make use of the relevant Mechanism to resolve conflicts of jurisdiction.[[18]](#footnote-18) Both Mechanism resolve conflicts in their own way, based on what issue they are meant to address. Therefore, this article will explore how both of these Mechanisms resolves conflicts of jurisdiction and compare them. This will allow the article to determine how the EU currently resolves conflicts of jurisdiction between prosecution services.

# Comparative Research Method

## Mechanism

This article makes use of the terms, Horizontal Mechanism and EPPO Mechanism. These terms are the embodiment of the way the EU resolves conflicts of jurisdiction as determined by the FD 2009/948/JHA and the EPPO Regulation respectively. These Mechanism’s are not independent entities that have an independent thoughts or ability to provide resolutions. Instead, they are meant to reflect the way in which a conflict of jurisdiction is resolved by the competent authorities within the EU. Whether a matter falls within one of the Mechanisms or is decided by the rules prescribed therein, are matters that are determined by the authority designated by the appropriate legislation.

## Analytical Framework

This comparative review’s main method applied to analyse four interlinked elements: competency, communication, determination of jurisdiction, and judicial review. These elements have been chosen, as it will allow a comprehensive review of the two mechanisms. Reviewing what types of conflicts it is capable of handling (competency), how the authorities should interact with each other (communication), the way conflicts are resolved (determinations of jurisdiction), and the way the mechanism prevents authorities from arbitrarily applying the law and protection of the rights (judicial review). As a result, this innovative methodological approach is also a manner for the comparative review to examine the changes the EPPO will bring as a resolution mechanism. The following elaborates upon their composition.

### Competency

The competency element is focused on the mechanism itself: i.e. what types of conflicts of jurisdiction is the mechanism meant to handle. This may be the criminal nature of the offence (e.g., the mechanism only handles murder cases), the type of conflict (e.g., the mechanism is only invoked in cases of negative conflicts of jurisdiction), the nature of the conflict (e.g., only in cross-border cases), etc. There are plenty of scenarios that one could think of. This element is focused on the jurisdiction of the conflict resolution mechanism and when it can or should be invoked. This could, or could not be limited by the scenarios indicated above. It can depend on the mechanism under review. The issue of competency also observes the way a mechanism approaches the *ne bis in idem* principle and issues of positive and negative conflicts of jurisdiction.

### Communication

The communication element deals with the issue of when and how the authorities should engage with each other and whether others are involved in this process. The main parts of this element regards when the relevant entities should engage with each other, what information should be provided to each other, and the time they have under the mechanism to do everything.

### Determination of Jurisdiction

The determination of jurisdiction element is the central aspect of any conflict of jurisdiction resolution mechanism. It is the heart of any resolution mechanism as it decides which authority should handle the case based on a given situation. This element is not focused on whether the different authorities should have prescriptive jurisdiction, but rather which of these authorities should exercise its jurisdiction. It will be assumed that when it comes to the determination element that the issue of prescriptive jurisdiction has been settled. It will consequently focus on how the mechanism determines which authority should exercise jurisdiction in a given case and how it should prevent forum shopping from taking place.

# Competency

## Horizontal Mechanism

The Horizontal Mechanism is, according to Article 1, meant to foster closer cooperation in criminal proceedings between competent authorities, with the goal at preventing situations where a person is subject to parallel criminal proceedings on the basis of the same facts. The reason given is that if these proceedings would be finalized in more than one MS this could result in an infringement of the *ne bis in idem* principle.[[19]](#footnote-19)

The Horizontal Mechanism is limited to actual concrete parallel proceedings taking place between two (or more) MS, to prevent *ne bis in idem* violations.[[20]](#footnote-20) However, if a case has been finalized in a MS, which would then turn to a question of ‘if another MS continues would there be a violation of the *ne bis in idem* principle?’ would fall outside its ability to resolve.[[21]](#footnote-21) Therefore, it is limited to situations where neither of the involved MS have come to a final judgement. Nonetheless, the issue of *ne bis in idem* is important to define when the Mechanism is competent.

The issue of *ne bis in idem* helps define when parallel proceedings are occurring, according to the Horizontal Mechanism. The way the Mechanism defines parallel proceedings – those that would lead to an infringement of the *ne bis in idem* principle if finalized in a MS – allows us to define the term by using this principle. The Court of Justice has defined the principle as the ‘existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected.’[[22]](#footnote-22) Furthermore, this assessment must be made objectively rather than subjectively.[[23]](#footnote-23)

The Court of Justice does allow for a margin of appreciation to this definition by national courts, and thereby flexibility in its understanding.[[24]](#footnote-24) However, as the Horizontal Mechanism ‘aim [is] to prevent situations where the same person is subject to parallel criminal proceedings in different Member States in respect of the same facts’ and therefore ‘seeks to prevent an infringement of the principle of “*ne bis in idem*”’ means that a wider understand of the definition should be applied.[[25]](#footnote-25) After all, attempting to prevent a violation of a principle that can only be judged after the proceedings have ended by a national court would require that MS national authorities should do their upmost to prevent this from becoming an issue. After all, if a situation is ignored, that should have been handle herein, this would have consequences for both the State and defence.

The Horizontal Mechanism, as a resolution mechanism, does not seem to provide for a binding decision making competent. There is not a person or body that can force the MS to act or not to act; the Mechanism only demands that MS competent authority’s work together to come to a consensus on who should handle the case.[[26]](#footnote-26) It only states that if consensus cannot be reached the matter may be referred to Eurojust to provide an opinion, which is also non-binding on the competent authorities.[[27]](#footnote-27) The Mechanism is more of a framework for communication to resolve these matters, rather than a binding mechanism to provide a definite outcome.

A unique aspect concerning the Horizontal Mechanism is to whom it is addressed to: the competent authorities in the MS.[[28]](#footnote-28) While this has normally been national authorities;[[29]](#footnote-29) with the adoption of the EPPO Regulation, this is no longer the case. Various MS, who are participating in the EPPO, have determined that the EPPO is a competent authority under the Horizontal Mechanism.[[30]](#footnote-30) This means that the EPPO is allowed to resolve conflicts of jurisdiction matters that are covered by the Horizontal Mechanism. However, due to the position of participating MS relationship with the EPPO, only those despites that involve non-participating MS may be handle therein, those involving participating MS are covered under the EPPO Mechanism instead.[[31]](#footnote-31)

## EPPO Mechanism

### Vertical Dimension

The EPPO has competency over PIF Offences – expenditure fraud, revenue fraud (excluding VAT), VAT fraud, money laundering, corruption (active and passive), and misappropriation (the later three offences will be referred to as Art 4 Offences)[[32]](#footnote-32) – as defined under the PIF Directive and implemented into national criminal law.[[33]](#footnote-33) This competency can be expanded to participation in a criminal organization if the organization’s focus is on PIF Offences or for other criminal offences that are inextricable linked to a PIF Offence.[[34]](#footnote-34) However, EPPO is never competent if national direct taxes are involved.[[35]](#footnote-35)

Another aspect to the EPPO’s competency is that a participating MS must have criminal jurisdiction over the accused. This may occur in one of three ways. First, the offence was ‘committed in whole or in part’ in a participating MS. Second, the offence was ‘committed by a national of a [participating] Member State, provided that a Member State has jurisdiction’ over that person for crimes committed abroad. Third, was committed by ‘a person who was subject to the Staff Regulation or to the Conditions of Employment, at the time of the offence’ provided a participating MS has jurisdiction. When both of these competency issues are met – material and personal – the EPPO has competency.[[36]](#footnote-36)

While the above states what the competency of the EPPO is, this is not the same as the competency of the EPPO Mechanism. The Mechanism has to determine whether EPPO has the competency (and the ability to exercise it therein) to have the case. This means that the EPPO Mechanism is capable of handling any type of potential conflict between the EPPO and participating MS, regardless of subject matter.[[37]](#footnote-37) The main difference between EPPO competency and the Mechanism’s is that the Mechanism is determining if the EPPO competency is met. For example, if a case is sent to the EPPO that involves only non-PIF Offences, the Mechanism still has to determine if EPPO has competency (and the ability to exercises it), yet the decision by EPPO under this Mechanism would be that it does not. In addition, since the vertical dimension is whether EPPO has the ability to take the case, it does not matter whether the situation is under (criminal) investigation.[[38]](#footnote-38) This allows the Mechanism to solve both positive and negative conflicts of jurisdiction.

While the Mechanism is capable of handling various conflicts, the Mechanism is limited in its power to force action. Only in two cases is EPPO forced to act. First, if there is no criminal investigation ongoing, then EPPO must open an investigation if it is found competency to act.[[39]](#footnote-39) Second, if EPPO attempts to refer a case back to the MS(s) and the MS refuses to take the case or does not respond within 30 days, then EPPO must keep the case as long as the material and personal competency is still fulfilled.[[40]](#footnote-40) Beyond these situations, there is no power to force action by either the EPPO or the MS(s).[[41]](#footnote-41) However, the Mechanism is capable of preventing authorities from acting. If EPPO takes a case it prevent both Union and MS from being able to act on the matter; in the same vein, it can be determined that EPPO may not act and must leave the case to other authorities.[[42]](#footnote-42)

### Horizontal Dimension

The EPPO has to determine, if a case is given to it, which MS the case will be investigated / prosecuted in.

In principle a suspect … should only face one investigation or prosecution by the EPPO … [in a situation] where an offence has been committed by several persons, the EPPO should in principle initiate only one case … in respect of all suspects … jointly.

[In addition] where several [EDP] have opened investigations in respect of the same criminal offence, the Permanent Chamber [of EPPO] should where appropriate merge such investigations . . . [however, it] may decide not to merge such proceedings or decide to subsequently split such proceedings.[[43]](#footnote-43)

There are specific provisions within the EPPO Regulation dealing with matters of where a case should go and when may a case be merged, split, or reallocated.[[44]](#footnote-44) The details of which will be examined in the determination of jurisdiction section. What is relevant here is the wide scope that is given within the EPPO Mechanism in horizontal matters.

EPPO has, in principle, the duty to ensure a suspect only faces one investigation by EPPO. While this would naturally have to apply if there two different EPPO investigations, which if completed would lead to a violation of the *ne bis in idem* principle,[[45]](#footnote-45) it has the potential to be far more reaching. The EPPO Mechanism is also capable of applying the principle of concertation of proceedings. This would allow the EPPO to merge multiple cases against an individual, for separate criminal facts, into one case. Likewise, it would allow EPPO to merge (or split) cases against multiple individuals in various MS. This means that the Mechanism is not limited to matters of parallel proceedings, but all types of proceedings that share the same person(s) and fact(s). Allowing the Mechanism to determine where each type of case should go and to whom. A limitation on the EPPO’s ability in resolving conflicts in the horizontal dimension is that any decision taken by the EPPO is only applicable to the EPPO; if a case is referred back to the MS(s) a new decision – most likely within the Horizontal Mechanism – must be taken of the MS of forum (if needed) as the EPPO choice of forum does not bind other authorities.[[46]](#footnote-46)

## Comparative Analysis

# Communication

## Horizontal Mechanism

The Horizontal Mechanism provides that when ‘a competent authority of a MS has reasonable grounds to believe that parallel proceedings are being conducted in another [MS], it shall contact the component authority’ of that State.[[47]](#footnote-47) Meanwhile, any ‘contacted authority shall reply to a request submitted’ to them, or if the contacted authority ‘is not the competent authority […], it shall without undue delay transmit the request for information to the competent authority and shall inform the contacting authority accordingly.’[[48]](#footnote-48) The use of ‘shall’ in the FD is a strong indicator of the obligatorily nature for MS authorities to communicate with each other when the Mechanism competency is potentially triggered.[[49]](#footnote-49) It is also ensuring that that the correct competent authorities are placed in contact with each other.

The obligation to reply to any competent authority using the Horizontal Mechanism seem clear: you shall reply, either as the competent authority handling the case at hand or by placing the competent authorities in contact with each other. What can be debated is when should a competent authority invoke the Horizontal Mechanism, in particular what constitutes ‘reasonable grounds’? The FD does provide some guidance on this matter, through a non-exhaustive list in the recital. Reasonable grounds can be inferred when a suspect has informed the authority that another MS has questioned them, the authority has received a mutual legal assistance request on the same matter, or the competent authority has been informed by the police that this may be the case.[[50]](#footnote-50) An additional way in which reasonable grounds could be established is through Eurojust.

Eurojust itself is unable to invoke or mandate the use of the Horizontal Mechanism, as it is not a competent authority under it, nor given that power within its provisions.[[51]](#footnote-51) Yet, it still plays an important role due to its mandate to assist national judicial authorities’ cooperation.[[52]](#footnote-52) This means that it is best placed to determine if multiple MS are requesting assistance via Eurojust on potentially the same facts (and persons) and inform the concerned authorities.[[53]](#footnote-53) In fact, it is not only that Eurojust may be best placed to see potential parallel proceedings, but it also has a legal duty to inform authorities if there may be an effect on the MS(s).[[54]](#footnote-54) Therefore, while Eurojust may not be able to invoke the use of the Mechanism, it still has an important task in assisting MS in determining whether there are reasonable grounds of parallel proceedings taking place between the MS.

Uniquely, the Horizontal Mechanism does not provide that requesting mutual assistance from another MS is a reasonable ground in the recital; instead, the onus seems to be for the MS that has received the request to determine if there could be parallel proceedings taking place.[[55]](#footnote-55) This reinforces the element that the Horizontal Mechanism is meant to handle concrete parallel proceedings (*in concreto* positive conflicts of jurisdiction) issues between the MS. In furtherance of this, that only when you have the reasonable grounds that this is occurring will the duty to communicate arise. This indicates that requesting mutual assistance does not rise to such a level, only if authority has received a request on this matter under investigation does it rise to a reasonable ground. Thereby, balancing the need to preventing issues concerning parallel proceeding in different MS, meanwhile not hampering these investigations based purely on speculation that another MS might be investigating due to the need for mutual assistance from that authority.

Whenever the Horizontal Mechanism is invoked by competent authorities, there is a requirement for information exchange: facts of the case, involved person(s), amongst other matters.[[56]](#footnote-56) The former two elements are an important aspect of the Horizontal Mechanism, as they will allow the involved authorities to determine whether the parallel proceedings do exist rather than simply having reasonable grounds that they may exist.[[57]](#footnote-57) In these cases, communication between the authorities must continue until a resolution is found, all the while informing each other of any important procedural measures taken in the case at hand.[[58]](#footnote-58)

An issue that can arise if the authorities do not agree on whether actual parallel proceedings are taking place, meaning no attempt would be made to find a solution. The Mechanism see these matters in black and white: either there are parallel proceedings or there are not. There does not seem to be a recourse mentioned within the FD in such a case. However, there might be a recourse to Eurojust, which has a broader scope in assisting the various MS in jurisdictional matters.[[59]](#footnote-59) This would allow the authorities to have a second opinion on the matter to see if there are indeed parallel proceedings taking place.

## EPPO Mechanism

### Vertical Dimension

Communication within the EPPO Mechanisms revolves around two types of communication; first, those that are initiated by non-EPPO authorities (which is further broken-down to obligation of reporting for both criminal and non-criminal authorities) and second, those initiated by the EPPO itself. This section will first analyse the obligation of non-EPPO authorities initiating communication with EPPO; afterwards the obligation of EPPO to initiate communication will be examined.

#### Reporting to EPPO

When it comes to the obligation to initiate contact with EPPO, both Union and MS component authorities shall ‘report to the EPPO any criminal conduct in respect of which it could exercise its competence in accordance with Article 22, Article 25(2) and (3).’[[60]](#footnote-60) Additionally all judicial or law enforcement authorities in the MS shall inform EPPO if it ‘could exercise its competence in accordance with Article 22, Article 25(2) and (3)’ when that authority ‘initiates an investigation’ or ‘at any time after the initiation of an investigation.’[[61]](#footnote-61) EPPO ‘shall inform the competent national authorities’[[62]](#footnote-62) or ‘shall […] inform the authority that reported [it]’,[[63]](#footnote-63) of its decision on whether it will take a case. These provisions law down the framework of how communication works between non-EPPO authorities reporting to the EPPO.

Intertwined in the above provisions are the requirements for both Union authorities and national authorities’ obligation to report to EPPO, as well as EPPO duty to inform them of its decision to take the case or not. The main issue here is when does the duty to report arise? It seems clear that when EPPO *could* exercise its competency it must be reported; thereby, *could* EPPO have both material competency (Article 22)[[64]](#footnote-64) and the ability to exercise that competency (Articles 25(2) and 25(3)). The latter of which requires the following:

* the offence causes (or likely to cause) damage of at least €10 000 unless it can be justified due to a Union interest (Article 25(2)), herein termed the minor damages criteria;[[65]](#footnote-65)
* the PIF Offence carries a higher maximum sanction than any inextricable linked non PIF-offence report with it or that the non-PIF Offence is instrumental to the completion of the PIF Offence (Article 25(3)(a)), herein termed the preponderant inextricable linked offence criteria;[[66]](#footnote-66)
* the PIF Offence damage causes (or likely to cause) have a higher damage to the Union than to another victim (Article 25(3)(b), this criteria is not applicable to expenditure and VAT fraud), herein termed the preponderant victim criteria.[[67]](#footnote-67)

It is only if both the material competency and exercise of competency *could* mean that EPPO has the ability to act does the obligation to report arise. However, the actual assessment of these criteria is meant for the EPPO to determine after a matter is reported.[[68]](#footnote-68) How would authorities make this determination,[[69]](#footnote-69) after all when does a situation mean EPPO *could* take a case? This will be analysed separately from both a Union perspective and a national perspective.

The Union already has a reporting mechanism in place for ‘fraud, corruption and any other illegal activity affect the financial interests’ of the EU, through OLAF.[[70]](#footnote-70) OLAF competency is similar to EP, but there are differences between OLAF and EPPO in areas of competency and the type of investigations performed (administrative vs criminal, respectively).[[71]](#footnote-71) However, the underlining element is similar: PIF Offences. While EPPO has the ability to conduct criminal activity beyond PIF Offences, they still require that a PIF Offence be present.[[72]](#footnote-72) Therefore, OLAF would be well placed to understand where there is a potential violation of a PIF Offences, under the PIF Directive, and if the various conditions for exercising competency are potentially met (as stated above). The obligation to report does not demand that there is a guarantee that a case can be handled by EPPO only that it *could* handle the case; in other words, is there potential for EPPO to have both material and exercising competency. While this shows that OLAF would be well placed to see this potential, the EPPO regulation does not prevent direct reporting to EPPO by Union authorities.[[73]](#footnote-73) What is provided is the ability to allow reporting through OLAF, instead of various Union authorities attempting to determine whether the conditions are met.

In a similar manner, this could work in national systems, where the centralised reporting system would have knowledge of whether a PIF like Offence has occurred. However, it could theoretically work differently, in that the centralised reporting system is through the national prosecution office, although another system may be used.[[74]](#footnote-74) In this way, the national prosecution office would have expertise on whether a potential crime has occurred under national law and if this crime also covered by the PIF Directive; for example, is it fraud, corruption, etc. The obligation to report would seem to demand that an in-depth review is not required. Again, the mechanism works on the basis of could EPPO have competency, as it is for EPPO to determine if it actually has the competency.[[75]](#footnote-75) Therefore, if it is in the realm of PIF Offences, the obligation would arise to report to EPPO, unless it is known that it is not covered by the PIF Directive or if it is known that there are issues arising from the ability of EPPO to exercise its competency.[[76]](#footnote-76) In all other cases, the obligation to report remains.

A question that can arise is whether an authority must take into account the applicability of Article 23 EPPO Regulation before triggering the EPPO Mechanism – territorial/personal competency issues. It is not a criterion test specifically required under Art 24, yet it could be implied to be there, as authorities are required to determine if the EPPO ‘could exercise its competency.’[[77]](#footnote-77) While this is one way to approach the issue,[[78]](#footnote-78) it is not the viewpoint taken here. The EPPO Regulation clearly provides which articles a reporting authority needs to review, specifically leaving out issues on territorial and personal competency. While the use of Article 23 EPPO Regulation is an important criterion in determining jurisdiction, it is not for the reporting authority to take into account nor be used as a justification to circumvent their obligation to report under Article 24.

#### Reporting to Non-EPPO Authorities.

The obligation to report is not only held by non-EPPO authorities, but also by the EPPO itself. There are two types of reporting; reporting to competent national authorities and reporting to OLAF. The obligation to report occurs in various situations and is contained both within the EPPO Regulation (for reporting to national authorities) and the working agreement between OLAF and EPPO (for reporting to OLAF). The provisions on EPPO reporting to national authorities will be analysed first and then the obligations to OLAF will be examined.

There are various obligation to report within the EPPO Mechanism, first:

Where is comes to the knowledge of the EPPO that a criminal offence outside of the scope of the competent of the EPPO may have been committed, it shall without undue delay inform the competent national authority.[[79]](#footnote-79)

This is the most basic standard of when the EPPO should communicate with national authorities, when it lacks competency as the EPPO. This arises in cases where it should reply to reports given under Article 24(1) – (2) by authorities, but can also arise in other situations. For example, when a situation is reported by a whistleblower,[[80]](#footnote-80) but the crimes indicated are outside of EPPO’s competency. Another example given is the case where EPPO is investigating a criminal offence and discovers evidence of other criminal activity, which is outside of it competency are.[[81]](#footnote-81) This too, would require EPPO to report to national authorities of this discovery.

Second:

1. Where an investigation conducted by the EPPO reveals that the facts subject to investigation do not constitute a criminal offence for which it is competent under Articles 22 and 23, the competent Permanent Chamber shall decide to refer the case without undue delay to the competent national authorities.

2. Where an investigation conducted by the EPPO reveals that the specific conditions for the exercise of its competence set out in Article 25(2) and (3) are no longer met, the competent Permanent Chamber shall decide to refer the case to the competent national authorities without undue delay and before initiating prosecution at national courts.[[82]](#footnote-82)

This provision is handling situations where the EPPO is conducting an active investigation (has started or evocate a case) and during the course of that investigation it is revealed that EPPO’s lacks competency.[[83]](#footnote-83) This is a specific obligation handling competency issues of case undertaken by EPPO rather than the previous general obligation provided for above.

Third:

If the EPPO becomes aware, by means other than the information referred to in Article 24(2), of the fact that an investigation in respect of a criminal offence for which it could be competent is already undertaken by the competent authorities of a Member State, it shall inform these authorities without delay. After being duly informed in accordance with Article 24(2), the EPPO shall take a decision on whether to exercise its right of evocation.[[84]](#footnote-84)

This provision is unique compared to the others mentioned herein. This provision is not about communicating about a lack of competency, but more to remind MS of a duty to report to the EPPO (there obligation mentioned above in ‘Reporting to EPPO’). The reason that EPPO knows of the case can vary, from whistleblowers to the EPPO investigating the case in another MS and becoming aware of parallel investigations in another MS.[[85]](#footnote-85) It would seem that this provision is meant to ‘fix’ issues within the reporting to EPPO by national authorities, if EPPO believes this may be the case. Although, the provision does not seem to demand action by the MS outright,[[86]](#footnote-86) it is a clear message that they should at least review whether there is an obligation to report under Article 24.

Fourth:

3. Where the EPPO is competent in accordance with Article 22(3) [inextricably linked offences], it shall dismiss a case only after consultation with the national authorities of the Member State referred to in Article 25(6).

The same applies where the EPPO exercises a competence in respect of offences referred to in points (a) [non-procurement-related expenditure fraud] and (b) [procurement-related expenditure fraud] of Article 3(2) of Directive (EU) 2017/1371 and where the damage caused or likely to be caused to the Union’s financial interests does not exceed the damage caused or likely to be caused to another victim.[[87]](#footnote-87)

The fourth provision handles situations where EPPO wishes to dismiss a case that has inextricably linked offences attached to it or if in cases of expenditure fraud the preponderant victim criteria could apply. The latter is due added as when determining whether EPPO has competency the preponderant victim criteria does not apply to either expenditure or VAT fraud.[[88]](#footnote-88) The former element, inextricable linked offences, makes sense. There are strict rules that apply when dismissing a case;[[89]](#footnote-89) however, the reason to dismiss a case may be reliant on issues of the PIF Offence, whereas there may be a reason to keep investigating or prosecuting the inextricably linked offence. This interlinked offence is only allowed to be kept by EPPO if the PIF is also present. Therefore, it should be for national authorities to decide. The latter element, expenditure fraud, is different. This involves a PIF offence that is being dismissed. However, it can be seen why it should nonetheless be reported due to the requirement that the damage must be at least if, not greater, to the MS than the Union. Either why, these are the only times that when EPPO wishes to dismiss a case must they report to national authorities about that discussion and enter into consultation with them.

Additionally, the EPPO is allowed to refer cases that are under investigation by it to national competent authorities if the damage is less than €100 000, and does not warrant EPPO involvement, or, in cases of expenditure fraud, if the (likely) damage caused to the EU does not exceed the (likely) damage caused to another victim.[[90]](#footnote-90) The latter element is only optional as long as the EPPO does not attempt to dismiss the case.[[91]](#footnote-91) These last two elements, €100 000 criteria or expansion of the preponderant victim criteria, do not invoke an obligation to report. It only allows for EPPO to transfer a case to national authorities if the EPPO believes this is the best course of action. This optional referral is only in cases where EPPO wishes to refer a case, not to dismissing, which does carry different obligations in regards to expenditure fraud.

The EPPO also has an obligations to report cases to OLAF; these arrangements are primarily for in the Working Arrangement between OLAF and the EPPO (OLAF-EPPO Agreement).[[92]](#footnote-92)

### Horizontal Dimension

This is a matter of internal communication within EPPO. No other authority is involved in EPPO decision to transfer a case between MS jurisdictions.

## Comparative Review

# Determination of Jurisdiction

## Horizontal Mechanism

When it is established that there are parallel proceedings taking place between MS, they are required to enter into direct consultations with each other to come to a consensus to prevent the adverse consequences of these types of proceedings.[[93]](#footnote-93) While this outcome may be that the there is a concentration of proceedings in one MS, there is not legal requirement to actual come to a resolution.[[94]](#footnote-94) However, it is clear that the purpose is to come to a consensus on a concentration of the proceedings.[[95]](#footnote-95)

When determining which authority should have the case going forward, authorities should consider the facts and merits of the case *and* any other factors they deem relevant in that particular circumstance.[[96]](#footnote-96) These are the only criteria that the horizontal mechanism provides for. This allows authorities to take any relevant factors into consideration, which may run counter to EU human rights law.[[97]](#footnote-97) For example, choosing a jurisdiction due to it having harsher penalties or that it allows the admittance of certain types of evidence – forum shopping. At the same time, it would also be permissible to take into account the wishes of the defense (council). Whether this is actual done is unknown, due to the secretive nature of these proceedings.

This outcome was different in the draft proposal on the FD; there was strong favouritism to the territorial principle, with the ability to take other factors, which were listed, into account where there was sufficient significant factors that favour choosing another MS.[[98]](#footnote-98) However, this was removed from the current FD. The Eurojust Guidelines, as provided in the preamble, are the only remnants left of a criteria based system, yet are only meant to be guiding principles and it is not mandatory that competent authorities take them into account when determining jurisdiction.[[99]](#footnote-99) Uniquely this has not prevented some MS from implementing substantive rules and criteria on solving conflicts within their laws: such as, for example, in Spain and Italy, which have incorporated a criteria-based system to be used during conflicts of jurisdiction resolutions.[[100]](#footnote-100) While this does not force other MS to obey these rules, it is an indicator that MS seems to be respective to the Eurojust Guidelines.[[101]](#footnote-101)

Another factor is that EPPO is also an authority in regards to the Horizontal Mechanism, when its own Mechanism is not competent. When it comes to EPPO, there are strict criteria for selecting the MS of forum for its own investigations.[[102]](#footnote-102) However, this is meant for when the EPPO is deciding on a case alone. The question is, does EPPO have to make use of these criteria when deciding within the Horizontal Mechanism? After all, the non-participating MS is not bound to the EPPO Regulation. It must be remembered that when it comes to the criteria and its use in the EPPO Mechanism, that the Mechanism (same with the Horizontal Mechanism) is simply a way this article describes the method used to resolve conflicts. The criteria bind EPPO when making a decision on MS of forum. Although they are only binding for EPPO, they still bind EPPO when making decisions. Therefore, they must be used by EPPO, however, this does not mean that flexibility cannot be used in case there are differences between it and a non-participating MS. This is allowed by the regulation as long as these differences are *duly justified* on the basis of those criteria.[[103]](#footnote-103)

Eurojust has a specific role to play when it comes to assisting in determining the jurisdiction within the Horizontal Mechanism. The role is to provide a non-binding decision on which authority should be given the case in cases where consensus cannot be reached between the authorities.[[104]](#footnote-104) In the Mechanism it is provided that Eurojust assistance may only be sought when it is within the competency of Eurojust,[[105]](#footnote-105) thereby Annex I crimes.[[106]](#footnote-106) However, a provision within the Eurojust Regulation would allow authorities to request assistance outside these crimes;[[107]](#footnote-107) in addition, EPPO has a specific provision that would allow them the ability to make use of Eurojust assistance in a similar manner.[[108]](#footnote-108) While this shows the role Eurojust plays within the Horizontal Mechanism, there still lacks any form of criteria that should be used by them when taking these decisions. While the guidelines from Eurojust are a natural element to use by Eurojust, just like their advice it is non-binding on them either.

## EPPO Mechanism

The EPPO Mechanism is comprised of two sub components: (1) resolving conflicts in a vertical dimension and (2) resolving conflicts in a horizontal dimension.[[109]](#footnote-109) The former resolves the conflicts of whether the EPPO or the MS should handle the case;[[110]](#footnote-110) meanwhile, the later resolves the conflict of which MS should the EPPO handle the case in (a more ‘classic’ method to resolve conflicts under EU law).[[111]](#footnote-111)

### Vertical Dimension (MS or EPPO)

The purpose of the vertical dimension of the EPPO Mechanism is to determine whether the EPPO should have the case or should the MS; if the case goes (or stays) with EPPO, this will prevent the MS(s) from acting, principle of primacy.[[112]](#footnote-112) Due to this strong ability to decide on whether MS themselves are allowed to act, the EPPO Mechanism is built upon numerous conditions when EPPO may decide to take a case or not. It takes account if these conditions are no longer met as well as if the case is under investigation by the MS.[[113]](#footnote-113) To make sense of these various conditions and what they mean for EPPO, they will be examined by looking at issues of competency and issues of exercising competency.[[114]](#footnote-114)

Competency

At all times the EPPO must have material and territorial/personal competency in order to act.[[115]](#footnote-115) Not only is this vital for EPPO to open or evoke a case, but if the case no longer fulfills either material or territorial/personal competency then the case must be returned to the MS. While the MS itself may be able to continue the investigation (if permitted by national law) the EPPO would not.

The material competency is with PIF Offences: expenditure fraud, revenue fraud (excluding VAT), VAT fraud, money laundering, corruption (active and passive), and misappropriation (the later three offences will be referred to as Art 4 Offences).[[116]](#footnote-116) PIF Offences are within the competency of EPPO when the criminal activity fulfills the definition as defined in PIF Directive and is equally fulfilling a criminal offence under national law.[[117]](#footnote-117) This means that EPPO is unable to claim competency for a PIF Offence for activity that does not fulfill the definition under the directive.[[118]](#footnote-118) Equally, if national law has not criminalized an activity that could be considered a PIF Offence then EPPO may also not claim competency. Thereby, EPPO is constrained by both EU and national law on whether it has competency.

Despite the constraints above, EPPO has the additional aspects that both extend and limit its ability to claim material competency. Firstly, EPPO is competent to prosecute criminal organizations, as long as their primary focus is based on committing PIF Offences. There is doubt whether a multi-focal criminal organization would qualify, as their primary focus is to commit PIF Offences, but it also has primary focuses elsewhere. Secondly, any additional offences (that are not PIF Offences, be it criminal, administrative, etc.) that are inextricably linked. In other words, if another authority would prosecute for that other offence would there be a violation of the *ne bis in idem* principle if EPPO was to continue (or vice versa). This ensures protection from violations of the *ne bis in idem* principle for defendants and ensure that MS do not block EPPO ability to act by prosecuting in another area. Finally, EPPO is, in all cases, prevented from handling any case that is focused on or linked to national direct tax. The above elements are the only times EPPO material competency can either be extended or limited.

The territorial/personal competency is the other main competency element EPPO needs to ensure that it has. This resolves around the person, is EPPO able to prosecute that individual? This may occur in one of three ways: Frist, that the person committed a relevant act, at least partly, on the territory of a participating MS. Second, that a national of a MS committed the offence and a participating MS has established jurisdiction over this person.[[119]](#footnote-119) Third, that the offence was committed by a person subjected to the Staff Regulations or conditions of Employment of the Union when the offence took place. This final one is an extension of the second element but is also limited to ‘staff’ and does not apply to more high-level Union persons: for example, MEP or Commissioners.

Exercising Competency

Material and territorial/personal competency is an absolute necessary condition for EPPO to have a case, the criteria for exercising competency are a bit more lenient. These criteria are more about when EPPO should not act, versus when are they competent/allowed to act. Therefore, it is based on the idea that some criminal acts should be handled by the national authorities rather than by EPPO. This is highlighted in the fact that if one of the three exercising competencies applies EPPO may not open or evoke a case; but if a case is already under investigation by EPPO and one of the conditions apply and the national authority does not take up the case EPPO remains competent.

The first exercising competency criteria is the €10,000 damages. This entails that if the damages caused to the Union financial interest is below €10,000 it must remain with the national authorities. However, there is an exception; if the case has repercussion at the Union level or if the suspect is a Union person. The reason for the level of damages set at €10,000 may be due to practical reasons, since the PIF Directive only requires criminalization on situations that has caused that amount in damages. This ensures a uniform application of the law across the MS (regardless of if MS apply stricter laws or not), while allowing exceptions if there is a specific Union aspect that requires special attention.[[120]](#footnote-120)

The second exercising competency criteria is the limitations on inextricably linked offences. While EPPO is competent to investigate and prosecute any other offence that would trigger the *ne bis in idem* principle if not handled at the same time as the PIF Offence, this has been limited here. EPPO is allowed to exercise its competency here as long as the non-PIF Offence carries a lesser maximum sanction under the law or is a vital element to the completion of the PIF Offence itself. This means while EPPO ability to take a case could have been far reaching, according to material competency, it has been limited by this exception to where the PIF Offence is central issue.

The third exercising competency criteria is based on damages and only applies to Revenue Fraud and Article 4 Offences. This criterion looks at who suffered more damages, was it the Union or another (a person, MS, etc.). Generally speaking, if the Union is not the one who has suffered the most, the case must remain with the national authorities. However, in unique situations, competent national authorities are allowed to waive this criterion and thereby allow EPPO to act instead.

There is a unique fourth exercising competency criteria, that only applies when EPPO is evoking or returning a case under Articles 27 and 34 respectively. It is similar to the €10,000 damages criterion, except the limit is set at €100,000. While it is debated whether EPPO could refuse to open a case under Article 26 by using this criterion, it may violate the Regulation if it is used in that manner. This criterion allows EPPO EDP to leave a case in the hands of national authorities as long as the case is already being investigated. It is uniquely applied by the EDP in evoking cases so that decisions under this amount may be handled quickly.[[121]](#footnote-121) In situations where a case is being returned the criterion is applied like the others above. If a MS does not take the case it remains with EPPO. However, the legislate seems to have set the base threshold for EPPO to take case that are caused due to damages in excess of €10,000 in damages. They only allowed exceptions if there if the MS themselves are either already investigating or willing to take the case over. Therefore, this criterion is of limited application compared to the other three, in that it only applies to evoking and referral to MS situations

Application

As shown in the last exercising competency criteria, there are three difference elements of conflicts that EPPO will have to resolve within the Mechanism: opening investigations, evoking cases, or referrals to MS. The limitations on the application of the fourth criterion to opening investigation is due to the use of the legality principle in the EPPO Mechanism. If a case fulfills the competency of the EPPO and one of the exercising competency criteria (other than the €100,000) is not applicable, then EPPO **must** open a case. This requirement within the EPPO Mechanism is to prevent *in concreto* negative conflicts from occurring. Meanwhile, when it comes to evoking a case, EPPO is given a lot of room to determine if it wishes to take the case, as it is already under investigation by a MS. Regardless, if the case fulfills all the elements for EPPO to take the case, they can still decide to not evoke. This ability to not evoke cases is used by EPPO to handle ongoing MS criminal cases that would not benefit from being transferred to EPPO – even if fully within its competency – as the national investigation is almost complete. Since the case is already being investigated, there is no need to require an EPPO investigation to prevent *in concreto* negative conflicts.

Preventing *in concreto* negative conflicts is also present when EPPO is meant to refer a case back to the MS. Here, however, the EPPO Mechanism changes they way the criteria explored above are applied. In every case, any time the material or territorial/personal criteria competency criteria unfulfilled EPPO must refer and may not have the case. However, if the reason to refer is due to an exercising competency criterion, then thing change. While EPPO must refer (only optional application when it concerns the €100,000 damages criterion) the case back to the MS, if the MS does not take the case within 30 days, EPPO remains the competent authority and must act as if all criteria are fulfilled. This is unique, since it allows EPPO to keep investigating / prosecute for PIF Offences in situations where they would not have been allowed to even have the case. On the other hand, it does ensure that EPPO has not contributed to another situation of a case being left undecided due to issues of negative conflicts of jurisdiction.

### Horizontal Dimension

While the vertical dimension of the EPPO Mechanism dealt with issues between MS and EPPO authorities, the horizontal dimension is meant to provide in which MS should EPPO handle the case. It functions similarly to the purpose of the Horizontal Mechanism, determining the MS of forum for a case. Unlike the Horizontal Mechanism, the EPPO Mechanism is criterion based. There are four criteria, which are provided for in order of priority: territoriality, habitual residency of accused, nationality of accused, and location of financial damage. There is no other criterion that EPPO may use within the Mechanism to pick the MS of forum. The territory of where the focus of the criminal activity took place, or the bulk of the offence took place (if several offences were committed), must be where the EPPO handles the case. Only if a situation duly justifies it, may EPPO decide to change the MS of forum.

The issue is when does a situation duly justify changing the MS of forum? This could be for various reasons: there is not focus MS, or while the focus was in one MS maybe the accused is resident and national of another MS, etc. The issue is that the limits on what is (or is not) duly justified are unknown. In a similar manner, the MS of forum may be changed due to the general interest of justice. Again, when is a matter in the general interest of justice is unknown. The main difference between the two – beyond the term used – is that duly justified is used for determining EDP in the first instance, where interest of justice is used to change the EDP. It is unknown if there would be actual differences in the application of the two elements that allow a change in MS or forum or not.

One aspect that is interesting here, is that EPPO has the right to split cases. Meaning that one part of the case could be dealt with in MS A and the other part in MS B. Thereby two criminal collaborators could theoretically be prosecuted in two different MS. However, there is a limitation on this, in theory. The recital notes that EPPO should generally only conduct one investigation or prosecution of an individual in order to safeguard the defendants’ rights. While this is only a strongly worded principle in the preamble, it is the closet that any EU resolution mechanism has come to a concentration of proceedings. This is even lightly given to apply to groups of individuals who commit criminal activity together, although not as strongly worded. Thereby, not only are the reason for choosing a MS of forum limited there is also the new idea application that EPPO should strongly attempt to concentrate their proceedings against an individual in one MS.

## Comparative Analysis

# Conclusion

1. The idea of positive and negative conflicts of jurisdiction is based on how the authorities treat a situation, if both wish to handle the case this is a positive conflict; whereas if both jurisdictions do not wish to handle the case or are unable to have the case, it is a negative conflict; see, P Caeiro, ‘Jurisdiction in Criminal Matters in the EU: Negative and Positive Conflicts, and Beyond’ (2010) 93 Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft 366, 370ff & 373 – 374ff; J Birk & A Curcio ‘Conflicts of Jurisdiction’ *Eurojust News* (The Hague, January 2016), 2 [↑](#footnote-ref-1)
2. For example, limited application of the principles of jurisdiction: territoriality, active personality, etc. [↑](#footnote-ref-2)
3. TFEU (n #), art 82(1)(b); the obligaiton to handle criminal conflicts of jurisidiciton was first stated in the Treaty of Amsterdam, albeit only with the obgliation to prevent them (nothing on setttling them), Treaty of Amsterdam [1997] OJ C340/18 art K.3(d); ); restated in the Treaty of Nice: Treaty of Nice [2001] OJ C80/10 art 1(8); with its current text adopted under the Treaty of Lisbon, Treaty of Lisbon [2007] OJ C306/42, art 2(67). [↑](#footnote-ref-3)
4. Eurojust News Issue 14 January 2016, 2. [↑](#footnote-ref-4)
5. For example see, Convention drawn up on the basis of Article K.3(2)(c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union [1997] OJ C195/2, art 4; Joint Action of 21 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union [1998] OJ L351/1; Council Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro [2000] OJ L140/1, art 7; Council Framework Decision 2001/413/JHA of 28 May 2001 combating fraud and counterfeiting of non–cash means of payment [2001] OJ L149/1, art 9 [↑](#footnote-ref-5)
6. Directive (EU) 2017/1371 of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law [2017] OJ L198/29, art 11, Directive 2017/541 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, art 19; Directive 2014/57/EU of 16 April 2014 on criminal sanctions for market abuse (market abuse directive) [2014] OJ L173/179, art 10; \*\*add some other provisions. [↑](#footnote-ref-6)
7. P Caeiro, ‘Jurisdiction in criminal matters in the EU: negative and positive conflicts, and beyond’ (2010) 93 Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft 366, 366-367, 370-371 & 376. [↑](#footnote-ref-7)
8. TFEU (n#), art 83. [↑](#footnote-ref-8)
9. Not that Denmark has an opt out in these fields and Ireland also, but may opt-in on these matters; therefore, the application will differ for these concerned MS. [↑](#footnote-ref-9)
10. Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime [2002] OJ L63/1 (Eurojust Decision), art 5 – 7. [↑](#footnote-ref-10)
11. When it came to negative conflicts, the MS would have to have criminal jurisdiction, but simply not be exercising it at the time. [↑](#footnote-ref-11)
12. Eurojust Decision (n#), art 5. [↑](#footnote-ref-12)
13. Eurojust Regulation (n#), arts 2 – 4. [↑](#footnote-ref-13)
14. Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings [2009] OJ L328/42 (FD 2009/948/JHA), art 1. [↑](#footnote-ref-14)
15. Council Regulation 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office (‘the EPPO’) [2017] OJ L283/1 (EPPO Regulation), art 22; Directive (EU) 2017/1371 of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law [2017] OJ L198/29, arts 3 – 4. [↑](#footnote-ref-15)
16. It must be noted that MS of forum decisions will also effect the investigation, as the chosen forum will be where the handling EDP will be. [↑](#footnote-ref-16)
17. EPPO Regulation (n#), arts 24 – 27, 34. [↑](#footnote-ref-17)
18. CFD 2009/948/JHA (n#), arts 5 & 9; EPPO Regulation (n#), arts 25 & 27(3). [↑](#footnote-ref-18)
19. FD 2009/948/JHA (n#), recitals 3-4, art 1. [↑](#footnote-ref-19)
20. FD 2009/948/JHA (n#), recitals 3 – 4, arts 1 & 10; C-129/14 *Spasic* ECLI:EU:C:2014:586, para 66; for the protection of preventing *ne bis in idem* violations, CISA (n#), arts 54 – 58; CFREU (n#), art 50; this also means that the Horizontal Mechanism does not handle cases under the principle of concertation of proceedings, such as: multiple proceedings against an individual based on different facts, multiple proceedings by MS against different individuals based on the same facts, etc.; see, A Marletta, ‘Forum Choice in the Area of Freedom, Security, and Justice’ in K Ligeti, J Vervaele, & A Klip (eds), Preventing and Resolving Conflicts of Jurisdiction in EU Criminal Law (Oxford University Press 2018), 145. [↑](#footnote-ref-20)
21. M Böse, ‘Models and instruments of solving conflicts of jurisdiction’ in M Böse, F Meyer, & A Schneider *Conflicts of Jurisdiction in Criminal Matters in the European Union Volume II: Rights, Principles and Model Rules* (Nomos 2014), 346. [↑](#footnote-ref-21)
22. C-436/04 *Van Esbroeck* ECLI:EU:C:2006:165, paras 36 & 42; C-150/05 *Van Straaten* ECLI:EU:C:2006:614, paras 41-51; C-467/04 *Gasparini* ECLI:EU:C:2006:610, para 54; C-288/05 *Kretzinger* ECLI:EU:C:2007:441, para 35; C-367/05 *Kraaijenbrink* ECLI:EU:C:2007:444, paras 26-28; Eurojust, ‘The Principle of *Ne Bis in Idem* in Criminal Matters in the Case Law of the Court of Justice of the European Union’ pp 17-21. [↑](#footnote-ref-22)
23. C-367/05 *Kraaijenbrink* ECLI:EU:C:2007:444, paras 29-31. [↑](#footnote-ref-23)
24. C-436/04 *Van Esbroeck* ECLI:EU:C:2006:165, para 38 C-150/05 *Van Straaten* ECLI:EU:C:2006:614, para 52; C-467/04 *Gasparini* ECLI:EU:C:2006:610, para 56; C-288/05 *Kretzinger* ECLI:EU:C:2007:441, para 36; C-367/05 *Kraaijenbrink* ECLI:EU:C:2007:444, paras 32. [↑](#footnote-ref-24)
25. FD 2009/948/JHA (n#), recital 3 & art 4. [↑](#footnote-ref-25)
26. FD 2009, art 10. [↑](#footnote-ref-26)
27. Eurojust reg, art..\*\*\* [↑](#footnote-ref-27)
28. FD 2009/948/JHA (n#), art 4. [↑](#footnote-ref-28)
29. Add provision on this. It is somewhere in later work\*\*\*\* [↑](#footnote-ref-29)
30. FD 2009/948/JHA (n#), art 4; EPPO Regulation (n#), art 105; This has been done by a few MS already: Bulgaria, Croatia, Czech Republic, France, Germany, Greece, Italy, Malta, the Netherlands, Slovakia, Slovenia, Romania; Council of the European Union, ‘Notifications in relations to Article 105 of the EPPO Regulation’ (2021) 10644/21. [↑](#footnote-ref-30)
31. EPPO Regulation (n#), recital 9, [↑](#footnote-ref-31)
32. PIF Directive (n#), art 3 & 4; See generally for more in-depth review of the particular offences, G Grasso, R Sicurella, & F Giuffrida, ‘EPPO Material Competency: Analysis of the PIF Directive and Regulation’ in K Ligeti, M João Antunes and F Giuffrida (eds) *The European Public Prosecutors’ Office at Launch: Adapting National Systems, Transforming EU Criminal Law* (Wolters Kluwer 2020), 23; W Geelhoed, ‘Categorising the Offence of Fraud against the Financial Interests of the European Union: A Law and Cognition Perspective’ in J Ouwerker *et al*. (eds) *The Future of the EU Criminal justice Policy and Practice: Legal and Criminological Perspective* (Brill 2019), 14. [↑](#footnote-ref-32)
33. This issue will be dealt with in more detail in the determination of jurisdiction section; EPPO Regulation (n#), art \*\*\* [↑](#footnote-ref-33)
34. EPPO Regulation (n#), art 22(2) & 2(3). [↑](#footnote-ref-34)
35. EPPO Regulation (n#), art 22(4). [↑](#footnote-ref-35)
36. EPPO Regulation (n#), art 23; whether EPPO can exercise that competency is another matter. However, this will be dealt with in detail in the section on determination of jurisdiction along with a more in-depth review of the conditions stated here. [↑](#footnote-ref-36)
37. For example, if a national prosecutor attempt to refer a murder investigation to EPPO (with zero links to PIF Offences) this would technically fall within the competency of the EPPO Mechanism. A decision in this matter would need to be done; this would take place with the criteria explained in the determination of jurisdiction section; however, the mechanism would state that the matter falls outside EPPO competency and return it to the national prosecutor. [↑](#footnote-ref-37)
38. EPPO Regulation (n#), arts 25(1) & 25(2) [↑](#footnote-ref-38)
39. EPPO Regulation (n#), art 26(1). [↑](#footnote-ref-39)
40. EPPO Regulation (n#), art 34. [↑](#footnote-ref-40)
41. There is never a situation where the EPPO Mechanism can force the MS to act. [↑](#footnote-ref-41)
42. EPPO Regulation (n#), art 25(1); art 25 (n#), 196 – 199. [↑](#footnote-ref-42)
43. EPPO Regulation (n#), recital 67 & 68 [↑](#footnote-ref-43)
44. EPPO Regulaiton (n#), arts 26(4), 26(5), 26(6), 35(3), 36(3). [↑](#footnote-ref-44)
45. Art 26 (n#), 220 – 221. [↑](#footnote-ref-45)
46. EPPO REgulaiton (n#), art 34; Art 34 (n#), 319 – 320. [↑](#footnote-ref-46)
47. FD 2009/948/JHA (n#), art 5(1). [↑](#footnote-ref-47)
48. Respectively, FD 2009/948/JHA (n#), art 6(1) & (3). [↑](#footnote-ref-48)
49. FD 2009/948/JHA (n#), art 5 & 6; C Tracogna, ‘*Ne Bis In Idem* and Conflict of Jurisdiction in the European Area of Liberty, Security and Justice’ XVIII Lex ET Scientia International Journal 2011, 70. [↑](#footnote-ref-49)
50. FD 2009/948/JHA (n#), recital 5. [↑](#footnote-ref-50)
51. See FD 2009/948/JHA (n#). [↑](#footnote-ref-51)
52. Eurojust Regulation (n#), art 4(1)(f). [↑](#footnote-ref-52)
53. Eurojust, ‘Report on Eurojust’s Casework in the Field of Prevention and Resolution of Conflicts of Jurisdiction’ (Updated 2018), 6 [↑](#footnote-ref-53)
54. Eurojust Regulation (n#), art 4(1)(a). [↑](#footnote-ref-54)
55. FD 2009/948/JHA (n#), recital 5. [↑](#footnote-ref-55)
56. Other information meant to be sent is the contact details of the authority, the stage of the proceedings and any major procedural measures taken; FD 2009/948/JHA (n#), arts 7, 8(1), 9(1), 9(2), & 10(1); M Böse, ‘Models and instruments of solving conflicts of jurisdiction’ in M Böse, F Meyer, & A Schneider *Conflicts of Jurisdiction in Criminal Matters in the European Union Volume II: Rights, Principles and Model Rules* (Nomos 2014), 347; PP Paulesu ‘*Ne bis in idem* and Conflicts of Jurisdiction’ in R Kostoris *Handbook of European Criminal Procedure* (Springer 2018), 415: Note the latter author here states that this is art 5, yet I believe the authors was referring to Arts 7 and 8. [↑](#footnote-ref-56)
57. FD 2009/948/JHA (n#), art 10(1). [↑](#footnote-ref-57)
58. FD 2009/948/JHA (n#), art 10. [↑](#footnote-ref-58)
59. Eurojust Regulation (n#), art 4; this is beyond the role given to Eurojust within the Horizontal Mechanism, which is to provide assistance in coming to a consensus on the competent authority when those authorities are unable to do so in actual parallel proceeding cases, see FD 2009/948/JHA (n#), art 12. [↑](#footnote-ref-59)
60. EPPO Regulation (n#), art 24(1). [↑](#footnote-ref-60)
61. EPPO Regulation (n#), art 24(2). [↑](#footnote-ref-61)
62. EPPO Regulation (n#), arts 25(5) & 27(7) [↑](#footnote-ref-62)
63. EPPO Regulation (n#), art 26(2); additionally see, art 24(7). [↑](#footnote-ref-63)
64. This deals with issue of criminal law provisions, that the criminal activity must be a PIF Offence that is implemented into national law, participating in a criminal organization whose main focus is committing PIF Offences, and also inextricably linked offences; Additionally, matters of national direct tax are excluded from EPPO’s competency, including PIF Offences if the latter is inextricably linked to a national direct tax matter; EPPO Regulation (n#), art 22(4); see also, ‘Art 22’ (n#), 169 – 170. [↑](#footnote-ref-64)
65. EPPO Regulation (n#), art 25(2); the idea of a Union interest is when the case either has repercussions at the Union level which requires an investigation by EPPO **or** officials of the Union, other servants of the Union, or members of the institutions of the Union could be suspected of having committed the offence. [↑](#footnote-ref-65)
66. EPPO Regulation (n#), art 25(3)(a); this criteria element is meant to handle situations where *ne bis in idem* principle may be applicable between a PIF Offence and non-PIF Offence, it is an attempt to ensure that the investigation that include non-PIF Offences are only handle by EPPO is the PIF Offence is the important one; see, recital 54 of the Regulation and ‘Art 25’ (n#), 202 – 204. [↑](#footnote-ref-66)
67. EPPO Regulation (n#), art 25(3)(b); the idea of another victim is generally seen to mean a MS; see, ‘Art 25’ (n#), 204 – 206. [↑](#footnote-ref-67)
68. EPPO Regulation (n#), art 24(6). [↑](#footnote-ref-68)
69. ‘Art 24’ (n#), 184. [↑](#footnote-ref-69)
70. OLAF Regulation (n#), arts 1 & 8; EPPO Regulation (n#), recital 51. [↑](#footnote-ref-70)
71. See generally, Directorate General for Internal Policies of the Union, ‘The future cooperation between OLAF and the European Public Prosecutor's Office’ PE 603.789 (2017). [↑](#footnote-ref-71)
72. EPPO Regulation (n#), art 22. [↑](#footnote-ref-72)
73. EPPO Regulation (n#), art 24(1). [↑](#footnote-ref-73)
74. EPPO Regulation (n#), recital 52. [↑](#footnote-ref-74)
75. D Brodowski, ‘Art 22’ in H-H Herrnfeld, D Brodowski, & C Burchard, *European Public Prosecutor’s Office: Article-by-Article Commentary* (Nomos 2021), 165. [↑](#footnote-ref-75)
76. EPPO Regulation (n#), arts 24(1), 24(2), 25(3); not that the latter article refers to the fact that the preponderant inextricable linked offence criteria & preponderant victim criteria are invalid reasons to not report if there is an active criminal investigation underway; see, ‘Art 24’ (n#), 185 – 187. [↑](#footnote-ref-76)
77. EPPO Regulation (n#), 24(1) – (2). [↑](#footnote-ref-77)
78. HH Herrnfeld, ‘Art 24’ in H-H Herrnfeld, D Brodowski, & C Burchard, *European Public Prosecutor’s Office: Article-by-Article Commentary* (Nomos 2021), 184. [↑](#footnote-ref-78)
79. EPPO Regulation (n#), art 24(8) [↑](#footnote-ref-79)
80. EPPO Regulation (n#), recital 50 [↑](#footnote-ref-80)
81. ‘Art 24’ (n#), 191. [↑](#footnote-ref-81)
82. EPPO Regulation (n#), art 34(1) – (2). [↑](#footnote-ref-82)
83. ‘Art 34’ (n#), 312 – 314. [↑](#footnote-ref-83)
84. EPPO Regulation (n#), art 27(3). [↑](#footnote-ref-84)
85. EPPO Regulation (n#), recital 50; ‘Art 27’ 237 – 238. [↑](#footnote-ref-85)
86. ‘Art 27’ (n#), 238. [↑](#footnote-ref-86)
87. EPPO Regulation (n#), art 39(3). [↑](#footnote-ref-87)
88. EPPO Regulation (n#), 25(3)(b). [↑](#footnote-ref-88)
89. EPPO Regulation 39; ‘Art 39’ (n#), 356 – 367. [↑](#footnote-ref-89)
90. EPPO Regulation (n#), art 34(3). [↑](#footnote-ref-90)
91. EPPO Regulation (n#), art 39(3). [↑](#footnote-ref-91)
92. Working arrangement between OLAF and EPPO (n#); there is also elements within the regulation of reporting under EPPO Regulation art 101(4); EPPO Regulation (n#), art 101. [↑](#footnote-ref-92)
93. FD 2009/948/JHA (n#), arts 1(2)(b) & 10(1). [↑](#footnote-ref-93)
94. FD 2009/948/JHA (n#), art 12(2); this deals with the idea that consensus cannot be reached and due to the lack of Eurojust to have power to make binding decision, may be that no resolution is ever made. [↑](#footnote-ref-94)
95. PP Paulesu ‘Ne bis in idem and Conflicts of Jurisdiction’ in R Kostoris Handbook of European Criminal Procedure (Springer 2018), 415. [↑](#footnote-ref-95)
96. FD 2009/948/JHA (n#), art 11. [↑](#footnote-ref-96)
97. A Marletta, ‘Forum Choice in the Area of Freedom, Security, and Justice’ in K Ligeti, J Vervaele, & A Klip (eds), *Preventing and Resolving Conflicts of Jurisdiction in EU Criminal Law* (Oxford University Press 2018) 155. [↑](#footnote-ref-97)
98. Council of the European Union ‘Proposal for a Council Framework Decision on prevention and settlement of conflicts of jurisdiction in criminal proceedings’ 5208/09 COPEN 7 (2009), art 15. [↑](#footnote-ref-98)
99. FD 2009/948/JHA (n#), recital 9; A Marletta, ‘Forum Choice in the Area of Freedom, Security, and Justice’ in K Ligeti, J Vervaele, & A Klip (eds), *Preventing and Resolving Conflicts of Jurisdiction in EU Criminal Law* (Oxford University Press 2018) 155; PP Paulesu, ‘*Ne bis in idem* and Conflicts of Jurisdiction’ in R Kostoris (ed), *Handbook of European Criminal Procedure* (Springer 2018) 416. [↑](#footnote-ref-99)
100. Ley 16/2015 of 8 July 2015 (ES), art 32(5); Decreto Legislativo n 29 of 15 February 2019 (IT), art 8(4); A Marletta, ‘Forum Choice in the Area of Freedom, Security, and Justice’ in K Ligeti, J Vervaele, & A Klip (eds), *Preventing and Resolving Conflicts of Jurisdiction in EU Criminal Law* (Oxford University Press 2018) 148. [↑](#footnote-ref-100)
101. A Marletta, ‘Report on Field Research at Eurojust, February 2015’ in K Ligeti, J Vervaele, & A Klip (eds), *Preventing and Resolving Conflicts of Jurisdiction in EU Criminal Law* (Oxford University Press 2018) 92-93 [↑](#footnote-ref-101)
102. The question of what these criteria are and what they mean will be handle in the section on the EPPO Mechanism Determination of Jurisdiction – Horizontal Dimension (MS of Forum). [↑](#footnote-ref-102)
103. The element of when is something duly justified, will be examined in more detail later on, EPPO Regulation (n#), art 46(4). [↑](#footnote-ref-103)
104. FD 2009/948/JHA (n#), art 12(2); Eurojust Regulation (n#), arts 4(2)(b) & 4; A Marletta, ‘Report on Field Research at Eurojust, February 2015’ in K Ligeti, J Vervaele, & A Klip (eds), *Preventing and Resolving Conflicts of Jurisdiction in EU Criminal Law* (Oxford University Press 2018) 92-93; Eurojust, ‘Report on Eurojust’s casework in the field of prevention and resolution of conflicts of jurisdiction’ 4 & 9; M Böse, ‘Models and instruments of solving conflicts of jurisdiction’ in M Böse, F Meyer, & A Schneider *Conflicts of Jurisdiction in Criminal Matters in the European Union Volume II: Rights, Principles and Model Rules* (Nomos 2014), 347. [↑](#footnote-ref-104)
105. FD 2009/948/JHA (n#), art 12(2). [↑](#footnote-ref-105)
106. Eurojust Regulation (n#), art 3(1) & Annex I. [↑](#footnote-ref-106)
107. Eurojust Regulation (n#), art 3(3). [↑](#footnote-ref-107)
108. Eurojust Regulation (n#), art 3(1). [↑](#footnote-ref-108)
109. Neither component is more important than the other; in fact, it can be that either dimension is solved first or second or at the same time depending on the situation; its ordering is done due to the authors’ preference, not because of its importance. [↑](#footnote-ref-109)
110. EPPO Regulation (n#), arts 26, 27, & 34. [↑](#footnote-ref-110)
111. EPPO Regulation (n#), arts 26(4) & 36(4). [↑](#footnote-ref-111)
112. EPPO Regulation (n#), art 25. [↑](#footnote-ref-112)
113. EPPO Regulation (n#), arts 22 – 27, & 34. [↑](#footnote-ref-113)
114. Note that the EPPO Regulation talks of competency, instead of jurisdiction; this is due to the fact the EPPO does not have its ‘own’ legal system, it relies on both EU law and national law; more importantly, it relies on charging a person on the basis of national criminal law provision and use national (criminal) court systems to do so; thereby it does not have its own jurisdiction; nevertheless, this is the synonyms with jurisdiction when it comes to the area of conflicts of jurisdiction. [↑](#footnote-ref-114)
115. EPPO Regulation (n#), arts \*\*\* [↑](#footnote-ref-115)
116. PIF Directive (n#), art 3 & 4; See generally for more in-depth review of the particular offences, G Grasso, R Sicurella, & F Giuffrida, ‘EPPO Material Competency: Analysis of the PIF Directive and Regulation’ in K Ligeti, M João Antunes and F Giuffrida (eds) *The European Public Prosecutors’ Office at Launch: Adapting National Systems, Transforming EU Criminal Law* (Wolters Kluwer 2020), 23; W Geelhoed, ‘Categorising the Offence of Fraud against the Financial Interests of the European Union: A Law and Cognition Perspective’ in J Ouwerker *et al*. (eds) *The Future of the EU Criminal justice Policy and Practice: Legal and Criminological Perspective* (Brill 2019), 14. [↑](#footnote-ref-116)
117. EPPO Regulation (n#), art \*\*\* [↑](#footnote-ref-117)
118. There is an exception, \*\*\*\* [↑](#footnote-ref-118)
119. This deals with extraterritoriality matters. [↑](#footnote-ref-119)
120. Note that this would still require that MS criminalized PIF Offences under national law for damages less than €10,000. [↑](#footnote-ref-120)
121. Examples are custom cases that could be solved on the spot, so why have EPPO be involved in such situations. [↑](#footnote-ref-121)