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Wade, Marianne L.

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The EPPO and the pitfalls of actuarial justice

Marianne L. Wade*

Abstract

The article offers a critique of the current structure of the EPPO from a victim rights perspective. It observes that the creation of the EPPO revolutionizes the institutional set-up of EU criminal justice by creating a supranational body to address the enforcement gaps identified in the protection of the financial interests of the EU. Unsurprisingly, this breakthrough has met with resistance from the Member States, which have directed their scepticism into the structural, procedural and substantive provisions for this new office. By consequently tying the EPPO to national law in a plethora of instances, they have created a body which primarily addresses serious financial crimes within the framework of domestic criminal justice systems. However, these approaches are, in turn, heavily marked by a pragmatic concept of actuarial justice, with negotiation and plea-bargaining as the dominant practices across Europe. Article 40 of the EPPO Regulation ensures that there is scope for such practice to be adopted for cases falling within the EPPO's competence. Highlighting the problems associated with prosecutorial deal-making, the article reflects upon the appropriateness of adopting such practice for the EPPO. It tentatively argues that a more honest recognition of the supranational nature of the EPPO (also reflected in its procedural rules) and of the type of victimization it seeks to address, might have instigated a productive dialogue ensuring the EPPO's work is framed with reference to serving a community and securing victim protection. Above all, this would have constituted a significant step towards ensuring that the EPPO's work is legitimate and perceived as such by the EU citizens it seeks to serve and protect from victimization.

Keywords

EPPO, victims, case disposals, legitimacy, actuarial justice

* University of Birmingham, Birmingham Law School, Birmingham, UK

Corresponding author:
Dr Marianne L. Wade, University of Birmingham, Birmingham Law School, Edgbaston. B15 2TT, Birmingham, UK.
E-mail: m.l.wade@bham.ac.uk

1. Introduction: The nascent European Public Prosecutor's Office as a champion of victim rights?

The Establishment of the European Public Prosecutor's Office (EPPO) is a revolution. The creation of a Prosecutor's Office at the EU level is a clear expression of supranational sovereignty in a core area usually reserved for (and jealously guarded by) the Member States.[1] The EU now features an agency wielding the *ultima ratio* of power over citizens. At the time of writing the Chief European Prosecutor (CEP) has been appointed and recruitment processes for European Delegated Prosecutors are under way. It is impossible to overstate the importance of this moment in terms of the institutional development of the EU.[2] As will become clear, however, it is also impossible not to recognize the distinctly EU nature of this revolution.[3]

The creation of the EPPO is the major EU act conceptualized as contributing to the countering of impunity within the EU.[4] At the heart of any such idea is the aim to ensure comprehensive criminal justice. Modern conceptions of this are as a service to society in general and victims specifically.[5] This unique, evolutionary development thus lends itself to an examination of how far the Union's practical deeds mirror the verbal and legislative commitments to victims' rights and interests that have formed a distinct characteristic of EU work in this policy area thus far.[6] In undertaking this examination, within the context of this special issue, this article analyses the EPPO (in the specific form created) as a factual triumph of (implemented) intergovernmentalism even in the face of strong supranationalization. Whilst the EPPO is undeniably the pinnacle of supranationalization, as we shall see, the reality of what is achieved (like the devil) is in the detail. This article will examine what this means in terms of the EPPO's likely standing in relation to victims and their rights. The reality explored is one in which EPPO practice is strongly oriented towards that in national criminal justice systems. These in turn will be demonstrated as far from exemplary in terms of how they conceptualize and treat victims in relation to financial crimes, adhering as they do to principles of actuarial justice.[7] The victory of factual intergovernmentalism will be highlighted as encouraging the transfer of bad criminal justice governance habits. This will be shown above all in relation to the case-disposal powers regulated for the EPPO in Article 40 of

1. See V. Mitsilegas, *EU Criminal Law after Lisbon* (Hart, 2016) p. 44 et seq. for an account of the enduring nature of this desire amongst some Member States.
2. See J. Öberg, 'The European Public Prosecutor: Quintessential supranational criminal law' in this special issue.
3. For an account of its evolution, see the contribution of J. Öberg and C. Harding, 'The journey of EU criminal law on the ship of fools – what are the implications for supranational governance of EU criminal justice agencies?' in this special issue.
4. See L. Marin and S. Montaldo, *The Fight Against Impunity in EU Law* (Hart Publishing, 2020), p. 8.
5. Within the German system the concept of 'Rechtsfrieden' (literally 'legal peace' but an idea of society at peace under the law) is recognized as the overarching goal of the criminal law M. Jahn, *Loewe-Rosenberg: Die Strafprozessordnung und das Gerichtsverfassungsgesetz: StPO, Band 1: Einleitung; §§ 1-47* (Beck, 2018) I, Margin Nr. 5. Ian Dennis identifies just decisions as the core of a legitimate criminal justice system – see e.g. I. Dennis, 'Rethinking Double Jeopardy: Justice & Finality in Criminal Process', *Criminal Law Review* (2000), p. 944.
6. See e.g. Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, [2001] OJ L 315/57.
7. M. Feeley and J. Simon, 'Actuarial Justice: the Emerging New. Criminal Law', in D. Nelken (ed.), *The Futures of Criminology* (Sage, 1994).

the EPPO Regulation.[8] This article identifies the failure to acknowledge the revolutionary, supranational nature of the EPPO and consequently to regulate for a relationship between victims and the supranational agency acting in their interest, as an enormous opportunity lost to ensure the EU criminal justice system is one marked by transparency and legitimacy.

There is potential to take issue with this Office as a suitable target for this kind of examination, given that it is being created to protect the financial interests of the European Union. The proximity to victim issues might consequently not seem given. It is, however, the European citizen (as taxpayer) who funds the European Union. In its preparatory documents for the procedure proposing the EPPO, OLAF, for example, was careful to highlight the need for this Office as driven by the need to protect EU citizens.[9] Steps were taken by the Union to counter the all too common narrative of financial crimes as 'victimless'. Given this conceptualization, the potential to address victims' needs can be viewed as having been present in, at least, some legislators' minds. This is to be welcomed given that large-scale financial crimes are, in fact, far from victimless. An immediately obvious, individual victim may not be easily identifiable. The loss to EU citizens is, however, concrete and the community as a whole suffers.[10]

It is also key to remember that prosecutors are the decisive players in modern criminal justice systems. As the latter have become overloaded, the convergent trend across Europe is that it is prosecutors who decide which procedural form will be taken in achieving justice in any given case. Their decision settles whether a case will be decided behind closed doors – perhaps a matter negotiated between defence and prosecution – or whether a defendant will be subject to the public scrutiny of a trial. With the exception of victim-offender-mediation, it is only fuller court proceedings which tend to accommodate victims within their procedure.[11] Prosecutorial decisions are thus central to deciding what role victims will be able to play in the process producing justice. This in turn may have profound effects upon how legitimate both victims and broader society view the justice 'produced' as well as the procedure leading to it as being.

With the creation of an EPPO, the EU has placed a supranational player at the heart of criminal justice processes. For the time being, this player's remit is limited. Nevertheless, it is reasonable to assume that the EPPO first created will serve as the touchstone for any further development.[12] In order to understand how victims and their rights will likely fare in EU criminal justice, it is therefore vital to evaluate how this revolutionary criminal justice figure has been positioned in relation to them.

Doubtlessly aware of the controversy surrounding her Office and indeed the legitimacy discussions which haunt even a perceived expansion of EU power, the appointed Chief European Public Prosecutor has proved keen to highlight the work of her office as benefiting EU citizens,[13] stating: 'What we do is not for us. It's for the benefit of the people. That is Justice.'

8. Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office, [2017] OJ L 283/1.
9. Including from, e.g., the financing of terrorist crimes – see e.g. Report of the European Anti-Fraud Office, Fifth Activity Report for the year ending June 2004, p. 40
10. See e.g. European Commission Staff Working Document, Impact Assessment, Accompanying the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, Brussels, 17.7.2013, SWD(2013) 274 final, p.104 et seq.
11. For an idea of the kinds of accommodations envisaged see Ministry of Justice, *Code of Practice for Victims* (Ministry of Justice, 2015).
12. For which Article 86 TFEU provides potential.
13. R. Kanani, 'Cracking Down on Corruption', *IMF Finance and Development* (2020), p. 53.

She echoes an idea that her office can only earn public trust and establish its legitimacy via 'credible results' which she defines as 'investigate cases based on solid proof, obtain convictions in court, and do so in an efficient and independent manner'.[14]

This is a notion of criminal justice based upon a traditional view of the criminal process[15] ultimately recognizing that the aim is justice (also seen to be done). Many modern visions of criminal justice, however, also make explicit reference to serving victims as a component of seeing justice done.[16]

2. The EPPO as a supranational agency steeped in intergovernmentalism

The creation of an EPPO, per se, must be regarded as supranationalism winning the headline argument as to which governance level is best positioned to administer criminal justice for this specific area of criminal activity. The raison d'être of the EPPO is protection of the financial interests of the EU from crimes such as fraud. The EU Anti-Fraud Office, OLAF, have long complained that the current reliance upon national prosecution services equates to inadequate protection.[17] National authorities often face enormous challenges when called upon to prosecute frauds against the EU budget[18] because complex cases may require consideration of acts committed or evidence found in one or more other Member States. Furthermore, the financial regulations of the EU are often new to prosecutors, raising further problems. Finally, national prosecution services may be so overloaded[19] in their daily business that the prospect of taking over or pursuing the prosecution of crimes against another sovereign, involving the breach of complex 'foreign' rules, may be impossible. So even where domestic prosecutors are willing to protect the EU's financial interest, they are often unable to do so.[20] Thus the imperative to create the EPPO.

Even a cursory reading of the EPPO Regulation, however, raises the distinct impression of the EPPO as a supranational revolution caught in the crosshairs of intergovernmentalism. The Regulation preambles alone are littered with discussion of conflict between the EPPO and Member States' national systems, laws and institutions.[21] Even in the very act of creating this novel body, the EU legislature expresses an overriding desire to bind it to the conventional. [22]

14. Ibid.
15. On this see A. Ashworth and L. Zedner, 'Defending the Criminal Law', 2 *Criminal Law, Philosophy* (2008), p. 21.
16. See e.g. J. von Schlieffen and T. Uwer, *Opferrechte im Strafverfahren* (Strafverteidigervereinigungen, 2017), p. 3; Ministry of Justice, *Code of Practice for Victims*, p. 1.
17. See Ministry of Justice, *Code of Practice for Victims*, p. 15 et seq.
18. A. Robledo and F. Cajani, 'Public Prosecution Office Milano Courtroom', in *Policy Department on Budgetary Affairs: Committee on Budgetary Control, The Follow-up of the European Anti-Fraud Office's (OLAF) Administrative Investigations in Member States* (European Parliament, 2009), p. 25.
19. See J.-M. Jehle, 'The Function of Public Prosecution within the Criminal Justice System', in J.-M. Jehle and M. Wade (eds.), *Coping with Overloaded Criminal Justice Systems* (Springer, 2006), p. 5 et seq.
20. See M. Wade, *EuroNEEDs Study Report* (2011), previously: http://www.mpicc.de/ww/en/pub/forschung/forschungsarbeit/strafrecht/euroneeds.htm – on file with author, e.g. p. 15 et seq. and 120.
21. Council Regulation (EU) 2017/1939, preambles 12 and 15.
22. See for example Council Regulation (EU) 2017/1939, preamble 102 directing the EPPO and Eurojust to work as 'partners'. Furthermore, the instruction preamble 80 that national courts must accept evidence legally gathered in other Member States is a clear example of EPPO work dependent upon the kind of inter-governmental EU mechanisms developed within the third pillar – see also Council Regulation (EU) 2017/1939, Article 37. Note also Council Regulation (EU) 2017/1939, Article 103, which sets out that it is a cooperative relationship with the European Commission.

This is perhaps no surprise. The idea of a European public prosecutor alone sparked unparalleled resistance.[23] The Regulation made law in 2017 is a very different creature to that proposed by the Commission in 2013. As was always to be expected, the Regulation was subject to intense debate in the Council. The corresponding documentation records a plethora of concerns and disagreements necessitating intense work to arrive at the results made law by the Regulation. Notes in Council reports recording the progress of negotiations often reveal contradictory, principled positions amongst the Member States.[24] A reader working from the 2017 Regulation would be forgiven for overlooking the supranational, revolutionary nature of the EPPO because the legislation clearly orients the Office's work around national law, procedure and criminal justice structures. In creating the EPPO, member state representatives appear guided exclusively by the experiences of their domestic systems and apparently gave little thought to the revolutionary nature of the Office they were creating.

The variety of ways in which any supranational dominance was to be countered was highlighted to the extreme by the varying states of the EPPO Regulation during its journey from Proposal to enacted legislation. The desire of the Member States to retain criminal justice action as intergovernmental in all but name can clearly be recognized in the factual structure of the EPPO which put paid to the supranational nature envisaged by the Commission in its original proposal.[25] The factual power of the EPPO sits in the permanent chambers of which national delegated prosecutors form the majority. Frontline powers rest with the European delegated prosecutors who remain deeply embedded in national criminal justice systems. The theoretical priorities set by the Regulation are also very much visible in the concrete implementation taking place at the time of writing. Thirty-two Delegated European Prosecutors are foreseen but only four legally qualified staff are foreseen for the central office in Luxembourg.[26] Tense negotiations are under way in which Member States seek to ensure the individuals appointed (despite being remunerated by the EU) work only part time for the EPPO and instead serve their national systems most of the time. This has drawn fierce criticism from the European Parliament questioning how effective '1/4 of a prosecutor' can really be.[27] This underlines all too clearly how actively the supranational nature of the EPPO is factually being countered by the Member States.

A. The dominance of national law

Very significant effort seems to have been made to ensure the EPPO's work centres around the characteristics of all the national systems of the participating Member States.[28] As stated by Article

23. See UK European Union Act 2011, Schedule 1, Part 2.
24. See Council Doc 10830/16, Article 29 in the version produced in July 2016.
25. For a detailed analysis of this see M.L. Wade, 'The European Public Prosecutor: Controversy Expressed in Structural Form', in T. Rafaraci and R. Belfiore (eds.), *EU Criminal Justice* (Springer, 2019), p. 165.
26. 'New EU Public Prosecutor has Four Staff for 3,000 Cases', *EU Observer* (2020).
27. Ibid.
28. Note for example, Council Regulation (EU) 2017/1939, Article 13 mirroring Article 4 clarifying that national trial law etc. is key. Article 32, Council Regulation (EU) 2017/1939, establishes that fundamental principles of national law have priority, Article 33 that it is national law that regulates arrest and pre-trial detention. Whilst the material scope of the EPPO is the so-called PIF Directive (Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, OJ [2017] L 198/29), it is that as implemented via national law (see Council Regulation (EU) 2017/1939, Article 22(1)). Article 23(b), Council Regulation (EU) 2017/1939, apportions the EPPO an ability to work in accordance with the active personality principle

5(3) of the Regulation, fundamentally national law[29] applies except where express provision (for a supranational rule) is made in the Regulation. Supranationalism is intended as the exception.[30] The EPPO power lies not with the European Chief Prosecutor but with the College[31] and above all the Permanent Chambers;[32] both organizational units born in the course of Council negotiations creating the Regulation. Like the College, the Permanent Chambers are dominated by prosecutors appointed as representatives of their member state. They are the oxymoronic European Prosecutor for their member state.[33] The European Chief Prosecutor can always be outvoted. Although she can doubtless exercise influence and power, her ability to do so is dependent upon not being blocked by prosecutors still rooted in their Member States.

The need for cooperation between the supranational EPPO and national systems is inherent in Article 86 TFEU as this foundational provision refers to proceedings in national courts. The EPPO envisaged in the TFEU is to exercise 'the functions of prosecutor in the competent courts of the Member States'.[34] The finalized Regulation, however, increases this need to the point of dependency.[35] The complex structure alone which has now emerged ensures that there is no direct

only where the respective member state would have it. The decisive criterion to resolve conflicts of jurisdiction between the EPPO and a member state is the member state's sentencing provision (in accordance with Article 25(3), Council Regulation (EU) 2017/1939) – a case will be left to the member state should it involves another offence with greater potential sentence available under national law. Investigations are to be initiated and conducted in accordance with national law (Articles 26 and 28), privileges and immunity are regulated by it (Article 29), as is the use of confiscated assets (Article 38). Article 40, Council Regulation (EU) 2017/1939, provides that simplified prosecutorial procedures for case disposals are also available as regulated by each member state's domestic provision. Whilst the Regulation guarantees the provision of defence rights as provided by the Stockholm Programme (in Article 41, Council Regulation (EU) 2017/1939), this is, of course, as implemented in national law. Judicial review (provided for in Article 42, Council Regulation (EU) 2017/1939) as well as EPPO case file management by European delegated prosecutors (regulated in article 45(2)) is also to be undertaken accordingly.

29. National law is defined as the law of the delegated European prosecutor who is running case.
30. And compliance with national law is emphasized, see e.g. Article 10(5), Council Regulation (EU) 2017/1939.
31. EPPO is a College (Article 9, Council Regulation (EU) 2017/1939), containing one European Prosecutor from each member state, the European Prosecutors supervise work of undertaken by delegated European Prosecutors in their country of origin (Article 12(1)). Article 12(4), Council Regulation (EU) 2017/1939, creates the latter as a type of extended national prosecutor because it is she who takes on any review functions a national prosecutor would usually be assigned. So processes very much mirror national set ups (and citizens' expectations). It is important to emphasize that victims are, of course, also national citizens. They may well be better served by national law rather than supranational procedures in many respects. The point of this article is not to assert the superiority of supranationalism. It is simply to highlight that consideration of victim's rights and interests vis-à-vis this supranational institutions should have been considered and might have yielded different results. Where e.g. victims of an offence being investigated through an EPPO-led investigation are spread across several Member States, EU citizens are unlikely treated equally because their rights as victims will be dependent upon the respective national law. This is not compatible with a notion of EPPO procedures serving them all equally.
32. Preambles 30 and 35, Council Regulation (EU) 2017/1939, for example, clearly demonstrate it is the European Prosecutors who are the driving force of the EPPO; preambles 78 and 79, Council Regulation (EU) 2017/1939, establish that it is the Permanent Chambers that assign jurisdiction.
33. See for example preamble 28 of Council Regulation (EU) 2017/1939.
34. 86(2) TFEU also explicitly stated in Article 4 of Council Regulation (EU) 2017/1939.
35. Thus case endings are dependent upon national law (preamble 82) whilst preamble 87 reflects the reality that EPPO work will be carried out by national authorities, sometimes domestic court approval is required. Furthermore, national courts are entirely decisive where actions affect the rights of third parties. Preamble 88 of Council Regulation (EU) 2017/1939, states that judicial review of actions is to be undertaken by national courts (using preliminary proceedings to the CJEU as necessary).

European line to the frontline professional dealing with the case. This individual is the European Delegated Prosecutor who works within each participating Member State's system.[36] The supranational character of the EPPO is structurally remote from the coalface of case work. It is therefore little wonder, perhaps, that no thought was given to the relationship between supranational prosecutor and victims.

It is worth noting that some dominant characteristics of the EU are noticeable in the Regulation. In particular, the importance of data protection to the EU governance level is unmistakably present. It is extensively regulated in Chapter VIII,[37] meaning that the Regulation very much ensures that the Union's identity as a data protection stronghold is maintained. It is thus arguable that similar attention could have been paid to victim's rights and positioning in relation to this new office given the previous work undertaken at this governance level.

B. Opening the door to actuarial justice

The reference to national law now made by Article 40 of the EPPO Regulation means that the debate about whether negotiating with suspects of serious financial crime is appropriate for the EPPO has been sidestepped. EPPO cases can be disposed of in line with the procedural rules of the member state in which the case is being run. This provision opens the door to the practices which have transformed national justice systems into actuarial case conveyor belts. Prosecutors who are used to negotiating case endings are empowered to carry on in the name of the EPPO. Reversion to national practices is, however, only desirable if these are exemplary in terms of the results achieved by them. For the purposes of this article this includes the attention they pay to the needs of victims, inter alia in order to ensure that the EPPO's work is regarded as legitimate and perceived as achieving justice. Unfortunately, there are grounds to believe this is quite precisely not the case. As demonstrated by the Commission impact assessment arguing the case for the EPPO, national systems are so stretched that they have proven themselves unable to rise to the challenges of protecting the EU budget. [38]

Of specific concern to this particular analysis is the fact that domestic criminal justice systems are now so deeply marked by practices serving to ensure efficiency gains, particularly in relation to financial crimes. This is a development detrimental to greater victim involvement as 'justice' becomes a matter to be negotiated between prosecutor and defendant, behind closed doors. The pressed reality of national systems is precisely what fuelled the need for the EPPO. The Office was created to deal with extremely serious financial criminals committing crimes on a large scale.[39] It is needed to ensure that investigations can adequately grasp the breadth and scale of their activities[40] and because poorly resourced national prosecutors have been demonstrably ill-equipped to deal with them.[41] Even where domestic prosecutors were able to deliver adequate investigations to enable a case to be brought to court (before statutes of limitations precluded these),[42] these potent

36. In accordance with Article 13(3) of Council Regulation (EU) 2017/1939, EU delegated prosecutors fundamentally work as national prosecutors unless the Regulation prevents this. See also e.g. preamble 32 of Council Regulation (EU) 2017/1939.
37. Articles 47–89 of Council Regulation (EU) 2017/1939
38. See e.g. SWD(2013) 274 final, p. 15.
39. See ibid., p. 11, 75 et seq.
40. M. Wade, *EuroNEEDs Study Report*, p. 115.
41. See SWD(2013) 274 final, p. 15 et seq.; M. Wade, *EuroNEEDs Study Report*, p. 19 et seq.
42. See e.g. Case C-105/14 Taricco and Others, EU:C:2017:936.

defendants were able to outmanoeuvre them, [43] disproportionately benefiting from out-of-court settlement procedures or lenient sentencing practices.[44] Again, such practices are out of line with what is espoused as beneficial to victims.[45]

Careful reading of Council documentation tracking the EPPO Regulation from 2013 to 2017 reveals the negotiations surrounding the EPPO Regulation as steeped in the understanding that prosecutors dealing with financial crime negotiate and do deals with those they suspect of wrongdoing.[46] The Council records of debates surrounding the draft Regulation demonstrate that the power to facilitate a negotiated case-ending (the so-called 'transaction') was the subject of intense debate. A few Member States questioned whether such a power should be granted but some insisted this power must be far greater.[47] The solution reached and passed into law as Article 40 of the EPPO Regulation could not see EU law predetermined by domestic law any more strongly. The EPPO can now end cases in accordance with the criminal procedural options available in the Member State in which a case is being dealt with.[48] This revolutionary office is not expected to tackle the crimes falling within its remit in a revolutionary manner. The supranational level is learning directly from the domestic. The domestic, however, has developed due to pressure and steeped in the fallacious notion that these crimes require no consideration of victims.[49] Prosecutors dealing with financial crimes will therefore do what has become established, accepted practice for them even in this new context of their work. Given that the novelty of the EPPO context is not highlighted by its creators, it is to be expected that practices which have become pervasive will transcend the national sphere, as career trajectories do.

Because it follows national practice, negotiated justice with Europe's most serious criminals has become the default setting of most operating arms of this novel body from the offset. The failure to consider the particular supranational nature of this legal revolution means that an important opportunity to review – and, if deemed necessary, reset – legal practice was missed. This is regrettable in theory but also in several practical regards, not least from the victimological viewpoint.

No matter how one defines victim's interests and rights as adequately protected in criminal proceedings, it would seem clear that participatory rights and transparency of proceedings are crucial features for achieving this.[50] Negotiated case-settlements linked to only the most

43. See e.g. Belgian prosecutors unable to prosecute Fortis bank for ABN-AMRO scandal because of settlements made with their Dutch colleagues. Reuters (2013) Belgian prosecutors seek trial of ex-Fortis directors, www.theglobeandmail.com/report-on-business/international-business/european-business/belgian-prosecutors-seek-trial-of-ex-fortis-directors/article8895503/.
44. SWD(2013) 274 final, p. 22.
45. Ministry of Justice, *Code of Practice for Victims*.
46. Such logic can also be found within national systems: see F. Mazzacuva, 'Justifications and Purposes of Negotiated Justice for Corporate Offenders', 78 Journal of Criminal Law (2014), p. 249; C. King and N. Lord, Negotiated Justice and Corporate Crime (Palgrave, 2018).
47. Council of the European Union, Justice and Home Affairs Council Conclusions, December 2016, p. 5. and annex 1.
48. Article 40 of Council Regulation (EU) 2017/1939.
49. See e.g. B. Dobovsek, 'Rule of Law versus Financial Crime', in M. Edelbacher et al. (eds.), Financial Crimes: A Threat to Global Security (2012, CRC Press), p.174; 'Financial Crime: Bringing to Light the Cost of "Victimless" Lawbreaking', *Thomson Reuters Blog* (2017), https://blogs.thomsonreuters.com/answerson/financial-crime-bringing-light-cost-victimless-lawbreaking/; Refinitiv, *Revealing the True Cost of Financial Crime: 2018 Survey Report*, www.refinitiv.com/content/dam/marketing/en_us/documents/reports/true-cost-of-financial-crime-global-focus.pdf.
50. Ministry of Justice, *Code of Practice for Victims*.

rudimentary court appearances are unlikely to serve these well. Particularly if the Member States seeking to ensure that their interest in European delegated prosecutors working time being made available for national cases succeeds, the push to reduce any time devoted to European cases via efficient case-disposal will be irresistible.

A strong, supranational message of mission purpose and intent – also to serve victims – would have been required to ensure this new body deals with financial crime suspects and convicts in a manner which benefits victim's rights and interests. The EPPO needed to disavow the member state trend towards actuarial justice in order to achieve this. This is the opposite of what has happened.

3. Victims: Their relationship and importance to the EPPO

There is some mention of victims in the Regulation creating the EPPO though it is clear it is EU institutions who are the anticipated victim of the relevant crimes. Beyond such discussion, the Regulation makes explicit mention of 'other victims'. Provisions are directed at such victims to ensure their rights are not curtailed[51] and appropriate protections are in place.[52] Information rights are regulated in order to ensure that these victims are positioned to participate in the process appropriately.[53]The EPPO's prosecutors are furthermore required to be actively considerate of such other victims. Where another victim may have suffered greater loss, EPPO procedures are to defer to theirs.[54] Where an EPPO deems a dismissal or alternative procedural form to be the suited route, the Regulation requires active consideration of the interests of such victims in the course of such decision-making.[55]

Nevertheless, the priority lent to less well-defined, supranational interest by the creation of the EPPO is in evidence. Ultimately the EPPO can exercise its competence even where another victim is identified as likely having suffered a greater loss, provided the EPPO is better placed to exercise competence than member state authorities. The EPPO is merely required to inform the member state of such a victim of its intention.[56]

Overall the EPPO Regulation cannot be characterized as a piece of legislation particularly stepped in the rhetoric of victim's rights. There is an amorphous understanding that the EPPO serves the European citizen and this in turn feeds the above-mentioned understanding of the EPPO as plugging a significant impunity gap. However, and as will be discussed below, unfortunately, the creation of the EPPO has not been accompanied by a process considering the place of victims in relation to criminal procedures led by a supranational agency. As will become clear, debates surrounding this revolutionary step were focused on a number of places, eclipsing any thought of such principled, novel consideration. This is a considerable loss.

51. In terms of victims' ability to challenge EPPO actions (judicial review of pre-trial decisions is regulated in preamble 87 of Council Regulation (EU) 2017/1939) or making claims against perpetrators (preamble 107) and rights to compensation (Article 38 of Council Regulation (EU) 2017/1939).
52. Data protection considerations are regulated in Article 51(c) of Council Regulation (EU) 2017/1939.
53. Information rights are provided in Articles 24, 34(3) and 103 of Council Regulation (EU) 2017/1939.
54. See ibid., Articles 25(3)b.
55. The right to be considered in relation to case dismissal or alternative procedural forms is provided for in ibid., Articles 39 and 40(1), respectively.
56. Ibid., preamble 60.

This strong, inter-governmental steer shackling the work of the EPPO described above is problematic because it jettisons any opportunity to establish the EPPO as an institution within a supranational system intended to end impunity *in the service of victims*. That would have required conceptualization as such, accompanied by communication to that affect. Above all, however, it would have required implementing legislation and measures to focus on the interests and needs of victims. These would, of course, have had to be identified for this particular context. In relation to the EU's financial interests, this might have encompassed emphasizing that the goal is not only the recuperation of EU funds for some indistinct purpose. A close look at the procedure by which this is achieved might have emphasized that EU citizens have an interest in understanding what funds might otherwise have been used for, had they not, for example, been subject to fraud. That in turn might bring attention to the specific loss to citizens, whether it be infrastructure projects not funded or farmers deprived of their livelihood. In such a way the benefits of publicly achieved criminal justice might be that citizens better understand what the EU as a governance level achieves; that those who commit offences against its financial interest are indeed breaching fundamental rules of a community. It would also better acknowledge victimhood. Anyone hoping for general deterrence effects (and thus the prevention of future victims) through criminal justice might then attach greater hope to these proceedings. The EPPO would distinguish itself from other agencies and bodies as a criminal justice institution serving all EU citizens. And a number of discussions as to how the respective victims might be served best could well ensue. Any such possibility was, however, thoroughly undermined by the legislative lack of commitment to the EPPO as a revolutionary body.

The EPPO thus provides a concrete example of a body justified to a certain extent by reference to unprotected victimhood in principle. The reality of its creation, however, is dedicated to punitive efficiency,[57] albeit likely actuarial in form.

The value of genuinely addressing victimhood in relation to these crimes would further have been as a gatekeeper to consideration of legitimacy. Notions of procedural justice and the fair serving of communities have been established as central to ensuring this for criminal justice agencies.[58] Overall victimhood is addressed by the Regulation only in a highly distant manner, leaving a distinct impression that the EPPO's competence extends to matters of a more administrative nature. Damage is characterized as caused to European agencies (if at all), reference is to monies that need to be recuperated and only because the cases of malfeasance are of such a large scale are criminal punishments sought.[59] Thoughts of social harm, let alone that done to individual victims, do not feature in the Regulation.

There can be no doubt that the prospect of a supranational criminal justice institution – no matter what its structure – raises serious issues, particularly in respect of the fundamental need to provide for democratic legitimacy, continuous and effective scrutiny of its activities and accountability for them. In the criminal justice context, this should also specifically relate to the actors of criminal justice proceedings. In more recent times, victims have been asserted as such, also by the EU governance level. Had, for example, the Council pursued the idea that the EPPO must be a

57. The true reason for which e.g. Garland identifies victims as being mobilized in modern criminal justice systems – see D. Garland, *The Culture of Control* (OUP, 2001), p. 143.
58. See e.g. J. van Dijk, 'Procedural Justice for Victims in an International Perspective', in G. Mesko and J. Tankebe (eds.), *Trust and Legitimacy in Criminal Justice* (Springer, 2015), p. 53; UK Government Green Paper, *Engaging Communities in Criminal Justice*, Cm 7583 (2009).
59. The route by which criminal sanctions should be sought are left predominantly in the hands of the Member States.

legitimate criminal justice institution in the eyes of EU citizens – rather than the actuarial body seeking to recoup funds that was prioritized[60] – it is hard to imagine the idea of victims slipping so comprehensively from the narrative surrounding its creation. If there is overarching legitimacy to EU criminal justice and the EPPO within it, then service of citizens, and particularly victims among them (whom this governance level protects from impunity), would appear to be the necessary group to explicitly address as its beneficiaries. By demonstrating clearly how the EPPO would serve victims and the community of EU citizens, a significant step towards ensuring it establishes its legitimacy could have been taken.

4. The likely nature of EPPO work

The manner in which the Member States ensured the dominance of national law and practice now envelops this supranational development is decisive because it sets the EPPO on a path deeply foreshadowed by the norms and realities of national systems. Again, it should be emphasized that the EPPO has only been created due to the failings of these systems (even with intergovernmental support) in tackling crimes perpetrated against the financial interests of the European Union.

If the EU legislature failed to acknowledge (and indeed actively played down) the revolutionary nature of this supranationalization of this criminal justice activity, it seems alien to expect the frontline prosecutors who do its bidding to ensure that their work is marked in any such way. The success of the EPPO has been rendered dependent upon the suitability of national working practices in the Member States to achieve its goals.[61] Investigations are to be run and case-endings achieved utilizing the 'normal' domestic route. The EPPO created is purely focused upon providing additional capacity specifically to ensure EU cases are not forgotten. There is no evidence that the work it leads is regarded as fundamentally different to that undertaken by member state criminal justice systems. The revolutionary nature of this agency, working under the mantle of a supranational sovereign, is fundamentally not reflected in the procedure to achieve justice in its name. Accordingly, of course (except in so far as it required the creation of an EPPO), the nature of the victimization imposed by the serious criminals whose activities justify this novel step has not been considered to be in any way genuinely different. There is therefore every reason to believe that the reality of EPPO work will be characterized by the working practices of the Member States in relation to similar (transnational) crimes.

Comparative studies of criminal justice systems across the European Union have highlighted prosecutors as the workhorses of these. In response to rising caseloads but stagnant or even dwindling resources, it has fallen to prosecutors to decide how cases should be dealt with.[62] Prosecutors drop cases for legal reasons but also on public interest grounds. They decide to utilize alternative procedural forms and indeed they make deals with suspects across Europe. In most European jurisdictions, only in a minority of cases do they take a case to court. Consideration of victims' roles and interests (so, for example, facilitation of victim impact statements, auxiliary claims for compensation, etc.) tend to attach only to these more traditional 'full proceedings' in

60. See e.g. SWD(2013) 274 final, p. 5.

61. For example the efficiency of national case disposal mechanisms as provided for by Article 40 of Council Regulation (EU) 2017/1939 – assuming for example that EPPO success is defined as the recuperation of funds.

62. M. Wade, 'The Power to Decide — Prosecutorial Control, Diversion and Punishment in European Criminal Justice Systems Today', in J.-M. Jehle and M. Wade (eds.), *Coping with Overloaded Criminal Justice Systems- The Rise of Prosecutorial Power Across Europe* (Springer, 2006), p. 27.

court and to the more exceptionally used[63] case-disposal mechanisms involving victim-offender mediation.[64]

The image invoked of a prosecutor professionally managing criminal justice resources and imposing more efficient solutions based upon categorization of offenders, rather than their and their cases' finely evaluated individual characteristics, is precisely reminiscent of some of the notions associated with actuarial justice.[65] The logic of the efficiency gains the prosecutor requires from such cases for the criminal justice system, and thus the functioning of justice as a whole, is that prosecutors will make a decision based upon the likelihood she sees that a simple warning (a low-impact, non-public sanction) will have the right effect upon, and be accepted by, the type of offender she regards the case suspect as being. Presumably this will be related to the needs of justice in that case and the deterrence effect upon the offender. A less serious offender requires fewer resources, a less severe reaction and lesser punishment. This may be based upon the prosecutor's personal opinion but is usually defined across Europe by (national or state) guidelines issued to prosecutors defining the categories of offence and offender for which the options available may legitimately be applied. Prosecutors are thus exercising executive powers, categorizing cases and suspects; 'punishing' without reference to the judiciary.[66] They do so, however, in accordance with a system developed by politically legitimated institutions.

Prosecutors are key in steering criminal justice systems and cases within them to the end thought suitable and utilizing resources proportionately as determined by the (confines of) the particular national system. Where, such as in England and Wales, Poland or Spain, prosecutorial powers to end cases are not considered appropriate, negotiated endings such as plea or sentence bargaining rule the day.[67] Even systems which rely heavily on prosecutorial case-endings – such as Germany – may still decide to allow negotiation to settle a portion of those cases it deems worthy of court time, if not a full trial.[68]

Practice is factually a far throw from being able to achieve the justice traditionally foreseen by the law in the books. Consequently the law in the books has changed across Europe. Along with it, so have the expectations of practitioners working to achieve it. The processes of compromise and negotiation have become the only achievable norm. There has been no room – let alone impetus – to consider the impact upon victims. Individual prosecutors learn their trade in domestic settings, grow to understand what it is to be a prosecutor in their first role and carry those lessons with them throughout their careers.[69]

In the course of the last few decades, new procedural forms and practices have changed the results achieved by criminal cases with (what were originally conceived as exceptional) consensual

63. See e.g. A. Hartmann et al., Täter-Opfer-Ausgleich in Deutschland (Forum Verlag, 2020), p. viii.
64. M. Wade et al., 'Well-informed? Well Represented? Well Nigh Powerless? Victims and Prosecutorial Decision-making', 14 European Journal on Criminal Policy and Research (2006), p. 249.
65. M. Feeley and J. Simon, in D. Nelken (ed.), *The Futures of Criminology* (SAGE, 1994), p. 173.
66. E. Luna and M. Wade, 'Prosecutors as Judges', 67 *Washington and Lee Law Review* (2010), p. 1413.
67. M. Wade, in J.-M. Jehle and M. Wade (eds.), *Coping with Overloaded Criminal Justice Systems*.
68. K. Altenhain, '*Absprachen* in German Criminal Trials', in S.C. Thaman (ed.), *World Plea Bargaining: Consensual Procedures and the Avoidance of the Full Criminal Trial* (Carolina Academic Press, 2010), p. 157; J. Peters, *Urteilsabsprachen im Strafprozess* (Universitätsverlag, 2011), p. 13.
69. See e.g. S. Boyne, *Prosecutorial Discretion in Germany's Rechtsstaat* (University of Wisconsin–Madison, 2007); G.C. Thomas III, 'When Lawyers Fail Innocent Defendants', Utah Law Review (2008), p. 45; American Bar Association, 'Legal Education and Professional Development – An Educational Continuum. Report of the Task Force on Law Schools and the Profession: Narrowing the Gap', (1992), www.corteidh.or.cr/tablas/28961.pdf.

case-ending practices becoming the norm in national systems across Europe.[70] In the face of overwhelming pressures, what is viewed as a just case outcome has fundamentally changed, at least in the eyes of the practitioners involved in achieving these.[71] A central result is thus that the expectations of practitioners, and above all prosecutors, have changed and actuarial forms of justice become accepted. The open, public nature of criminal justice, reformed to give victims their 'day in court' more recently, has been lost. Via Article 40 of the EPPO Regulation this is the culture likely to guide EPPO case-disposal practice.

Prosecutors have, over time, become accustomed to deciding how much resource a just result – as they anticipate it – is worth. White collar crime specialists will emphasize asset recovery (ensuring crime does not pay) as decisive. They are not alone in tailoring their responses to crime pragmatically, oriented entirely to the perpetrators they seek to bring to justice.[72] Judges and prosecutors across Europe alike willingly testify that there is a proportionate amount of executive power (and resource) that can and should be dedicated to achieving a specific result.[73] Where 'just deserts' is not fully achievable, some justice, achieved without crippling the system, is (not unreasonably) accepted as justice enough because the effort required to achieve the marginally better response is so great that it comes at the cost of not achieving any justice at all in other cases.

An alternative fear is the risk of raising so much resistance from the defendant and the defence that any punishment at all becomes unviable. A full trial is a draining exercise focused on one case, meaning others must be neglected. Therefore, if at some level a defendant is willing to cooperate with the justice system, reaching an agreement of some kind, this is frequently the path chosen. This still achieves (at least quasi-)punishment, sometimes a conviction and a justice of sorts. It is justice which is achievable through proportionate effort (within the context of a pressured system) and it is viewed as far better than none at all.[74]

Centrally the EPPO is to be expected only to deal with a limited category of offenders.[75] Suspects of serious financial crime are precisely those often associated with being disproportionately well-resourced. In other words, they are precisely the suspects most likely to raise enough resistance to make diversionary and compromising case-disposals attractive to prosecutors.[76] The resistance prosecutors currently testify to facing in dealing with crimes against the financial interests of the EU is such that cases often cannot be brought as they are out of time, falling foul of statutes of limitations. Well-resourced suspects, operating across borders, are able to outplay national prosecutors.[77] This is one of the reasons why calls for a European Public Prosecutor to be created have been successful.

70. See M. Wade, in J.-M. Jehle and M. Wade (eds.), *Coping with Overloaded Criminal Justice Systems.*
71. Though this does not accord with public expectations of justice as can be seen by the reactions to negotiated case-endings covered by the press.
72. See e.g. EuroNEEDs interview results analysed in M. Wade, 'Prosecution of Trafficking in Human Beings Cases', in J. Winterdyk, et al. (eds.), *Human Trafficking: Exploring the International Nature, Concerns and Complexities* (CRC Press, 2011); M. Wade, 'Prosecutors and Drugs Policy', *Utah Law Review* (2009), p.153.
73. See M. Wade, EuroNEEDs – interview results, on file with author.
74. For an evaluation of the cost and benefits of plea-bargaining in domestic and international criminal justice settings see N. Amoury-Combs, *Guilty Pleas in International Criminal Law* (Stanford University Press, 2007). p. 27 and 136 et seq.
75. Jurisdiction is not asserted for damage of less than 100,000 Euros, see Articles 10(7), 25(2), 27(8) and 34(3) of Council Regulation (EU) 2017/1939.
76. See K. Altenhain in S.C. Thaman, (ed.), *World Plea Bargaining. Consensual Procedures and the Avoidance of the Full Criminal Trial*; F. Mazzacuva, 78 Journal of Criminal Law (2014) p. 249; C. King and N. Lord, Negotiated Justice and Corporate Crime, p.
77 ; SWD(2013) 274 final, p. 22.

The problem is, however, that it is this reality of being disadvantaged which has shaped prosecutorial practice relating to such suspects. In their rush to bind the EPPO to national practice, the Member States lost sight of what has necessitated that practice and how great a departure it is from procedural ideals. The latter, however, are still what constitute justice in public opinion.[78] The fact that the EPPO is destined to be populated by frontline practitioners trained in and still embedded in systems marinated in these practices as the norm is deeply concerning for the EPPO generally and victim representation specifically. Prosecutors are accustomed to operating behind closed doors, without any dialogue with victims, orienting the punishment they seek purely to with their evaluation of the suspect's characteristics and with insufficient resources to do anything differently. These are the reasons why more revolutionary, supranational thinking would have been needed in the design and shaping of the EPPO. If the criminals currently benefiting from impunity are so serious that they justify the creation of an EPPO, surely their victims deserve them to be destined for more than corner-cutting, negotiated justice?

A revolutionary supranational criminal justice body requires bolstering in its work as legitimate. Its efforts must be communicated as valuable to the citizens – including victims – it is intended to serve. This is surely what motivates the proactive communication strategy the newly appointed Chief European Prosecutor is engaged in? Saddling the EPPO with practices associated with public outcry in the Member States[79] is, however, setting this Office up for controversy.

5. The potential cost of forgetting victims

An accusation often levelled at the European Union and its institutions is that it is remote. The lack of perceived (positive) direct impact on citizens' lives is identified as a factor leading to a lack of engagement in its political processes[80] and the perception of illegitimacy which often haunts it. It is a driving factor rendering the EU a community 'without a polity'.[81]

The EU, as a governance level, is now poised to embark upon a path which sees its agents engaged in punitive process with direct bearing upon the lives and liberty of citizens,[82] rendering this issue more pressing. As a result of the process, distinctly EU (because it consisted of a tug of war between the Commission and the Member States in the Council), the supranational aspects of the EPPO have been rendered as remote as can be. The stated aim of equal protection for all EU citizens victimized by these crimes[83] has become unlikely. If it is to survive, let alone thrive, as the

78. Consider public reactions to negotiated case-endings in proceedings against e.g. Ronaldo, BAE Systems, Rolls-Royce (see C. King and N. Lord, Negotiated Justice and Corporate Crime, p. 101 et seq.), Helmut Kohl, Steffi Graf and Boris Becker.
79. Ibid, press and citizens condemn such deals as aberrations of justice.
80. European Committee of the Regions, From Local to European, European Union (2019), https://cor.europa.eu/en/engage/brochures/Documents/From%20local%20to%20European/4082_Citizens%20Consult_brochure_N_FINAL.pdf, p. 28 and 70; J. Rankin, 'Is the EU Undemocratic?', *The Guardian* (2016), www.theguardian.com/world/2016/jun/13/is-the-eu-undemocratic-referendum-reality-check.
81. N. Walker, 'Europe's Constitutional Momentum and the Search for Polity Legitimacy', 3 *International Journal of Constitutional Law* (2005), p. 212.
82. And this will inevitably be the case. It is the nature of criminal proceedings and for all the Member States embedding EPPO processes in national law and procedures, Articles like 12 of Council Regulation (EU) 2017/1939 (which allow for the substitution of a European Prosecutor according to internal rules where necessary) mean that, in time, the supranational nature of this Office will show, most likely, when it wields decisive, repressive power.
83. SWD(2013) 274 final, p. 59.

appointed European Chief Prosecutor has identified, the EPPO must establish its legitimacy. In order to do so, it is decisive to establish it as serving a community – European citizens – and to do so properly and via a process which is valued. Negotiated case-endings are therefore something to be avoided.

Once the EPPO starts triggering arrests, a narrative recognizing that these are made serving a collective of individuals who are harmed by offences against the EU's financial interests will ensure that a (surely likely) Eurosceptic accusation of illegitimacy can be countered. It is a shame that the case for the EPPO was not already made to citizens during its legislative passage into reality. Instead of burying the supranational in domestic clauses, the Council would surely have been better advised to stand by its (large majority) decision that a European agency (equipped to act even-handedly across the Union) alone can serve their interests? Identifying and discussing victimhood in its true nature would have offered a genuine means by which to do this. A debate about relevant participatory rights would then have had to follow. Consideration should thereafter have turned to appropriate channels of political (and legal) accountability to ensure proper working, transparency and accountability. The EU could have led as a champion of victim consideration.

This article is not a call for utilitarian or emotive recourse to vague debate about victims. It concerns a point of principle. It is not the EU budget which requires protection in the dry words of this policy initiative. The lessons of the 2008 financial crisis are that financial crimes are deeply harmful crimes with devastating effects for large numbers of individuals.[84] In relation to the offences falling within the competence of the EPPO, these individuals, deserving of protection, are European and deserving of protection against the serious criminals who operate against them.

It is vital that discussion of victims at the supranational level is not merely cover for increased punitiveness. The figure of the victim should also not be advanced to drive Europeanization. Due attention must be paid to what they really want and need from the institutions representing their interests. How this can properly be done is a matter which requires far more exploration. Backroom dealings with powerful suspects seem, however, with certainty to be far from it.

Where victimhood is truly defined by European citizenship, the legitimacy of supranationalism – in awareness of the limits of intergovernmental action – is called for. This ensures that genuine impunity gaps can be countered. It does, however, also require careful consideration of the rights and interests of all actors engaged in the criminal justice process, including victims. The question of whether victims of crime can be well represented by a centralized agency at the heart of the Union of over 400 million people is quite another. But in relation to the EPPO, this much is surely true: the symbolism of the creation of this Office might at least have been used to highlight the nature of victimization differently. If supranationalized criminal justice was deemed necessary, poised to wield the ultimate sword of state power against individuals, the reasoning for this should usefully have been presented to the community that this agency is intended to achieve criminal justice for. As the appointed European Chief Prosecutor emphasizes, this is not work being done for its own sake.

84. In the UK, the cost of bailing out the banks alone was 137 billion pounds. Enormous long-term negative effects on wage levels and unsecured debt amongst citizens are documented alongside the job losses associated with the immediate recession – see e.g. 'Ten Years On: The Financial Crisis in Numbers', *The Week* (2017), www.theweek.co.uk/87574/ten-years-on-the-financial-crisis-in-numbers.

6. Conclusion

Although the creation of the EPPO undeniably represents a supranational triumph, the factual result produced is an agency operating above all along the lines of intergovernmental practice thoroughly reined in by the modalities of national, member state criminal justice systems. As has been argued above, because this was the result prioritized, any opportunity to ensure better service of crime victims has been foregone by this development thus far. Unfortunately, this will likely mean practices associated with actuarial justice will likely enter the supranational criminal justice arena. As has been discussed above, such undertakings are unlikely to serve the interests of victims of crime.

This means that the opportunity to demonstrate the fight against impunity that the EPPO represents, as benefiting victims more broadly, and citizen victims specifically, has passed by. Given criticism that the EU remains distant and apparently irrelevant to so many citizens, this is a clear opportunity lost. Since the Member States deemed the case for the creation of a supranational criminal justice agency to be made, it seems a great shame they did not allow, let alone require, that agency to make its case to the citizens it serves in line with more modern notions of criminal justice activity. The revolutionary EPPO is here. A revolutionary impact upon our understanding of how financial crime victimizes communities is not to be expected from it. Therewith a significant opportunity to demonstrate and establish its legitimacy was foregone.

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ORCID iD

Marianne L. Wade https://orcid.org/0000-0003-0167-3146