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Shifting Perspectives on the European Public Prosecutor's Office



Willem Geelhoed
Leendert H. Erkelens
Arjen W.H. Meij *Editors*

 Springer

EXTRAS ONLINE

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Foreword

*Parturient montes, ...*¹

The foreword to this second T.M.C. Asser Instituut volume on what should have been the first, non-intergovernmental, European body responsible for criminal investigations into large-scale fraud with regard to the Union’s financial interests, must unfortunately begin, this time, with a sad remark.

After years of studies, green papers, reports and lectures and seminars held all over Europe, and after more than 3 years of intensive legislative work done in the context of a procedure involving the European Parliament, the Council and the European Commission (the so-called “special legislative procedure”), the “mountains” (i.e. the sovereign Member States), gathered far from public eyes in a room of the Council in Brussels (7 February 2017), have finally acknowledged the lack of required unanimity to adopt the regulation on the European Public Prosecutor’s Office (EPPO). A quite predictable outcome, as several Member States, and not only one, expressed their concerns about such a proposal, and not all for the same reasons.

The European taxpayers and the autonomous legal order of one of the most important, united, economic inter-states realities in the world will therefore be deprived, for quite some time, of a European key instrument in the judicial configuration of the Union.

Even so, the EPPO is not yet officially dead.

During an informal meeting of the JHA Council in Malta, a few days before the above-mentioned European “surrender”, seventeen Member States were said to be ready to carry on the project and to submit the proposal to the European Council, in view of establishing an enhanced cooperation allowing no less than nine Member States to have their own EPPO, so reported Věra Jourová, the Commissioner in charge of this file (see Agence Europe, 8.2.2017, N°11°720). It was 10 March 2017 when the European Council, due to the impossibility of reaching a consensus on the

¹ *Parturient montes, nascetur ridiculus mus.* (Horatius, *Ars Poetica*, v. 139). (*The mountains are in labor, [and] an absurd mouse will be born:* Merriam Webster Dictionary).

creation of a European Public Prosecutor, gave rise to the birth of *an absurd mouse*, as Horatius, the poet, would have said. A tiny and therefore weak EPPO, operating within a limited number of EU Member States, and which will therefore be even less able to investigate fraud in the sophisticated and border-free single market, where very efficient criminal organizations will probably play with this “fancy” EPPO, like the cat plays with a little mouse!

However, from the legislative point of view, the major downside to the foreseen enhanced cooperation procedure would be how to justify the EU democratic legitimacy of such an “intergovernmental” body. Indeed, according to Article 86(1) second indent, TFEU, if at least nine Member States wish to establish an enhanced cooperation on the basis of the draft regulation concerned, *they shall notify the European Parliament, the Council and the Commission accordingly [and] the authorization to proceed with enhanced cooperation ... shall be deemed to be granted*

This means that the EPPO legal text could be entirely put in the hands of a few Member States and adopted without any further substantial involvement of the Commission, the European Parliament or even of the Council. Such a result is probably not fully in line with the EU legality standards on criminal matters. Therefore, to avoid such a risk, it could be advisable, on one side, to adopt the regulation establishing the above-mentioned enhanced cooperation on the basis of the Commission’s initial legislative proposal, the only one which has already gone through the National Parliaments subsidiarity test. On the other side, due to the significant changes introduced by the Member States sitting on the Council, the Commission should submit, for the purposes of this particular enhanced cooperation, a public revised text of its proposal, to be then submitted to the European Parliament for consent before the final adoption by the Council.

According to the Treaty (see Article 20 TEU), enhanced cooperation means *to further the objectives of the Union, protect its interests and reinforce its integration process*. Establishing a Council’s “homemade” Public Prosecutor between, now, seventeen Member States could be, I guess, politically meaningful, but it does not correspond, in this case, to the very objectives of an enhanced cooperation. From such a perspective, it could even be preferable to put aside, for a while, this proposal and really reinforce Eurojust and OLAF, in order to better pave the way for a future, genuine EPPO.

An alternative option to this state of play could be to connect the role of the EU General Court with the EPPO’s activity.

Due to its recent December 2015 reform, the General Court of the European Union will be composed, by the end of 2019, of 56 judges, two for each Member State.

Could this new General Court be charged, within the legal structure of the Court of Justice (see Articles 86(3) and 263(4) TFEU), to review also the legality of EPPO’s procedural acts and/or to examine preliminary questions that national courts could raise before the Union’s judge (see Article 36(2) of the draft EPPO regulation)?

The time has probably come to look ahead towards an efficient European Prosecutor, operating in the entire area of freedom, security and justice, and not only in some Member States. All in all, a European Prosecutor who must be, as Viviane Reding and Robert Badinter have recently declared to *Le Monde* (27.10.2016), *European not only in name but also in acts*.

Be that as it may, this book, which collects the various contributions submitted by great EPPO experts, is exactly what is needed to properly understand all the nitty-gritty of the pending EPPO's proposal. Indeed, the draft text examined by these connoisseurs corresponds largely to the text finally "rejected" by the Council under the Maltese Presidency on February 2017, which could become the future text of the EPPO-enhanced cooperation.

My suggestion, if I may, would be to read each of these critical analyses bearing in mind the reasons why EPPO has been so far an unsuccessful European story. The reader will catch and appreciate all the legal and practical implications raised by these authors, and therefore be persuaded that what is nowadays needed by the Union and its citizens is an efficient European Public Prosecutor. A body which will not take away from the Member States a piece of their sovereignty, but which, on the contrary, will efficiently help these countries and the Union to fight against the currently increasing European scourge, i.e. fraud and corruption.

Luxembourg
April 2017

Ezio Perillo
Judge at the General Court of the European Union²

² The opinions expressed here are strictly personal and under the sole responsibility of the author.

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Chapter 1

Introduction

Willem Geelhoed, Leendert H. Erkelens and Arjen W.H. Meij

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In July 2013, the European Commission presented a legislative proposal for a regulation establishing a European Public Prosecutor's Office (EPPO).¹ The T.M.C. Asser Instituut organised, shortly thereafter, the first conference in which this proposal was discussed.² The main point of departure for that conference was the idea that the establishment of the EPPO would be a step in the direction of bestowing the European Union with the exercise of criminal law competences. The conference focused on constitutional, institutional, legal and operational questions arising from that idea. These issues also comprised the main part of a book delivering the results of the 2013 EPPO conference.³

At that moment, the legislative initiative appeared to be a major breakthrough in the rather lengthy process of strengthening the protection of EU finances against fraud.⁴ Undeniably, the Commission's proposal provoked many serious comments. However, the scholarly world reacted quite favourably to the proposal. It was considered to be a reasonable attempt at creating a European Public Prosecutor's

¹ Commission 2013.

² TMC Asser Instituut 2013.

³ Erkelens et al. 2015.

⁴ A brief history of the EPPO is provided in Erkelens 2015.

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Office, though the proposal was deemed to be in need of improvement. This was thought to be particularly necessary in order to establish the Office in such a way that it would be able to function effectively. It was suggested that the effectiveness of the Office could be improved through increasing the level of harmonisation of the rules that the Office would need to apply, whether these rules related to procedure or substantive criminal law or to the determining of its competences *ratione materiae*.⁵ In that respect, the so called *Corpus Juris* study served as a point of reference providing for a homogeneous, transnational set of rules on substantive criminal law concerning offences against the financial interests of the Union and procedural rules concerning the functioning and the competences of an EPPO.⁶ The Commission's proposal underlined the concept of European territoriality: for the purposes of investigation, prosecution and trial, the European Union should constitute a single, judicial area. Though the Commission proposal embraced this principle, it still relied on national criminal procedure, on nationally determined competences of the Office⁷ and on the mutual recognition of judicial decisions between the Member States. The Office was intended to be hierarchically organised, in a two-layer system with a European prosecutor (and his/her staff) at the top, and European delegated prosecutors in each of the Member States.

Subsequent deliberations in the Council appeared to deviate in many respects from the Commission's proposal. This resulted in a thoroughly revised text. In a nutshell, the Council preferred shared competences over exclusiveness, abolished the principle of a single legal area, and opted for a five-layer institutional setup, combining Delegated Prosecutors in the Member States with a central Office consisting of a College, a European Public Prosecutor, Permanent Chambers, and single European Prosecutors. Besides this, the functioning of the Office and the powers to be conferred upon it would be almost entirely determined by the national laws on criminal procedure and substantive criminal law.⁸ In hindsight, it can be concluded that this intergovernmental approach was heavily influenced by a Franco-German common position which, among other elements, advocated a collegial model.⁹ Alternatively, that position expressed a generally accepted view among EU Member States that intergovernmental cooperation should remain a dominating principle of governance in the Area of Freedom, Security and Justice (AFSJ).

The Council's multiple adaptations of the original proposal inspired the organisers to set up a second gathering of scholars, legislators and policy-makers in order

⁵ *Supra* note 3. Among many, many other comments on the proposal, see Caianiello 2013.

⁶ *Corpus Juris* 2000.

⁷ PIF Directive 2017. EPPO competences are to be determined through implementation by the Member States of this directive.

⁸ *Ibidem*.

⁹ French/German Common Position 2013 (of the 20th March) stating in the accompanying letter: 'Nous pensons que la structure collégiale est à même de garantir l'efficacité opérationnelle et l'indépendance de ce Parquet européen, tout en assurant un ancrage fort en une vraie légitimité dans les États Membres.'

to scrutinise the draft text of the regulation. It was decided not to wait for the adoption of the final legislative instrument, as it became clear that—after almost three years of negotiations—the Dutch Presidency of the Council was able to reach a partial agreement on the main body of the text at the end of its term.¹⁰ This partial agreement on EPPO, together with the draft PIF directive, constituted the basis for discussions at the second EPPO conference held in The Hague on 7 and 8 July 2016.¹¹ The main targets of this conference were threefold: to take stock of the current state of the Council negotiations, to provide a scholarly examination of the draft EPPO Regulation as it stood and to present an inside assessment of that draft by informed members of two institutions and a highly involved agency—Eurojust.¹²

The EPPO Conference of 7 and 8 July 2016 started with introductory remarks and a first panel session, in which the state of play was sketched, and in which representatives from presidencies and institutions reflected on major issues in the negotiations. This set the scene for the second part of the conference, starting with a second panel, in which three normative perspectives were unfolded, intended to scrutinise the EPPO proposal: the idea of better regulation, the benchmark of human rights, and the foundations of criminal law and criminal procedure. The third panel, dealing with issues of substantive criminal law, discussed the links between the EPPO proposal with the proposed PIF directive and the *Taricco* case, as well as the subject of ancillary offences and *ne bis in idem* issues. The fourth panel shifted the discussion to the procedural realm, focusing on forum choice and judicial review, and on the question of applicable law and the admissibility of evidence. The fifth panel discussed the institutional elements of the proposed regulation: the decision-making procedures within the EPPO, its cooperation with OLAF and its cooperation with Eurojust. The conference's third part consisted of a final panel reflecting on the *raison d'être* of the future EPPO, both from the point of view of several institutions as well as from an academic perspective.

This volume of proceedings aims at disseminating the results of the conference in order to inform the ongoing debate on the EPPO. Preceded by a highly topical foreword by General Court Judge and conference panel chair **Ezio Perillo**, this volume is composed of three parts, corresponding to the three parts of the conference.

Part I, entitled 'General Perspectives on the EPPO: From the Outside and the Inside' provides introductory remarks and institutional views on the state of the project. In Chap. 2, **John Vervaele** places the basic idea of the EPPO project against the background of the fight against fraud affecting the EU's financial interests. He questions the legitimacy of the establishment of EPPO both from a

¹⁰ EPPO partial general approach 2016. This draft text was published on 3 June 2016.

¹¹ T.M.C. Asser Instituut and Leiden University 2016. The organisers thank OLAF for a project grant helping to make this conference possible.

¹² EPPO Conference report 2016. This report provides a comprehensive summary of the Conference discussion.

point of view of effectively fighting fraud, and from a political perspective. According to his idea, the EPPO should only be established if it is clear that it can effectively fight the as yet not very well understood problem of EU fraud, and if its establishment is in the interest of citizens and suspects. In Chap. 3, **Marnix Alink** and **Nicholas Franssen** describe the progress that was made in the negotiations during the Dutch Presidency of the Council in the first half of 2016. They refer to three topics: the relationships between EPPO and its strategic partners OLAF and Eurojust, the protection of personal data, processed by the EPPO, and the provisions on simplified prosecution procedures. Council discussions on these topics were complicated, but nevertheless acceptable solutions were found, sometimes undeniably having the character of a compromise. In Chap. 4, **Wouter van Ballegooij** presents a view on the negotiations from the perspective of the European Parliament. He summarises the involvement of the Parliament, which was quite active given the nature of the legislative procedure. In substance, the European Parliament stressed that the EPPO should be set up in such a way that it is able to operate effectively and efficiently, and that its operations conform to fundamental rights. Equality of arms is—when it comes to the latter aspect—one of the most important rights to pay attention to when deliberations progress.

Part II, titled ‘Scholarly Perspectives on the EPPO: Constitutional, Regulatory and Institutional Issues’, contains pieces of academic reflection, relating to major aspects of the prospective EPPO. The first two contributions strive to suggest particular benchmarks that can be used to evaluate the legislative draft. In Chap. 5, **Ester Herlin-Karnell** takes the Better Regulation Agenda as a point of departure for her analysis of the EPPO framework. Additionally, she discusses the proposed EPPO framework from a subsidiarity perspective. According to her analysis, it might be the best solution to grant the EU more competences in order for the EPPO to be a workable institution. In Chap. 6, **Valsamis Mitsilegas** and **Fabio Giuffrida** evaluate the draft EPPO Regulation against human rights standards. To that end, they identify four relevant viewpoints: the Charter of Fundamental Rights, the procedural safeguards within the draft Regulation, the possibilities for judicial review of the acts of the Office, and the specific needs of cross-border investigations. They perceive a strong tension between upgrading the fight against fraud and not downgrading the protection of human rights in supranational proceedings.

The remainder of Part II is dedicated to substantive, procedural, and institutional issues. Chapters 7 and 8 deal with substantive criminal law. In Chap. 7, **Rosaria Sicurella** essentially focuses on the quite unsatisfactory results of the negotiations on the PIF Directive, devoting special attention in this context to the ECJ judgment in the *Taricco* Case. This judgment turned out to be of crucial importance for the negotiations. At the same time, as this contribution demonstrates, it may have a rather complicating impact on the role of the national legality principle, thus giving rise to a fresh preliminary reference of the Corte costituzionale. In Chap. 8, **Eric Sitbon** analyses the different categories of offences which may be included in the material competence of the EPPO: offences defined by the PIF directive, participating in a criminal organisation with a specific focus, and offences inextricably linked to offences falling within the previous categories. He then evaluates the

relevant provisions in the light of the *ne bis in idem* principle. Chapters 9 and 10 discuss matters of procedural criminal law. In Chap. 9, **András Csúri** compares the investigations of the prospective EPPO with the mutual cooperation based on the European Investigation Order. He is of the opinion that the draft Regulation envisages an increasingly hybrid scheme of cross-border investigations that echoes the European Investigation Order (EIO) Directive without borrowing the necessary elements from it. The EPPO would work better were it to use the EIO in its cross-border investigations. In Chap. 10, **Michiel Luchtman** deals with the issue of forum choice, which he regards as a both important and problematic topic. While it affects all the actors involved in criminal proceedings, there are few remedies available. Luchtman analyses the proposed legal framework on forum choice and judicial review, which was heavily debated in negotiations, and proposes some amendments based on the system in place in Switzerland. The last chapter focuses on institutional issues. In that chapter, Chap. 11, **Anne Weyembergh** and **Chloé Brière** analyse the relationship between the future EPPO and Eurojust. They examine the envisaged institutional relationship between both bodies, their management and administrative links, and their operational cooperation. Since they experience difficulties in seeing Eurojust as EPPO's privileged partner, as it should be, they recommend clarifying the relationship between both actors in their respective regulations.

Part III, titled 'Summa Summarum: Assessing EPPO's *Raison d'Être* in the Light of the Debates', revisits the issue of *raison d'être* that was raised in Part I. The text of the two chapters closely reflects the discussions at the conference, where the panel topic was introduced by John Vervaele. In his opening words, he commented on the legislative process, including the possibility—in the meantime activated by 16 Member States¹³—of enhanced cooperation and the fundamental questions this entails. Vervaele also raised the intriguing question whether the draft as it stood—and in the meantime is referred to enhanced cooperation—corresponds to the added value that an EPPO based on Article 86 TFEU is supposed to produce as compared to a reformed Eurojust finding its basis in Article 85. In other words, does the present text fit within Article 86? Furthermore, the chair of the final panel pinpointed the question whether in the set-up of the present text the independent authority of the office and its chief in organised hierarchy can be guaranteed in a way corresponding to the Council of Europe's 2000 Recommendation on the role of public prosecution and criminal justice systems.¹⁴ In Chap. 12, **Hubert Legal** stresses that the multiple changes made during Council negotiations improved the structure of the EPPO and, in doing so, its prospects as an operational Office. Furthermore, its legitimacy is strengthened because it rests on the solid foundation of the Member States' democratic decisions. In Chap. 13, **Alex Brenninkmeijer** paints a different picture: he foresees that the EPPO will turn out to be a failure in terms of an effective fight against fraud. Already now, the Member States seem to be unwilling to take the

¹³ Press Release 184/17 (2017).

¹⁴ Council of Europe 2000.

principle of loyal cooperation seriously and opt for a very nationalistic approach. The EPPO, when it is established according to the draft regulation, will not change much and consequently offer little value for money for EU citizens. This contribution can be seen as related to a recent report by the Court of Auditors.¹⁵

A final comment on the concept '*raison d'être*', the central issue of Part III, is in place here, given the fundamental legal and political questions that surround the EPPO project. The concept '*raison d'être*' originates from the Union's legislative process. It refers back to the most fundamental objective(s) for the realisation of which a legislative measure should be taken and proposed by the Commission accordingly. In the course of the legislative process, it may occur that the Commission reaches the conclusion that the original proposal has been robbed of the appropriate instruments to achieve these fundamental objectives. When that happens, the draft legislative instrument transforms into an object that is susceptible to being 'discontinued', that is: withdrawn by the Commission.¹⁶

At the time of writing this introduction, the negotiations on the EPPO have moved into a stage where enhanced cooperation has started, as the Council could not reach unanimity. It can be questioned in what way the Commission's rights to withdraw this proposal still apply during the procedure for enhanced cooperation. The answer to that question could be made dependent on the relationship between the prior legislative procedure, ending inconclusively in the Council, and the subsequent procedure for enhanced cooperation. One way of looking at this is that the start of enhanced cooperation marks the beginning of an entirely new legislative procedure, which is governed by Article 20 TEU and Title III on Enhanced Cooperation of Part Six TFEU. In this view, Article 86(1) TFEU only slightly adapts that framework by providing that the authorisation to proceed with enhanced cooperation shall be deemed to be granted. Otherwise, the regular provisions on enhanced cooperation apply, which provide for detailed rules on the procedure to be followed. In this view, it would not be very logical to suppose that the Commission's right to withdraw a proposal would equally apply in a procedure for enhanced cooperation started on the basis of Article 86. After all, that procedure is started on the basis of an initiative of the Member States participating in the cooperation and not on the basis of a legislative proposal submitted by the Commission, which is the regular method for starting enhanced cooperation as provided for in Article 329, para 1 TFEU.

Another way of looking at the relationship between the two procedures is, evidently, to regard them as a coherent whole. In that view, Article 86(1) provides the linking pin between the two, stating that enhanced cooperation can be requested '... on the basis of the draft regulation concerned, ...'. In this view, therefore, there is only one continuous procedure, consisting of a regular stage and a stage of

¹⁵ European Court of Auditors 2015.

¹⁶ The competence of the Commission to may discontinue pending legislation is laid down in Article 293(2) TFEU. See further *Council v Commission*, Case C-409/13. Among others, scrutinised by Rittleng 2016.

enhanced cooperation and the Commission's withdrawing rights will remain intact during the enhanced cooperation procedure. Such an approach is corroborated by the fact that it is not self-evident, as particularly shown in the case of the EPPO, that the original combination of fundamental objectives and appropriate instruments to achieve these, which inspired the initial proposal, still inspires the object of the enhanced cooperation. In such a perspective even the Commission may not necessarily be in a position to support and pursue enhanced cooperation.

Perhaps the EPPO will be established using enhanced cooperation. But even if that attempt fails, the legal basis for its establishment will remain, and so will the need for its introduction. Therefore, it is to be expected that the contents of this volume will remain useful in order to inform future debates on the nature and functioning of the European Public Prosecutor's Office.

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Part I
General Perspectives on the EPPO: From
the Outside and the Inside

Chapter 2

The European Public Prosecutor's Office (EPPO): Introductory Remarks

John A.E. Vervaele

Abstract These introductory remarks deal with the reasons why the EPPO is perceived by some as a controversial body. These reasons are mirrored with the problem identification and the causes thereof. The size of EU fraud and related corruption and money laundering, both at the income and expenditure side, is quite significant. There is also a strong enforcement deficit in the Member States, especially in the case of complex transnational VAT and customs fraud cases. Three fields of action are potentially of interest for the EPPO: VAT, customs and smuggling, and fraud and corruption within the EU institutions. This leads to the analysis of what the potential added value of the EPPO could be, both from a technical fraud perspective as from a political legitimacy perspective. Finally, the introduction deals with the ongoing negotiations on the EPPO proposal, taking into account the mandate and rationale of Article 86 TFEU in the framework of the Area of Freedom, Security and Justice.

Keywords Corpus Juris · Sovereignty · Area of Freedom, Security and Justice (AFSJ) · Financial Interests EU · Fraud · VAT Fraud · Customs Fraud · OLAF · European Public Prosecutor's Office

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2.1 The European Public Prosecutor’s Office: A Controversial Body

Both the T.M.C. Asser Instituut and Leiden University deserve sincere congratulations for the organization of the event, as the choice of the topic and the timing could not have been better planned. At the end of the Dutch Presidency there is a first general draft of the Council, although quite some specific topics remain under debate and will be addressed by the incoming Slovak Presidency.

When one evaluates the scholarly work¹ on the topic—avoiding the very rich UK tabloid press—it is quite astonishing to see what words are used: the European Public Prosecutor’s Office (EPPO) is a conundrum, it is an enigma, it is mysterious, it is a Trojan horse, it is a white elephant,² it is a two headed dragon,³ and it can go on like that. This sounds appealing, but there is also something alarming, something threatening. At the tenth anniversary of the ECLAN network⁴ in Brussels in April 2016, the Belgian Minister of Justice, Mr. Geens, labelled the EPPO draft design of the Council as follows: ‘The baby is not a beauty, let’s hope it has some brains’.⁵

So why is this topic so controversial? In fact, there are many reasons for that. The first reason is that it is a new supranational institution in the field of criminal law enforcement. Unlike Europol and Eurojust it would also be entrusted with autonomous operational investigative and prosecutorial powers. This means that Member States fear that their sovereign powers will be transferred to the supranational EU level.

The second reason is that this transfer of sovereignty is in fact a matter of ‘shared sovereignty’, or of what the Germans call ‘*Vergemeinschaftlichung*’. This means that at the national level, in this case the pre-trial investigation and prosecution, the European dimension is increasing. National authorities are increasingly bestowed with European functions. Transfer of sovereignty and shared sovereignty seems to

¹ Csúri 2016; Erkelens et al. 2015.

² Csúri 2016.

³ Erkelens et al. 2015.

⁴ ECLAN: European Criminal Law Academic Network.

⁵ Conference programme available at: http://www.iee-ulb.eu/files/attachments/1292/ECLAN_final_programme.pdf (accessed January 2017).