

THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE: WHAT ROLE FOR OLAF IN THE FUTURE?

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The idea of a European Public Prosecutor has been part of academic and policy discussions on developing the European criminal justice area since the 1990s. Although there are no exact figures about how much money is lost through crime against the EU budget, it has been argued that the existing system of the protection of the financial interests of the EU does not ensure the sufficient detection and investigation of these offences. Against this background, after nearly 15 years of scholarly and policy reflection, in July 2013, the EU Commission presented its proposal to set up the European Public Prosecutor's Office [hereafter EPPO].¹ Meanwhile negotiations are on-going in the Council and successive EU Presidencies (Greece, Italy, Latvia, Luxembourg) have substantially revised the text.

This contribution aims at highlighting the contradictions of the present negotiations on the EPPO. It shall start with explaining the reasons for an EPPO (1) and the initial and still pertaining disagreement between the Member States how to fill the existing gap in the enforcement of the EU budget (2). As it will be shown, the on-going negotiations have turned the idea of a European (supranational) judicial body – as presented by the original proposal of the Commission – into an increasingly intergovernmental agency (3). By taking the example of evidence law, it will be argued that a collegiate EPPO working with national substantive and procedural law as spelled out in the latest version of the negotiated text will not solve the problems that it was called to answer (4). The concluding remarks (5) shall take into account the overall institutional panorama of European criminal justice bodies and agencies and will reflect on the need for OLAF in the future next to the EPPO.

1. ENFORCEMENT GAP IN THE PROTECTION OF THE EU'S FINANCIAL INTEREST

The perception that the financial resources of the European Communities are not protected adequately started to emerge in the 1980s at European level. The gradual expansion of supranational competences and the increasing signif-

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¹ Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, 17 July 2013, COM (2013) 534 final [hereinafter: Commission's Proposal].

importance of the EEC (EU) budget both in revenue and expenditure² contributed to such perception and called for attention at the political level to the protection of the Community's financial interests especially against fraud.

Putting hard figures to show the dimension of the problem and to define the magnitude of EU fraud is, however, a challenge that has puzzled politicians, EU officials and researchers for decades.³ By its very nature,⁴ fraud and corruption entail a high dark figure and therefore difficult to quantify. In particular, in relation to offences committed against the EU budget, very different estimates have been made over the past, some based on only partial data or on assumptions. To show the diversity, it is enough to look at some recent estimates. According to the European Commission's report the amount of detected fraudulent irregularities in 2011 was 404 million euros against a total EU budget of 141,9 billion euros.⁵ In 2014 the figure reported by the European Commission was raised to 538,2 million euros against a total EU budget of 142,6 billion euros. Compared to the official figures of the Commission, an inquiry made by the UK House of Lords in 2012 estimated the amount of fraud against the EU budget in 2011 to be 4,82 billion euros.⁶ This figure is almost ten times higher than the one quoted by the European Commission in its report for the same period.

Even in lack of reliable data and considerable discrepancies in the various estimates, the above-mentioned numbers clearly indicate that there is an "enforcement gap" in the protection of the financial interest of the EU. Although Member States have not denied the existence of the problem, they traditionally have disagreed as to the solution that should be adopted; i.e. "how" should this "enforcement gap" be filled and "who" should do it. Is it a matter for the

² The EU Budget is mainly based on three revenue streams: 1. TOR: Traditional Own Resources: customs duties and sugar levies; 2. VAT-based own resources: revenue calculated on the basis of the VAT collected by the Member States; 3. GNI-based own resources: resources derived from the Member States' Gross National Income.

³ See for instance the European Commission Staff Working Document (*Impact Assessment Accompanying the Proposal for a Council Regulation on the establishment of the European Public Prosecutor*) SWD (2013) 274 final, p. 74; U. Sieber, "Eurofraud: Organised Fraud Against the Financial Interests of the EU" in *Crime, Law & Social Change*, 1998, p. 1 ff.; Z. Durdevic, "Fraud Adversely Affecting the Budget of the European Union: the Forms, Methods and Causes" in *Financial Theory and Practice*, 2006, p. 253 ff.

⁴ The dark figure problem in relation to white collar crime is explained by various factors such as the inherent secretive nature of these offences, the absence of direct victims in many cases, the interest of all involved parties in secrecy of their illegal activities and also definitional problems which could complicate the collection and recording of white-collar crime statistics.

⁵ See COM (2012) 408 final.

⁶ See the House of Lords – European Union Committee, *12th Report of Session 2012-2013, The Fight Against Fraud on the EU's Finances*, <http://www.publications.parliament.uk/pa/ld201213/ldselect/ldecom/158/158.pdf>

administrative and judicial authorities of the Member States through a system of improved (horizontal) cooperation or should it be addressed by means of a vertical solution, namely by establishing a European prosecution service in charge of investigating and prosecuting offences against the EU budget?

2. THE CONTESTED NEED FOR A VERTICAL SOLUTION

The Treaty lays down duties in relation to the protection and the enforcement of the EU budget. Accordingly, Art. 325 TFEU – as well as its predecessor Art. 280 TEC – prescribes that the EU and its Member States “shall” take deterrent and effective measures to counter fraud and other illegal activities affecting the EU’s financial interests,⁷ the Member States “shall” coordinate their actions to protect the same interests,⁸ the EU legislature “shall” adopt the necessary legislative measures for both preventing and fighting such misconduct and the Commission “shall” periodically report both to the Council and the European Parliament on the state of their implementation.

In contrast to the language of Art. 325 TFEU, Art. 86 TFEU stipulates a tentative legal basis. The Council “may” adopt a regulation setting up the EPPO according to a special legislative procedure. This optional legal basis is the result of the compromise between the supporting, the hesitating and the opposing Member States⁹ and shows the lack of a common understanding on the need and the core features of the EPPO.¹⁰ In fact, by rendering Art. 86 TFEU optional, the drafters of the Treaty delegated the assessment of the need for an EPPO to the Member States and made it subject to eventual future political momentum.

During the period directly following the entry into force of the Lisbon Treaty, this political momentum was hindered by the inter-institutional tensions between the Commission and the Council and the implementation of Art. 86 TFEU fell into an institutional deadlock. The differences between the Commission and the Council concerning the establishment of the EPPO emerged since the setting of the “Stockholm” policy agenda and could be over-

⁷ Art. 325 paras. 1 and 2 TFEU.

⁸ Art. 325 para. 3 TFEU.

⁹ Already the 2003 follow-up report on the Green Paper distinguished between Member States who support the principle of establishing the EPPO, those who are simply sceptical about the usefulness or feasibility of the idea and those who reject the project out of hand. Follow-up report on the Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, COM (2003) 128 final, 19th March, 2003, p. 6.

¹⁰ See on the negotiation history of Art. 86 TFEU K., “The European Public Prosecutor’s Office” in V. Mitsilegas, M. Bergström, T. Konstadinides (eds.), *Research Handbook on EU Criminal Law*, Edward Elgar, 2015.

come only in 2012.¹¹ Following that the Commission could take up its work on the proposal for the regulation that was presented on 17 July 2013.

The Commission, when drafting its proposal, sought to balance the ambition of setting up a new European judicial actor and the reality of political negotiations. The Commission made considerable efforts to consult national governments and national and European organisations of practitioners¹² in order to pave the way. Nevertheless, the Proposal found a mixed reception. Member States voiced considerable concerns during the subsequent negotiations in the Council that resulted in important changes in the proposal.

3. INTERGOVERNMENTAL-STYLE EPPO INSTEAD OF A SUPRANATIONAL PARQUET

The initial model of the EPPO dates back to the *Corpus Juris*.¹³ This model is based on the idea of a highly specialised European body (dedicated to deal only with crimes committed against the EU budget) equipped with strong autonomous investigative powers and a combination of centralised and decentralised elements of prosecution. Accordingly, the EPPO is a hierarchically organised EU body composed of European Public Prosecutor and its staff at the central level and European Delegated Prosecutors in the Member States.

By entrusting the EPPO with a limited mandate and by keeping its central structure small, the *Corpus Juris* envisioned a small and relatively inexpensive body with a high symbolic value for the development and integration of the whole field of criminal justice.

This centralised, vertical model envisioned by the *Corpus Juris*¹⁴ also inspired the Commission's Proposal. According to the Commission's Proposal, the EPPO would be established as a body of the Union with a decentralised structure¹⁵ and legal personality.¹⁶ The structure of the EPPO would be comprised of a European Public Prosecutor, his/her Deputies and staff as well as European Delegated Prosecutors located in the Member States.¹⁷ The EPPO would be headed by the European Public Prosecutor who will direct its activities and organise its work. The European Delegated Prosecutors shall be

¹¹ European Council, 29 June 2010, Doc EUCO 76/12.

¹² An extensive overview of the preliminary consultations carried out in 2012 and 2013 is provided in the Commission Staff Working Document – Impact Assessment, *op cit* (2013) 9.

¹³ M. Delmas-Marty – J.A.E. Vervaele (Eds.), *The Implementation of the Corpus Juris in the Member States* – Vol. 1, 2000, Intersentia.

¹⁴ M. Delmas-Marty – J.A.E. Vervaele (Eds.), *The Implementation of the Corpus Juris*, cit.

¹⁵ Art. 3 para. 1 of the Commission's Proposal.

¹⁶ Art. 3 para. 2 of the Commission's Proposal.

¹⁷ Art. 6 para. 1 of the Commission's Proposal.

in charge of the investigations and the prosecutions under the “direction and supervision”¹⁸ of the European Public Prosecutor.

This system presents two essential features: First, there would be a strong hierarchical relationship¹⁹ between the central and the peripheral level. There would be a clear chain of command between the EPPO central office, the European Delegated Prosecutors and the competent national authorities. The European Public Prosecutor may instruct European Delegated Prosecutors with regard to offences in the remit of the EPPO. The European Delegated Prosecutors might then undertake the investigation measures themselves or instruct the competent national law enforcement authorities to do so.²⁰ National law enforcement authorities would need to follow the instructions of the European Delegated Prosecutor and execute the investigation measures assigned to them.²¹ The EPPO would have, therefore, binding powers *vis-à-vis* national authorities.

Second, the European Delegated Prosecutors would have a “double-hat”: they would be at the same time part of the EPPO and remain integrated in the judicial systems of their respective Member States.²² Although the European Delegated Prosecutors would work exclusively for the EPPO on cases falling into the competence of the EPPO, they might, however, perform national investigations in relation to other offences.²³ According to the Commission, the double hat model would be the best guarantee to ensure both coherent (through central and hierarchical decision-making) and effective (through local law enforcement, the proximity of the European Delegated Prosecutors to the field work of the investigation and his direct access to the national resources and law enforcement agencies) prosecutorial action.

The Commission’s vision of a centralised EPPO has caused concerns in a number of EU Member States, both at the level of governments and at the level of parliaments.²⁴ Shortly after the negotiations started, the Greek Presidency

¹⁸ The European Delegated Prosecutors “shall lead the investigation on behalf of and under the instructions of the European Public Prosecutor”. See Art. 18 para. 1 of the Commission’s Proposal.

¹⁹ Apart from the powers of direct investigation and reallocation, the European Public Prosecutor has an ordinary power to “instruct” the European Delegated Prosecutors (Art. 18 para. 4 of the Commission’s Proposal).

²⁰ Art. 18 para. 1 of the Commission’s Proposal.

²¹ Art. 18 para. 1 of the Commission’s Proposal.

²² The ‘double hat’ approach has been advocated ever since the *Corpus Juris*: (p 79 ff). It entails that delegated prosecutors will maintain their status within their national justice systems and will simultaneously form part of the EPPO, in order to ensure a certain proximity to the field work of investigations.

²³ Art. 6 para. 6 of the Commission’s Proposal.

²⁴ In accordance with the Early Warning System laid down in Article 7 of Protocol No 2 to the Lisbon Treaty on the application of the principles of subsidiarity and proportionality,

published a revision of the proposal.²⁵ The revised text also referred to as the Presidency's Proposal²⁶ clearly demonstrated the intent of the Member States to return to a more intergovernmental setting.

Accordingly, the Presidency's Proposal departed from the concept of a hierarchically organised central structure and instead suggested a much more intergovernmental model. Though retaining the idea of a single office with a central office and decentralised enforcement in the Member States, the level of decentralisation is stronger than in the Commission's Proposal. The central office is to be composed of a College, one or more Permanent Chambers and the Members of the College (European Prosecutors). The central office is to be led by the European Chief Public Prosecutor and his Deputies.²⁷ The decentralized level is still represented by the European Delegated Prosecutors.

The Presidency's Proposal gives a lot of weight to the Permanent Chambers. It will no longer be the European Public Prosecutor who will take the central operational decisions, but a group of prosecutors sitting in Permanent Chambers. The Permanent Chambers are small collegial organs composed by two European Prosecutors and the European Chief Prosecutor or one of his Deputies entitled to instruct and monitor the European Delegate Prosecutors. In contrast, the College of the EPPO would be mostly management functions, but may take decisions related to strategic matters or matters of general application arising out of individual cases.²⁸

This new governing structure is not only strongly reminiscent of the structure of Eurojust, but also reveals an increased complexity in the structure of the EPPO, with additional layers of prosecutors being introduced in between the central EPPO Collegiate structure (which will be led not by a 'European Public Prosecutor' but by a 'Chief Prosecutor') and the work of European Delegated Prosecutors at the national level.

Each case²⁹ should be initially assigned by the European Chief Prosecutor to a Permanent Chamber which will be competent to adopt certain "core" deci-

the Commission's Proposal was submitted to the consideration of national Parliaments. For a summary of the arguments of the national parliaments see V. Franssen, "National Parliaments Issue Yellow Card against the European Public Prosecutor's Office" (2013) <http://europeanlawblog.eu/?p=2025> (accessed 10 December 2015).

²⁵ See Council of the European Union, 21 May 2014, Doc 9834/1/14 REV 1.

²⁶ At the time of writing, the most recent version of the Presidency's Proposal is Council Doc. 13444/1/15 REV 1 of 29 October 2015.

²⁷ The number of the Deputies is still under discussion.

²⁸ Art. 8 para. 2 of Council Doc. 10264/15 of 24 June 2015.

²⁹ There are two modalities for initiating an investigation (see Council Doc. 11045/15 of 31 July 2015, Art. 22): on the one hand, the power to initiate an investigation is primarily entrusted to the European Delegated Prosecutor, when "in accordance with the applicable national law" there are reasonable grounds to believe that a PIF offence has been committed. On the other hand, the Permanent Chamber to which the case has been previously

sions related to the prosecution of cases (decision to bring the case to judgment and choice of forum, dismissal of the case, transaction and, where necessary, allocation to another European Delegated Prosecutor, authorization to evocate the case under specific circumstances).³⁰

In addition to the Permanent Chamber that will “monitor and direct” the investigation, a European Prosecutor will be appointed at the central level who will be responsible for the “supervision” of the European Delegated Prosecutor. The “supervising European Prosecutor” will function as a “liaison” and “channel of communication” between the Permanent Chamber and the European Delegated Prosecutor and will also have the power to give specific instructions to him “in compliance with the applicable national law and in compliance with the instruction given by the Permanent Chamber”.³¹ The European Prosecutor who is supervising an investigation or a prosecution will participate in the deliberations of the Permanent Chamber.³²

The European Delegated Prosecutors will be responsible for the investigations and prosecutions which they have initiated and will follow the direction and instructions of the Permanent Chamber in charge of the case as well as the instructions from the supervising European Prosecutor³³ while, at the same time, complying with his own national law.³⁴ The European Delegated Prosecutors will act on behalf of the EPPO in their respective Member States and will have the same powers as national prosecutors with respect to investigations,³⁵ prosecutions and bringing cases to judgment in addition and subject to the specific powers and status conferred on them and under the conditions provided for in the EPPO Regulation.³⁶

assigned by the European Chief Prosecutor, will have the power to instruct a European Delegated Prosecutor to initiate the investigation, where no investigation had been initiated by a European Delegated Prosecutor. Interestingly, the Art. 22, para. 1 recalls the compliance “with the applicable national law” for both determining the existence of “reasonable grounds” and of “jurisdiction”.

³⁰ See Art. 9 paras. 3 and 4 of Council Doc. 10264/15 of 24 June 2015.

³¹ Art. 11 para. 3 of Council Doc. 10264/15 of 24 June 2015.

³² Art. 9 para. 6 of Council Doc. 10264/15 of 24 June 2015.

³³ Art. 12 para. 1, second indent of Council Doc. 10264/15 of 24 June 2015.

³⁴ See Art. 23 of the Council Doc. 11045/15 of 31 July 2015.

³⁵ According to Art. 26, investigative measures will include in cases of serious offences (punishable by a minimum maximum penalty of 4 years of imprisonment) search and seizure, freezing of instrumentalities or proceeds of crime and of future financial transactions and telecommunications interceptions. The European Delegated Prosecutors may also order or request arrest or pre-trial detention.

³⁶ Art. 12(1), first indent of Council Doc. 10264/15 of 24 June 2015. See also Art. 25, which introduces the principle of assimilation by stating that The European Delegated Prosecutor handling the case must be entitled to order or request the same types of measures in his/her Member State which are available to the investigators/prosecutors according to national law in similar national cases.

At first sight, the frequent reference in the Presidency's Proposal to "the applicable national law"³⁷ - and the potential fragmentation of the investigative powers resulting from it - combined with the multi-level structure and complex chain of command of the EPPO seem to result in a rather bureaucratic system. The complex interaction between the Permanent Chamber, the European Prosecutor and the European Delegated Prosecutor risks becoming dysfunctional and raises questions about accountability for the decision-making.

4. RULES ON THE INVESTIGATIVE MEASURES AND THE ADMISSIBILITY OF EVIDENCE: GOING BACK TO MUTUAL LEGAL ASSISTANCE?

The potential problems that such a complex, multi-layered system may create shall be discussed in relation to the rules on investigative measures and admissibility of evidence.

It is worth recalling that the Commission in its Proposal refrained from creating a harmonized set of rules for the investigative measures of the EPPO.³⁸ Instead, the Commission's Proposal prescribed a mixed system consisting of a minimum of European rules to be extended by national criminal procedural laws.

The Commission Proposal listed 21 types of investigative measures available to the EPPO, distinguishing between measures for which a prior judicial authorisation would be required and measures for which the judicial authorization would be needed only if the national law of the concerned Member States had prescribed it.³⁹ The conditions for the authorization and the execution of the various investigative measures, however, were essentially left to the national law of the Member State concerned.⁴⁰ What is more, the Commission's Proposal did not expressly require the national judicial authorities to mutually recognise the authorisation already obtained in another Member State. Ac-

³⁷ See Art. 9 para. 4, Art. 11 para. 3 and of Council Doc. 10264/15 of 24 June 2015. For the investigative measures, see Council Doc. 12621/15 of 5 October 2015 (art. 24-35). And in particular: Art. 25 paras. 1b and 3; Art. 26 paras. 2,4 and 8.

³⁸ In that sense the Commission's Proposal prospects a less supranational impact of the EPPO than the *Corpus Juris* or the Model Rules did. Both proposals envisaged namely that setting up the EPPO would be accompanied with harmonisation of the substantive competence, the powers and of the related procedural safeguards of this European office. See M. Delmas-Marty – J.A.E. Vervaele (eds), *op cit* (2000); K. Ligeti (ed), *op cit* (forthcoming 2015).

³⁹ See Art. 26 para. 1 of the Commission's Proposal.

⁴⁰ Exception made for the reference to the existence of "reasonable grounds" and the consideration of a less restrictive alternative; see Art. 26 para. 3 of the Commission's Proposal.

cordingly, if a single investigative measure would have to be carried out in various Member States, the EPPO would have needed to request several different authorisations in the different Member States involved.

Although, the part of the Commission's Proposal relating to evidence gathering was modestly ambitious compared to the provisions on the institutional design, also this part has been substantially amended during the Council negotiations.⁴¹ The most important changes are the following: The number of investigative measures that must be available for the EPPO is cut down from 21 to 5 and their availability is now conditional to a penalty threshold requirement of at least four years of imprisonment.⁴² Second, in case of cross-border investigations and cross border investigative measures, a system of cooperation between the European Delegated Prosecutors of the various Member States has been introduced. Art. 26 of the Presidency's Proposal distinguishes between the European Delegated Prosecutor handling the case and the assisting European Delegated Prosecutor in the Member State where the measure is carried out. This terminology is clearly reminiscent of the system of mutual legal assistance and seems to be somewhat alien to the concept of a single office.

Several features of the Presidency's Proposal – such as the consultation procedure in case the law of the Member State where the measure is to be carried out, does not provide for the required measure⁴³ or the possibility for the assisting European Delegate Prosecutor to consider an alternative and less intrusive measure than the one required⁴⁴ – seem to be transplants of concepts from the European Investigation Order.⁴⁵ Differently, however, from the European Investigation Order, the Presidency's Proposal is not based on mutual recognition.⁴⁶ Instead it relies on a complex multi-level institutional architecture which raises serious doubts on its workability and on the possibility for the EPPO to effectively perform its job.

⁴¹ See Council Doc. 13444/1/15 REV 1 of 29 October 2015.

⁴² See new Art. 25 of Council Doc. 13444/1/15 REV 1. Interestingly, no distinction is provided for this threshold which – currently – indiscriminately applies for the production of documents and the interception of communications.

⁴³ See Art. 26 para. 5d and para. 7 of Council Doc. 13444/1/15 REV 1.

⁴⁴ See Art. 26 para. 5c of Council Doc. 13444/1/15 REV 1.

⁴⁵ See Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 on the European Investigation Order in criminal matters.

⁴⁶ The resort to mutual recognition instruments is referred to in Art. 26 para. 6 of Council Doc. 13444/1/15 REV 1: “if the assigned measure does not exist in a purely domestic situation”, indirectly suggesting that the system of cross-border investigations laid down in the draft Regulation is not based on mutual recognition.

5. CONCLUDING REMARKS

Developments in the Council clearly show that Member States do not share the Commission's vision of a vertically integrated and hierarchical European Public Prosecutor. The rather intergovernmental structure and horizontal working method of the EPPO as it emerges from the Council negotiations reveal the deep concern of Member States as regards the potential impact that the EPPO may have on their national criminal justice systems and sovereignty.

There are still many open questions in the negotiations. It remains to be seen whether OLAF will be subsumed within the EPPO and how the relationship between EPPO and Eurojust will develop with the respective regulations being negotiated in parallel.

Already prior to the Commission's Proposal it has been argued that with the establishment of the EPPO the administrative investigations conducted by OLAF will become unnecessary. Indeed, the Impact Assessment Study that accompanied the Commission's Proposal provides for a reallocation of nearly the entire budget and personnel of OLAF to the future EPPO. The reinforcement of the criminal law dimension of the protection of the financial interests of the EU will, however, not *per se* eliminate the need for efficient administrative investigations.

The role of administrative investigations is even more relevant in light of a future EPPO à *géométrie variable*. Given the *opt-outs* of the United Kingdom and Denmark, the EPPO will not cover all the Member States. Moreover, the EPPO may be established by enhanced cooperation of at least nine Member States. How will the future EPPO cooperate with non-EPPO Member States?

Differentiated integration and enhanced cooperation may represent an opportunity to overcome temporary stalemates by providing for more flexibility. In relation to the EPPO, such option (expressly foreseen under Art. 86 par. 1 TFEU) is likely to lead to dysfunctional results. Although, in practice, mutual legal assistance arrangements or mutual recognition might prove to be valuable tools to overcome obstacles at the operational level. However, especially as regards transnational PIF offences, the geographically fragmented jurisdiction of the EPPO risks to undermine the effectiveness of the overall repressive action and may lead to intra-EU "safe heavens".