ASSER PRESS

The European Public Prosecutor's Office

An Extended Arm or a Two-Headed Dragon?

L.H. Erkelens
A.W.H. Meij
M. Pawlik *Editors*

Springer

The European Public Prosecutor's Office

L.H. Erkelens · A.W.H. Meij
M. Pawlik
Editors

The European Public Prosecutor's Office

An Extended Arm or a Two-Headed Dragon?

ASSER PRESS

Springer

Editors
L.H. Erkelens
A.W.H. Meij
M. Pawlik
EU Law
T.M.C. Asser Instituut
The Hague
The Netherlands

ISBN 978-94-6265-034-3 ISBN 978-94-6265-035-0 (eBook)
DOI 10.1007/978-94-6265-035-0

Library of Congress Control Number: 2014948751

Published by T.M.C. ASSER PRESS, The Hague, The Netherlands www.asserpress.nl
Produced and distributed for T.M.C. ASSER PRESS by Springer-Verlag Berlin Heidelberg

Printed on acid-free paper

Springer is part of Springer Science+Business Media (www.springer.com)

Foreword

The conference on the plans to create a European Public Prosecutor's Office (EPPO) held by the T.M.C. Asser Institute in The Hague early September 2013 took place at a highly opportune moment. July 2013 had seen the publication of the European Commission Proposal for a Council Regulation on the establishment of the EPPO.[1] The conference was thus the first opportunity to discuss, from a scholarly perspective, both the proposal itself and the problems identified in a number of political commentaries. One of the questions it addressed was whether the EPPO should be seen as 'an extended arm or a two-headed dragon': should it operate as the long arm of the law, reaching down from European level to tackle at national level crimes that harm the EU's financial interests, or is it likely to become an ungovernable monster, with its European and national 'heads' squabbling about who is in control?

This book is the outcome of discussions at the conference. Debate on the proposal is now in full swing. From the outset, the Commission had a less than easy ride: parliaments in 11 Member States, including the Dutch assembly, gave it a yellow card because they believed the proposal did not comply with the subsidiarity principle. This compelled the Commission to take another look at the matter to see if modification or even withdrawal was the next logical step. However, the Commission saw no reason to do either, and decided to maintain the original proposal.

On 12 March 2014, the European Parliament adopted a resolution on the proposal on the EPPO. The resolution entailed a rather long range of 'political guidelines' addressed to the Council. At the same time, it suggested some amendments. These recommendations included strict observance of the right to a fair trial, precise determination of the scope of the EPPO's competence, and the availability of uniform investigative tools and investigation measures compatible with the legal systems of the Member States. The optimistic response of the Commission's Vice-President Viviane Reding, the EU's Justice Commissioner, and Algirdas Semeta, the EU Anti-Fraud Commissioner, to the European Parliament's

[1] COM (2013) 534 final of 17 July 2013.

backing was: 'Today's vote by the European Parliament is good news for Europe's taxpayers and bad news for criminals. The EPPO will make sure that every case of suspected fraud against the EU budget is followed up so that criminals are brought to justice'.

I use the word 'optimistic' in light of the next step along the road to establishing the EPPO: the proposal will now be submitted to the Council of the European Union. To pass this hurdle, the proposal must be adopted unanimously, in accordance with Article 86, paragraph 1, second sentence of the Treaty on the Functioning of the European Union. As yet, unanimity is far from guaranteed. Even before the yellow cards were issued, it was clear that the chance that the Member States would unanimously accept the proposal was small. The objections of the 11 parliaments made that even clearer. The Commission and the Parliament are therefore assuming that the EPPO will come into being via the 'enhanced cooperation' procedure also laid down in Article 86, paragraph 1. This entails a compromise in which at least nine Member States will jointly set up an EPPO which can only operate in the participating states. In this case too unanimity is an issue, since a proposal for enhanced cooperation requires consensus in the European Council. Part V of this book deals with questions regarding the feasibility—and consequently the effective functioning—of the EPPO if it is established under the enhanced cooperation procedure.

But this is just one of the issues covered in this book. At the root of the problems identified above and the criticism of the proposal lies a political question: what kind of Europe do the Member States want? For some the proposal does not go far enough; they believe the Commission has missed the opportunity to create European rules of criminal procedure alongside the EPPO. Others are convinced the decentralised model chosen by the Commission, in which prosecution is based on the criminal procedure of the Member State in question, is in itself too great an interference with the sovereignty of the Member States in criminal matters, since the initiative to prosecute will come from Europe. In this book, these opposing political views are being discussed from a scholarly viewpoint.

This book offers a useful basis for further debate on whether an EPPO is desirable and feasible, and if so, how it should work.

The Hague, May 2014

J.W. Fokkens
Procurator General at the
Supreme Court of the Netherlands

Contents

Abbreviations

Acquis	*acquis communautaire*: the accumulation of EU Treaties, EU legislation and EU Court decisions
AFSJ	Area of Freedom, Security and Justice
AG	Advocate General (at the European Court of Justice)
AIDP	l'Association Internationale de Droit Pénal
Cepol	European Police College
CFR	Charter of Fundamental Rights
CISA	Convention Implementing the Schengen Agreement
CMS	Case Management System
COM	European Commission
EAW	European Arrest Warrant
EC	European Community
ECHA	European Chemicals Agency
ECHR	European Convention of Human Rights
ECJ	European Court of Justice
ECLAN	European Criminal Law Academic Network
ECtHR	European Court of Human Rights
EDP	European Delegated Prosecutors
EDPS	European Data Protection Supervisor
ENCS	Eurojust National Coordination System
EPP	European Public Prosecutor
EPPO	European Public Prosecutor's Office
EU	European Union
EUCrim	European Criminal Law Association's Forum
Eurojust	European Union Agency for Criminal Justice Cooperation
Europol	European Union's Law Enforcement Agency
IGC	Intergovernmental Conference
JIT	Joint Investigation Team
MLA	Mutual Legal Assistance
OHIM	Office for Harmonization in the Internal Market

OJ	Official Journal of the EU
OLAF	Office de Lutte Anti-Fraude (European Anti-Fraud Office)
PIF	Protection des Intérêts Financiers (Protection of EU Financial Interests)
PPS	Public Prosecution System
REACH	Regulation on Registration, Evaluation, Authorisation and Restriction of Chemicals
RIDP	Revue Internationale de Droit Pénal
SWD	Staff Working Document (European Commission)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TWF	Temporary Work File
UK	United Kingdom
USA	United States of America
ZIS	Zeitschrift für Internationale Strafrechtsdogmatik

Chapter 1
Introduction

Criminal Law Protection of the European Union's Financial Interests: A Shared Constitutional Responsibility of the EU and Its Member States?

Leendert Erkelens

Abstract A brief historic account is given of the institutional endeavours and extensive legal research projects preceding the proposal on the establishment of a European Public Prosecutor's Office finally delivered by the Commission in July 2013. Marked by this history, the proposed Council regulation walks a fine line between trying to respect legal identities and essential state functions of Member States and to allow as much as possible for efficiency requirements which though will lead to a centralised system, legally as well as organisationally. The different authors in this book do investigate this dilemma as well as a few other issues. Their contributions are briefly presented.

Keywords Financial interests of the Union · Corpus juris · Treaty changes · Lisbon Treaty · Identity clause · Article 86 TFEU · European public prosecutor's office

Contents

Rather obviously, everybody wants to have their money protected against stealing, abuse or misuse by others. In the same vein, States, natural and legal persons, including international organisations, do have an equal need to protect their assets

Leendert H. Erkelens is a Visiting Research Fellow at the T.M.C. Asser Instituut in The Hague, The Netherlands.

L. Erkelens (✉)
T.M.C. Asser Instituut, The Hague, The Netherlands
e-mail: l.erkelens@asser.nl

L.H. Erkelens et al. (eds.), *The European Public Prosecutor's Office*,
DOI 10.1007/978-94-6265-035-0_1

and financial means. Alas! Fraud against public means is not uncommon. Precautionary measures to help ensure the necessary protection are required. However both, States, natural and legal persons, are dependent on financial institutions entrusted with dealing with their money on one hand and from law enforcement authorities responsible for enforcing the law on the other. The same holds true for the European Union (EU),[1] which for a long time has been trying to enhance the level of security of its own budget. From 1958 to 1970 the EEC (and Euratom) budget was financed by a system of Member States' contributions[2] effectively until 1971,[3] when a system of own resources for the general budget was introduced intended to progressively replace the financial contributions from Member States. According to the European Commission, this allocation of own resources to the Community triggered the idea of specifically furthering criminal law protection of the Community's financial interests.[4] To that end in 1976, the Commission proposed a draft amendment to the Treaties to permit the adoption of common rules on the protection of the financial interests of the Communities[5] and the prosecution of infringements of the Treaty provisions.[6] In this instance, the proposed common rules on the protection of its financial interests made explicit provision that the criminal provisions of each Member State relating to infringements causing damage to the Member State's financial interests applied in an equivalent manner to acts or omissions causing such a damage to the financial resources and budget of the Communities.[7] The Commission's proposal implied that the protection of the financial interests of the Communities should be placed in the hands of the Member States. In accordance with their criminal policies on investigating and prosecuting crimes affecting the State's financial interests, their criminal law authorities should actively investigate and prosecute offences against EU fraud. This original proposal applying the principle of equivalence did not make it, but nevertheless it created the baseline.

Since then, the EU has come a long way till the most recent Commission proposal of July 2013 to establish a Public Prosecutor's Office.[8] In the intervening

[1] The EU also in its capacity as successor of the European Community (EC).

[2] European Commission 2008, p. 18 and further.

[3] Council Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources (70/243 ECSC, EEC, EURATOM). *OJ* L 094, 28/04/1970, pp. 19–22.

[4] European Commission 2001, p. 5.

[5] This refers to all three European Communities functioning at that time: the EEC, the European Coal and Steel Community (ECSC) and the European Atomic Energy Community (Euratom).

[6] Draft for a Treaty amending the Treaties establishing the European Communities so as to permit the adoption of common rules on the protection under criminal law of the financial interests of the Communities and the prosecution of infringements of the provisions of those Treaties, *OJ* C 222/2, 22.9.1976.

[7] See Articles 14 and 15 of the Protocol attached to the Draft for a Treaty amending the Treaties, supra n. 6.

[8] Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office; Brussels, 17 July 2013, (COM 2013 534 final).

period new developments took place. The Convention on the protection of the financial interests of the EC (1995) was signed[9] and a new provision of the Amsterdam Treaty led to the establishment of a new agency entrusted with administrative powers to combat fraud against the Communities' budget, known by its French acronym OLAF.[10] OLAF is a part of the Commission and has the task of conducting 'external administrative investigations for the purpose of strengthening the fight against fraud, corruption and any other illegal activity adversely affecting the Community's financial interests'. In other words, OLAF's competences are limited and of administrative nature only; no judicial powers to investigate and prosecute the aforementioned illegal activities have been conferred on OLAF.

While emphasising the scale and impact of fraud cases against the Community's financial interests, the Commission continued its quest for providing criminal law measures especially by means of a European Prosecutor to help protect these interests. To that end, preceded by almost 10 years of preparatory work, in 2001 a Green Paper on this matter was issued by the Commission.[11] The most important part of that work consisted of the rather famous Corpus Juris, originally brought about under the direction of Professor Delmas-Marty, it entailed a set of rules for the criminal law protection of the Community's financial interests.[12] The Corpus Juris was not just an intellectual exercise but an outcome of an academic undertaking solidly based on a comparative study of national criminal law systems of those days' Member States. According to the Corpus Juris' rules of criminal procedure, the territory of the Member States of the Community would constitute one single area within which a European Public Prosecutor would become the authority responsible for investigating, prosecuting, and the committal for trial and the execution of sentences imposed for offences against the financial interests of the Community.[13] Definitions of these offences were provided in a separate, substantive part of the Corpus Juris. This approach abandoned the principle of equivalence and introduced a radical reversal of the criminal law perspective and the relationship between Community and Member States in comparison with the base line proposed by the Commission in 1976. It abandoned the idea of common rules attributing jurisdictional competence to the criminal law systems of the Member States to investigate and prosecute these offences. On the contrary, powers in this area were to be invested in the Community itself. In fact, the Corpus Juris drew a new line in the sand providing a fresh starting point for future developments in this area.

The academic efforts on this issue provided also a substantive impetus for intergovernmental negotiations on the idea of a European Public Prosecutor. During

---

[9] *OJ* C 316, 27.11.1995, 49. This Convention entered into force on 17 October 2002.

[10] Office de Lutte Anti-Fraude (OLAF), based upon Article 280 TEC and established by a Commission Decision of 28 April 1999. *OJ* L 136, 31 May 1999, 20.

[11] European Commission, Green Paper 2001.

[12] Delmas-Marty 1997.

[13] See Article 18 of the revised version of the Corpus Juris known as the 'Florence version' of May 1999, available at http://ec.europa.eu/anti_fraud/documents/fwk-green-paper-corpus/corpus_juris_en.pdf (Accessed May 2014).

the Intergovernmental Conference (IGC) in Nice (2000), the Commission vainly proposed the introduction of a new provision regarding the appointment of a European Public Prosecutor and the conditions for the exercise of its functions.[14] The idea of creating an EPPO was taken up again by the 2004 IGC and inserted in the Constitutional Treaty. With some amendments it finally landed in the Lisbon Treaty (Article 86 TFEU).

The entering into force of the Lisbon Treaty in December 2009, while entailing in Article 86 TFEU a legal base for the establishment of the EPPO, did effectively accelerate and deepen the debate[15] and intellectual efforts regarding the European Public Prosecutor and related issues such as his investigative and prosecutorial powers and competences, the functioning of his Office, the relationship with national criminal law, rights of the defence and legal remedies. In this regard, a most outstanding academic undertaking was the research project 'European Model Rules for the European Public Prosecutor's Office', carried out at the University of Luxembourg and directed by Professor Katalin Ligeti.[16] A monumental project, among others providing a comparative overview of 20 criminal law jurisdictions of 19 Member States based on a full description of the pre-trial phase of criminal procedure of the respective 20 systems and the investigative measures and prosecutorial tools available to the authorities as well as procedural safeguards. All this was followed by 'model rules'. These Model Rules were '(…) delineating the investigative and prosecutorial powers of a European Public Prosecutor's Office (EPPO), the applicable procedural safeguards and the evidential standards'.[17] while building upon the rules of the Corpus Juris. The two legal projects together

[14] Additional Commission contribution to the Intergovernmental Conference on institutional reforms—The criminal protection of the Community's financial interests: A European Prosecutor 29.9.2000.

[15] Since the entering into force of the Lisbon Treaty many conferences and meetings were devoted to the EPPO, wholly or in part. Most recently (as of 2012) held were among others the following: Eurojust held a conference in The Hague ('10 Years Of Eurojust') on 12 and 13 November 2012 spending half a day EPPO. Almost at the same time, 7–9 November 2012, OLAF held a conference in Berlin entitled: 'Cooperation of a future European Public Prosecutor's Office with National Prosecution Services'. ERA held a conference in Trier on 17 and 18 January 2013 entitled: Towards the European Public Prosecutor's Office (EPPO)'. The 7th European Jurists' Forum organised a conference in Barcelona from 18 to 20 April 2013 during which half a day was spent to EPPO. The 6th Meeting of the Network of Public Prosecutors or equivalent institutions at the Supreme Judicial Courts of the Member States of the European Union, Cracow, 15–17 May 2013. In Rome a 2 day international conference was held with the support of OLAF—Hercule II from 12 to 14th June 2013 on 'Protecting fundamental and procedural rights from the investigations of OLAF to the future EPPO'. The European Academic Criminal Law Network in Brussels held a Conference on 2 July 2013, entitled: 'Les Apéros du Droit Européen—"The European Public Prosecutor: sooner or later?"'

[16] Ligeti 2013, 2014.

[17] Katalin Ligeti, Introduction to the model rules. Available at: http://eppo-project.eu/design/eppodesign/pdf/converted/index.html?url=c982b9eef093cee8cebfbfcb2b0556d1.pdf&search (Accessed May 2014).

provided fundamental groundwork for the legislative proposal on the EPPO of the Commission of July 2013.

The present publication provides a selection of legal issues and questions related to the Commission's legislative proposal itself. All contributions have been written by experts in the area of Justice and Home Affairs or related areas of EU law. In September 2013, the T.M.C. Asser Instituut organised a first conference entitled 'Criminal law protection of the European Union's financial interests: a shared constitutional responsibility of the EU and its Member States?', which was solely focused on the Commission's proposal on the establishment of an EPPO.[18] Speakers at the conference were so kind to contribute to this book elaborating and recasting the original texts of their conference speeches. In addition, Mr Martin Wasmeier of OLAF was kind enough to contribute his ideas on the choice of forum by the EPPO in a separate chapter.

The underlying theme of the Asser conference as well as of this publication pertains to constitutional issues of balancing powers, competences and interests of the Member States and the Union. Will the Commission's legislative proposal (finally) deliver a well-structured body, able to apply in a satisfactorily balanced manner European and national rules of procedure, evidence and review? Vera Alexandrova presents a general overview of the Commission proposal. The Treaty on the Functioning of the EU stipulates rather enigmatically that the Office of the European Public Prosecutor shall be established 'from Eurojust'.[19] The draft regulation offers now some insight into its features and implications regarding the relationship between an intergovernmental agency like Eurojust and the new Office modelled as a Union body. In this perspective, Michèle Coninsx provides an overview of the main characteristics of the proposal especially in the light of the constitutional obligation that EPPO has to be established 'from Eurojust'.

The title of this publication attempts to grasp the balancing act between the positions of the Union and its Member States: '*The European Public Prosecutor's Office: an extended arm or a two headed dragon?*' It conveys two ways the EPPO could be viewed. One image is of the EPPO as an organisation assisting Member States in their endeavours to crack down on EU fraud. The other image is referring to Hydra, the multi-headed and almost invincible monster from Greek mythology. For each head cut off it grew two more. Substituting head for 'competence creep' endows this image its European connotation and symbolises the concerns of some Member States. These rather contrasting options are elaborated in a much more subtle way by Katalin Ligeti and Anne Weyembergh in their contribution on certain constitutional issues emanating from the Commission proposal. Bernardus Smulders explores the constitutional balance between Eurojust and its tasks and competences as a horizontally oriented agency and those attributed to the new, vertically organised body. He maintains that, while taking into account an urgent financial

[18] Background information available at: http://intranet.asser.nl/events.aspx?archive=1&id=368&site_id=34 (Accessed May 2014).

[19] Ligeti and Simonato 2013 on the relationship between EPPO and Eurojust.

problem resulting from a suboptimal enforcement of EU rules at national level, the Commission proposal strikes the right balance.

The advent of a European Public Prosecutor in the Area of Freedom, Security and Justice having exclusive power in all Member States to investigate and prosecute criminal offences against the Union's financial interests is without precedent and could involve far reaching consequences. One could assert that it impinges on the distribution of powers and therefore immediately raises questions with regard to constitutional principles of subsidiarity, proportionality and conferral of competences. It could also be claimed that the Office with its new powers will affect the (exclusive) power of a State to assert its jurisdiction on its own territory, even though this Office would only be concerned with fraud against the EU funds, thus offences not directly within the sphere of national sovereignty. However, national competences to determine the criminal justice priorities and the subsequent capacities of law enforcement, justice and the penitentiary system to implement those priorities will be affected by the new Office. Culturally, national values and norms of what is considered 'good' and 'bad' seem to lack a common focal point.[20] In other words, the question may and has to be brought up as to the extent this legislative proposal sufficiently satisfies the constitutional requirement that the Union shall respect the national identities of the Member States and their essential state functions in the sense of Article 4, para 2 TEU.[21] According to Guastaferro, the so-called 'identity clause' could become, to a certain extent, a constraint on the EU legislator.[22] The clause could be interpreted as a general constraint on the EU legislator, requiring it to favour the measure which less pre-empts the Member State's scope of action.[23] From that point of view the new Office needs sound and balanced operational foundations.

In this volume Kai Lohse, in his capacity as a practising public prosecution officer, comes forward with practical solutions to establish such a foundation by practical proposals to ease off the tension between the proposed vertical powers of EPPO and the necessity to acknowledge the jurisdictional responsibilities and competences of Member States with regard to crimes violating their own legal order. Marta Pawlik and André Klip provide a critical assessment of the proposed legal arrangement of the material powers of the new Office, the lack of

[20] Many of these questions respectively critical remarks were brought forward by national Parliaments in their reasoned opinions issued in accordance with Protocol No 2 to the Treaties on the application of the principles of subsidiarity and proportionality. See: European Commission 2013.

[21] Article 4, para 2 TEU: 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State'.

[22] Guastaferro 2012, p. 46.

[23] Ibid, p. 51.

accountability and provisions regarding the cooperation between EPPO and EU Member States. Catherine Deboyser scrutinises in great detail the consequences of the proposed tasks and competences of EPPO for Eurojust and ways of cooperation and interaction between both bodies.

Another area being explored in this publication pertains to the administrative structure, the legal bases and procedures for EPPO operations and judicial review, as well as the division of rules of substance and procedure governing EPPO's operations between the Union and the national level. Further, some constitutional issues related to Eurojust and the EPPO will be scrutinised. Martin Wasmeier focuses in particular on questions related to the choice of *forum* by a supranational authority working within a pluralistic legal framework. Jan Inghelram scrutinises the competence to review search and seizure measures. Contrary to the Commission's proposal, Inghelram argues that EPPO investigation measures will not be governed only by the law of the Member States nor will in every respect their courts be competent to review the validity of those measures. Inghelram sets out that in relation to crucial aspects the reviewing of the validity of EPPO investigation measures will be a matter for the EU courts. Arjen Meij explores issues regarding the legality and legitimation of a multilevel administration consisting of composite levels of integrated administration in a particularly sensitive area. He questions whether the hierarchical structure of the proposed model, including national operational resources, is the least intrusive model as regards national institutional autonomy. Also, serious doubts are raised in respect of the legal fiction provided for, turning the EPPO into a national authority for the purposes of judicial review of its procedural measures.

The present book closes with tackling the rather challenging topic of 'enhanced cooperation'. With a view to enable Member States that are determined to make progress and integrate their polities in a certain area the Treaties provide for a special cooperation framework, the so-called 'enhanced cooperation' framework. Under certain conditions Member States that wish to cooperate on a certain issue can make use of this specific legal figure. Alongside the horizontal clauses on enhanced cooperation, the Treaty provides for a special legal regime on the establishment of EPPO as entailed in Article 86. The procedures under this regime differ significantly—though not completely—from those of the general system on enhanced cooperation. The topic has become rather acute since the UK, Denmark and Ireland already declared that they will not participate in EPPO.[24] A wealth of legal and constitutional questions is emerging from this specific framework and the way it could be or will be applied. Julian Schutte especially investigates the implications of enhanced cooperation for the decision making procedures. Szymon Pawelec focuses on the implications of enhanced cooperation for the EPPO model and the interactions and ways of cooperation with non-participating Member States.

[24] See: Point 6 of the Legal Service Contribution to Working Party on Cooperation in Criminal Matters (COPEN) of 7 February 2014, Council of the European Doc 6267/1, available at: http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%206267%202014%20INIT (Accessed May 2014).

In the form of an Appendix to this book has been attached the corpus of the proposed Council regulation on the EPPO. The Explanatory Memorandum together with the 75 articles of the proposal have been included though without the Annex to the proposed regulation, the Legislative Financial Statement and the Estimated Financial Impact of the Proposal/Initiative.

References

Delmas-Marty M (1997) Corpus Juris, introducing penal provisions for the purpose of the financial interests of the European Union, Paris

European Commission (2001) GREEN PAPER on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, 11 Dec-2001, COM (2001) 715 final. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2001:0715:FIN:EN:PDF. Accessed May 2014

European Commission (2008) European Union public finance, 4th edn, pp 135–136. http://ec.europa.eu/budget/library/biblio/publications/public_fin/EU_pub_fin_en.pdf. Accessed May 2014

European Commission (2013) COMMUNICATION from the Commission to the European Parliament, the Council and the national parliaments on the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office with regard to the principle of subsidiarity, in accordance with Protocol No 2. COM (2013) 851 final, of 27 November 2013

Guastaferro B (2012) Beyond the exceptionalism of constitutional conflicts: the ordinary functions of the identity clause. New York University School of Law, New York. http://centers.law.nyu.edu/jeanmonnet/papers/12/documents/JMWP01Guastaferro.pdf. Accessed May 2014

Ligeti K (ed) (2013) Toward a prosecutor for the European Union. A comparative analysis, vol 1. Hart Publishing, Oxford

Ligeti, K (ed) (2014) Toward a prosecutor for the European Union. Draft rules of procedure, vol 2. Hart Publishing, Oxford (forthcoming)

Ligeti K, Simonato M (2013) The European Public Prosecutor's Office: towards a truly European Prosecution Service? New J Eur Crim Law 4(1):7–21

Part I
Presentation of the Main Features of the Proposed EPPO

Chapter 2
Presentation of the Commission's Proposal on the Establishment of the European Public Prosecutor's Office

Vera Alexandrova

Abstract This article provides an introduction to the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, adopted by the European Commission on 17 July 2013. The author outlines the governing structure of this office, its competences and the investigative measures available, as well as forms of judicial remedies. The proposal foresees the creation of an independent, decentralised and integrated prosecution office to effectively combat crimes affecting the financial interests of the Union. This novel approach, which is based on the Treaty of Lisbon, would constitute a significant development in the field of EU criminal law policy and bring about the desired added value and coherence in the protection of the financial interests of the Union.

Keywords Article 86 TFEU · Crimes against the financial interests of the Union · Eurojust · European Public Prosecutor's Office · Lisbon Treaty

Contents

The author is Policy Officer at the European Commission, DG Justice, Unit B2 (Criminal Law).

V. Alexandrova (✉)
European Commission, Brussels, Belgium
e-mail: vera.alexandrova@ec.europa.eu

L.H. Erkelens et al. (eds.), *The European Public Prosecutor's Office*,
DOI 10.1007/978-94-6265-035-0_2

2.1 Introduction

Many different opinions have been expressed on what the European Public Prosecutor's Office (EPPO) should look like. The debate has been going on for many years.[1] Practitioners, politicians and academia have expressed enthusiasm, commitment, but also doubts and disapproval. The topic remained challenging. At the present stage, however, the nature of the discussion has changed fundamentally compared to previous years following the adoption of the Proposal for a Council Regulation on the Establishment of EPPO on 17 July 2013.[2] Some blame the Commission for being too ambitious in its proposal; others recognise its modesty. The fact is that the Lisbon Treaty entails a legal basis providing for a much larger ground than the present proposal actually does. It is always a matter of proper tailoring in order to cover the ground at once or making progress step by step.

The Treaty on the Functioning of the European Union (TFEU) explicitly foresees the possibility to establish the EPPO[3] giving some clear indications on the area of competence and the powers, as well as on the structure and other important aspects of the future Office. In its proposal the Commission builds on the following objectives: to provide an efficient structure, to be able to protect better the financial interests of the Union and to ensure operability, which will enable the Office to work within the legal systems of the Member States while building a genuine European prosecution policy.[4]

These objectives are broad and ambitious and deserve long-lasting attention. However, in view of the overall theme of this book the following issues have been selected to be dealt with in this chapter: the governance structure (Sect. 2.1); the competence (Sect. 2.2); some procedural aspects, in particular the investigative measures (Sect. 2.3) and judicial review (Sect. 2.4).

2.2 Governance Structure of EPPO

Many options have been subject to the Commission's analysis.[5] Bearing in mind the objectives mentioned above, the Commission has opted for an integrated, but decentralised model of governance.

First, the integrated model implies an independent European body with separate legal personality which will be able to provide efficient response to the existing gap

[1] See Chap. 1 of this volume: 'Introduction'.

[2] COM 2013 534. See the Appendix to this Volume. Hereafter 'EPPO proposal'.

[3] Article 86 TFEU.

[4] See the Impact Assessment accompanying the Commission's proposal, SWD (2013) 274 of 17.7.2013.

[5] For more details, see the Impact Assessment supra n. 4.

in the protection of the Union's financial interests. Such a model will also be able to ensure equivalent protection throughout the Union.

Second, the decentralised model proposes a structure which builds on the national law enforcement and prosecution services. Article 86 TFEU already gives some indication in that respect. It foresees that the concerned criminal cases must be prosecuted before the national courts. The advantage of this choice is that in such way EPPO will benefit from the proximity of the place of crime. Moreover, this is already a hint for the division of labour between the European and the national judicial authorities. This issue will be dealt with in more detail in Sect. 2.5, dealing with judicial review aspects.

The Commission considers that this decentralised model offers the best balance between European and national decision making, but furthermore also the best chances that EPPO will be genuinely effective and accepted at Member State level.

The structure of EPPO, as foreseen in the Commission's proposal, comprises two layers. The first consists of the European Public Prosecutor (EPP) and his/her four Deputies.[6] They shall be appointed by the Council with the consent of the European Parliament in an open competition applying a transparent procedure.[7] The fact that the two arms of the EU budgetary authority will be the appointing authorities of the head of the EU office responsible for the protection of the Union's financial interests is of a significant importance which adds to its legitimacy. This appointment procedure gives the necessary guarantees for the independence of the EPP and its Deputies which is of fundamental importance for its efficiency and its added value. The EPP and his/her Deputies will be located in the headquarters.

The second layer of the EPPO structure consists of the European Delegated Prosecutors (EDPs), who will be appointed by the EPP, on the basis of a list of at least three candidates submitted by the Member State concerned.[8] This procedure of appointment reflects the EDPs' double-hatted status (see below) and seeks to ensure the best balance between the integrity and acceptance from both sides. The EDPs will each stay in their own Member State.

The role of the EPP will be to exercise the central coordination and steering in order to ensure consistency and equivalent protection of the Union's financial interests.[9] This is the core function of the office, and its central position will allow to develop a genuine EU wide prosecution policy.

In order to be able to pursue this main function, the EPP shall monitor during the investigation phase the investigations and ensure their coordination. According to the proposal he/she will instruct the EDPs where necessary[10] or also may reallocate the case to another EDP or even take up the investigations himself/ herself if certain

[6] Article 6.1 of the EPPO proposal.

[7] Articles 8(1) and 9(1) of the EPPO proposal.

[8] Article 10(1) of the EPPO proposal.

[9] Recital 12 of the EPPO proposal.

[10] Article 18(4) of the EPPO proposal.

conditions are fulfilled.[11] During the prosecution phase the EPP receives for review the summary of the case with the draft indictment and the list of evidence.[12] In the event the EDP considers the investigation completed, the EPP may instruct to dismiss the case, to bring it before the national court, to refer it back for further investigations, or to bring himself/herself the case before the national court.[13] The choice of jurisdiction is with the EPP in close cooperation with the EDPs, based on objective criteria set up in the draft regulation.[14] This is the only decision which shall be centralised. The initiation of the investigation on the other hand can be done at local level by the EDPs.

The *European Delegated Prosecutors* maximise the efficiency and minimise the costs.[15] They are the emanation of the principle of decentralisation which has an impact on their specific status. The EDPs originate from national prosecution bodies and maintain their powers as national prosecutors (their national hat). And yet acting on behalf of and under the authority of the EPP, they are integral part of EPPO (their European hat).

This 'double-hatted' status has, both, institutional and operational implications. In institutional terms, before being appointed, the EDPs must be already national prosecutors with relevant experience and qualification. Moreover, they shall keep their status as national prosecutors during the whole mandate as EDPs.[16] This requirement has essential operational and practical reasons. It aims at ensuring smooth operational cooperation between the EDPs and the national law enforcement authorities. Furthermore, it allows the EDPs, to the extent compatible with their EPPO status and powers, to use their national prosecutorial powers and apply the relevant national legal framework, e.g., regarding the modalities for carrying out investigative measures or procedural rules applicable in the trial phase.[17]

Also, the EDPs cannot be dismissed as national prosecutors by the competent national authorities without the consent of the EPP during the exercise of their functions on behalf of EPPO.[18] This provision should not be considered as an unjustified interference with the national decision making on the career development of the prosecutors but as a guarantee for the EDPs' independence.

Moreover, the EDPs cannot receive nor seek instructions from their national superiors as regards EU fraud cases. According to the Commission's proposal EPPO will have exclusive competence to deal with EU fraud cases and therefore, the national authorities will not be competent to give instructions on these cases.[19]

---

[11] Article 18(5) and (6) of the EPPO proposal.

[12] Article 27(2) of the EPPO proposal.

[13] Criteria laid down in Article 28 of the EPPO proposal.

[14] Article 27(4) of the EPPO proposal.

[15] Recital 13 of the EPPO proposal.

[16] Article 10(2) of the EPPO proposal.

[17] Article 26(2) of the EPPO proposal.

[18] Article 10(3) of the EPPO proposal.

[19] See Article 6(5) second sentence of the EPPO proposal.

Consequently, conflicting instructions on EU fraud cases shall not occur. The national law enforcement authorities will work on EU fraud cases but only on the basis of EDPs' instructions.

At the same time the EDPs shall be an integral part of EPPO. They shall be appointed by the EPP and act under his/her exclusive authority.[20] As a consequence, their acts shall be attributed to EPPO.[21] These are logical consequences of the establishment of a genuine European prosecutorial authority.

The EDPs may exercise their functions as national prosecutors as well if there is no EU fraud case assigned to them. To ensure efficiency and resolve potential conflicting assignments, the EDPs shall notify the EPP if the exercise of EDPs' function as national prosecutors is in conflict with their function as European prosecutors. Following consultation with the national prosecution authorities, the EPP may instruct EDPs to give priority to the European fraud case and inform the national authorities thereof.[22] Acceptance of this EU priority by national authorities stems from the obligations imposed on the Member States to combat criminality affecting the financial interests of the Union[23] and the principle of sincere cooperation envisaged in Article 4 TEU, which requires the Member States to facilitate the achievement of the Union's tasks and refrain from measures that could jeopardise their attainment. A similar obligation is stated by the proposed EPPO regulation.[24]

Another important aspect which deserves special attention is whether the Treaty reference to the establishment of EPPO 'from Eurojust' means that EPPO shall have a Eurojust-like collegial structure. The Commission considers that creating EPPO with an intergovernmental collegial structure would seriously hamper the independence of EPPO to take decisions on prosecutions. It would also slow down the decision making and therefore be inefficient.[25]

Firstly, there is a need to ensure that EPPO will be able to take decisions independently. A collegial structure as foreseen for Eurojust allows pursuing national interests in the field of judicial cooperation and in this form contravenes the notion to create an independent prosecutorial office. Such model echoes the intergovernmental approach of the pre-Lisbon cooperation in criminal matters which is neither compatible with the current legal framework nor in line with the objective to develop a genuine EU wide prosecution policy. In addition, a collegial structure following the model of Eurojust could mean that any action to be taken by EPPO would require an agreement of the Member State concerned with regard to the investigation and/or prosecution, creating the possibility for national interests to outweigh Union ones.

---

[20] Article 6(5) of the EPPO proposal.

[21] Article 6(7) of the EPPO proposal.

[22] Article 6(6) of the EPPO proposal.

[23] An obligation as provided for in Article 325(1) TFEU.

[24] Article 11(7) of the EPPO proposal.

[25] See Impact Assessment supra n. 4.

Secondly, a collegial structure like Eurojust's, would be cumbersome, and could mean serious delays in the operational decision making during the investigation (e.g. searching premises or arresting suspects in several Member States), in the prosecution phase (e.g. choice of jurisdiction, indictments), and in particular in cases of conflicts of jurisdiction.

Thirdly, a collegial structure for taking decisions on prosecutions is found nowhere in the Member States' systems—even in cases where the general prosecution policy is determined by the highest judicial authorities, the individual decisions, whether or not to prosecute, are always taken by the individual prosecutor in order to avoid political interference with the administration of justice.

Last but not least, in the case of Eurojust the Member States, whose national members are sitting in the college, have retained their competence to investigate and prosecute crimes. This situation differs fundamentally from the set-up of EPPO, which according to the Treaty will have its own European competence to investigate, prosecute and bring cases before the court.

The Commission has analysed carefully the arguments raised by those who defended the collegial structure of EPPO, and the need for a close cooperation between the headquarters and the EDPs has been recognised. The Commission's proposal foresees a forum of 10 members (the EPP, his four Deputies and five European Delegated Prosecutors) with the competence to decide on the internal rules of procedure of EPPO. These rules are of major operational importance since they will cover, *inter alia* the organisation of the work of the Office, as well as the general rules on the allocation of cases. This approach does not compromise the independence of the Office, neither its efficient decision-making process.

2.3 EPPO Competence

2.3.1 Exclusive Competence

The exclusive competence of EPPO[26] has a crucial operational function: to avoid parallel investigations at EU and national level. It shows clearly who does what and who takes the responsibility for conducting investigations and prosecutions.

However, this does not mean that the national authorities are excluded from the process or that their obligation to protect the financial interests of the Union diminishes. The decentralised structure of EPPO allows for the involvement of national law enforcement authorities into the process. The purpose is not to exclude national authorities but to work better together.

[26] Article 11(4) of the EPPO proposal.

2.3.2 Mandatory Prosecution Versus Discretion to Prosecute

The Commission has opted for mandatory prosecution based on the following reasoning; EPPO's discretion to decide whether or not to prosecute a criminal case falling within its remit would mean that the Office could decide not to handle a case despite clear indications that a crime affecting the financial interests of the Union has been committed. Such possibility would be incompatible with the strong commitment of the Union towards legality and legal certainty and the policy of zero tolerance for these offences. This means in practice that whenever EPPO has reasonable grounds to believe that a criminal offence within its competence was committed, it has an obligation to initiate a criminal investigation.

Moreover, the principle of mandatory prosecution is a logical consequence of the exclusive competence of EPPO to deal with crimes against the financial interests of the Union. Since EPPO will be the only Office to deal with these offences, there should be no discretion whether or not to prosecute in case of sufficient evidence. This does not mean that minor offences will be always prosecuted in court; EPPO may dismiss cases where the offence is minor and refer them to OLAF or to national authorities for administrative follow-up.

2.3.3 Material Competence—Offences Against the Financial Interests of the Union

The Treaty[27] foresees the possibility to establish EPPO to combat crimes affecting the financial interests of the Union. The European Council may by a unanimous decision and after obtaining the consent of the European Parliament and consulting the Commission, extend the powers of EPPO by including serious crimes having a cross-border dimension. Such a decision would require a detailed analysis of the operational activities of EPPO first as well as the political will to introduce such a major change. Article 74 of the proposal foresees that such analysis be conducted 5 years after the regulation's application.

2.3.4 Ancillary Competence

Ancillary competence is a well-known concept in law. It aims at an efficient use of resources and better administration of justice, given that EU fraud is generally not committed alone but in conjunction with other crimes. The proposed provision on ancillary competence[28] says that only according to strictly determined criteria and

[27] Article 86 TFEU.

[28] Article 13 of the EPPO proposal.

on a case-by-case basis EPPO might be competent to investigate and prosecute offences other than EU fraud, if these other offences are inextricably linked with EU fraud, both offences are based on the same facts, and the EU fraud is preponderant. On the same basis, national prosecution services might be competent to investigate and prosecute EU fraud following the same criteria, if EU fraud is not preponderant EPPO. The national prosecution authorities shall consult each other on this matter.

The ancillary competence of the EPPO should not be understood as an extension of the EPPO competences as provided for by Article 86(4) TFEU. This Treaty provision indeed refers to serious and cross-border crime (e.g. trafficking in human beings, terrorism). It is not likely that those crimes can be committed together with EU fraud and on the basis of the same facts, as required by the Commission's proposal. In that sense the Commission's proposal on the ancillary competence of EPPO does not circumvent Article 86(4) TFEU. Essentially, the Commission proposal aims at avoiding unnecessary duplication of investigations and prosecution rather than artificially separating cases.

2.4 Procedural Aspects: Investigative Measures

According to the Commission's proposal, EPPO will rely on, both, EU and national rules of investigation and prosecution.

EPPO will have the power either to request authorisation from a national court, or, depending on the circumstances, to order itself, the investigative measures listed by the proposed EPPO regulation.[29] The proposal foresees a catalogue of investigative measures which will be at the disposal of the EPP / EDPs throughout the territory of the Member States. Among others, the investigative measures at the disposal of EPPO include the search of premises, property and computer systems, the interception of telephone conversations and the questioning of the suspected person(s) and witnesses.

The proposal refers to the national rules as regards the conditions for applying the investigative measures, as well as for the procedural rules for the trial phase.

This common toolbox will ensure consistency and uniformity of the protection of the Union's financial interests as the investigative measures will not depend on the choice of jurisdiction. Some of these measures are more intrusive than others. For the most intrusive measures the proposal requires prior judicial authorisation by national courts.[30]

The second key procedural element of the proposed regulation is the rule on the admissibility of evidence.[31] The proposal foresees a provision which ensures that evidence lawfully gathered in one Member State shall be admissible in the courts of

[29] Article 26 of the EPPO proposal.

[30] Article 26(4) of the EPPO proposal.

[31] Article 30 of the EPPO proposal.

all (participating) Member States, if—according to the trial court—the admission would not adversely affect the fairness of proceedings or the rights of the defendant as enshrined in the Charter of Fundamental Rights. This does not deprive the trial court from its right to assess the evidentiary value of the evidence in question. This provision is of fundamental importance for the efficient follow-up of criminal cases as confirmed by Commission Communications[32] and recent OLAF reports.[33]

2.5 Judicial Review

The provision on judicial remedies is one of the shortest provisions in the proposed regulation. And yet it brings one of the most important changes to the well-known system of judicial remedies of the EU.[34] The well-established case law[35] of the ECJ says that the national courts cannot assess the validity of the acts of European institutions. And yet, in line with Article 86(3) TFEU, Article 36 of the proposal creates a legal fiction. It provides that for the purpose of judicial review EPPO shall be considered as a national authority when adopting procedural measures in the performance of its function. As a result, national courts will be entrusted with the judicial review of all EPPO's challengeable acts of investigation and prosecution, both during the pre-trial and trial stages.

The Commission's view is that it would not be feasible to foresee the ECJ's competence for this purpose given the potential volume of cases to be handled (an estimate of 2,500 cases per year) and the absence of a specialised EU court.[36]

There are many reasons for this innovative approach. EPPO's acts of investigation are closely related to an eventual prosecution and will mainly deploy their effects in the legal orders of the Member States. In most cases, they will also be carried out by national law enforcement authorities acting under EPPO's

---

[32] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the protection of the financial interests of the European Union by criminal law and by administrative investigations, COM (2011) 293, see p. 6 and following.

[33] See in particular OLAF Report 2011, p. 35 and following, mentioning among others that: '[…] practitioners have pointed out that mutual legal assistance has its limits, that the use of evidence in cross-border cases is sometimes problematic and that there is a tendency to limit prosecutions to domestic cases and disregard the European dimension'. http://ec.europa.eu/anti_fraud/documents/reports-olaf/2011/olaf_report_2011_en.pdf (Accessed June 2014).

[34] Article 36 of the EPPO proposal:
Judicial review:
1. When adopting procedural measures in the performance of its functions, the EPPO shall be considered as a national authority for the purpose of judicial review.
2. Where provisions of national law are rendered applicable by this Regulation, such provisions shall not be considered as provisions of Union law for the purpose of Article 267 of the Treaty.

[35] Judgment of 22 October 1987, Foto-Frost/Hauptzollamt Lübeck-Ost, Case 314/85.

[36] See the Impact Assessment supra n. 4.

instructions, sometimes after having obtained the authorisation by a national court. EPPO is therefore a Union body whose actions will mainly be relevant in the national legal orders. It is therefore appropriate and coherent to consider EPPO as a national authority for the purpose of the judicial review of its acts of investigation and prosecution. This solution provides a significant benefit to the extent that suspects and their defence lawyers will work within the national legal systems which they know well.

This innovative approach is without prejudice to the competence of the Court of Justice of the European Union to give preliminary rulings.[37] The Court's powers in this respect will not become affected by the proposed regulation. In accordance with Article 267 TFEU, national courts are able or, in certain circumstances, bound to refer to the Court of Justice questions on the interpretation or the validity of provisions of Union law which are relevant for EPPO's acts of investigation and prosecution. The preliminary rulings procedure will thus ensure that this regulation is applied uniformly throughout the Union.

[37] Article 267 TFEU.