

European Public Prosecutor's Office: To be or not to be?

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Abstract

The European Union for year's struggles with the low percentage of the verdict in fraud cases. The fraudsters are usually not convicted due to different problems in the procedures on both national and central level. The agencies such as Europol, Eurojust, and OLAF are coping with this problem but cannot directly get involved in solving it. Due to the obvious reasons, the European Commission is pushing towards the creation of a new body the European Public Prosecutor's Office that will be able directly to prosecute the fraud cases without the consent of the national legislative authorities. This, of course, raises many cons especially in the issue of subsidiarity.

Key words: European Public Prosecutor Office, subsidiarity, Eurojust, OLAF.

1. Introduction

The European Union is still coping with the side effects of the economic crisis, its financial interests are still vulnerable due to fraud, corruption and other kinds of deceptions towards the EU budget. On the Commission's political agenda priority is to give assurance that taxpayer's money is being used correctly. The Lisbon treaty has reinforced Article 85, 86, 325 of TFEU to deal with this hurdles. The EU budget consists of taxpayer's money that should be used for implementing the EU policies. But despite the legislation and tools in 2009 Member States reported 279.8 million euros worth of suspected fraud cases. The protection of EU financial interests across the Union varies from state to state. Investigations into fraud and other financial crimes have an uneven legal and procedural framework. ¹ The Member States judicial authorities use their national criminal law tools to fight crime against the EU budget. There is insufficient cooperation between authorities, limitations in the legal assistance, unused evidence, restriction in the prosecution to domestic cases, insufficient investigation power. ² All

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¹ "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". An integrated policy to safeguard taxpayers' money. Brussels, 26.5.2011 European Commission. Online. Available: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:52011DC0293> pg. 2-3.

² "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". An integrated policy to safeguard taxpayers' money. Brussels, 26.5.2011 European Commission. Online. Available: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:52011DC0293> pg. 6-8.

these weaknesses lead to the rising numbers of not convicted frauds, which gives the opportunity to the criminals to straighten their power and still even more because the chance of being caught, or convicted is minimal.

There are administrative investigations, controls and audits, legislative actions, but they are not enough so the Commission believes there is a need for a new directive on fraud through criminal law, also there is the need for a new or reformed OLAF, and the need of specific investigation and prosecution measures.³ With the passing of the Commissions idea and establishing a European Public Prosecutor's Office, it is expected improvement in the protection of the financial interests of the citizens and creation of a steady prosecution policy. The independence of such body will ensure that investigations and prosecutions will be dealt with and taken to national courts, without the influence and delay of national authorities.⁴

2. Why create an EPPO when existing actors already work on fighting EU financial fraud?

There are actors at a European and national level that are involved in the fight against EU financial fraud. Eurojust is such an agency that deals with crossbred judicial cooperation in criminal matters, but it does not have the power to start a criminal investigation or prosecution in the Member States. Eurojust may ask the authorities to:

- To investigate or prosecute specific acts;
- To accept that one country is better placed to prosecute than another;
- To set up a joint investigation team;
- To improve Eurojust with information necessary to carry out its tasks.⁵

Article 85 and 86 of the Treaty of the functioning of the European Union (TFEU) discuss Eurojust revision. Article 85(1) TFEU establishes the horizontal role of Eurojust: "its job is to support and strengthen coordination and cooperation between national authorities when member states are affected or require a prosecution of operations conducted and information supplied by the States and by Europol". Article 85(2) specifies that in the prosecution process, the judicial procedure will be done by national officials. It does not specify the relationship between the initiator of criminal investigations and prosecutions and the national authorities. To initiate criminal investigation Eurojust will need criminal investigation resources.⁶ And this resources Eurojust does not acquire.

Eurojust was established by the Council, it helps national investigators and prosecutors to cooperate and coordinate around 1500 cross-border cases a year. Each Member State must appoint a national member of Eurojust: a prosecutor, judge or police officer. Eurojust may help in the administrating of the requests and decisions relating to judicial cooperation. On 17 July 2013, the Commission presented a proposal to reform

³ "Impact Assessment Accompanying the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office". Commission Staff Working Document. Brussels, 17.7.2013 Online. Available: http://ec.europa.eu/justice/criminal/files/eppo_impact_assessment_en.pdf pg. 4.

⁴ *Ibid*, pg. 4.

⁵ *Ibid*, pg. 8.

⁶ White, Simone and Dorn Nicholas. "Towards a decentralized European Public Prosecutor's Office". Amicus Curiae Issue 89, spring 2012 Online. Available: <http://sas-space.sas.ac.uk/4676/1/1673-2136-1-SM.pdf> pg. 2.

Eurojust together with a proposal to establish an EPPO.⁷ Article 86 states that the Council may establish a European Public Prosecutor's Office from Eurojust. Also, the Council will act collectively after receiving the consent of the European Parliament. This makes the creation of EPPO uncertain but article 86 further states that if there is no joint agreement in the Council a group of at least nine Member States can request that the draft regulation is presented to the European Council.⁸ Which gives the opportunity for such a body to be created even though all the member states do not agree.

Besides Eurojust, EUROPOL (EU Agency for Law Enforcement Cooperation) is another agency that exists since 1997 and it supports investigations into EU financial crimes through analysis and information exchange networks. It has no operational powers and it cannot conduct criminal investigations.⁹ To continue with, in 1988 the Commission established the Fraud Coordination Unit which transformed its structure in 1999 in Anti-Fraud Office (OLAF). OLAF functions as an independent administrative control body with the department within each EU country. OLAF together with Europol, Eurojust, the European Union Agency for Fundamental Rights and Frontex form the institutional structure in preventing and fighting crimes, together with the national law enforcement agencies and the rule of law.¹⁰ OLAF is responsible for protecting the financial interests of the Union by fighting fraud, corruption, and other illegal activities. Its mission is to conduct administrative anti-fraud investigations and support the Commission to apply fraud prevention and detection policies. But it cannot conduct criminal investigations.¹¹ There are many limits of the existing bodies, they lack enforcement structure and common European prosecution policy. The institutional and legal frameworks are weak with a crumbled prosecution and are based on national feedback and depend on the resources and prioritization of the national investigations, prosecution, and judicial authorities.¹² OLAF, between 2010-2016:

- Concluded over 1600 investigations;
- Recommended the recovery of over € 3.6 billion to the EU budget;
- Issued over 2000 recommendations for judicial, financial, disciplinary and administrative action to be taken by the competent authorities of the Member States and the EU.¹³

But of all these investigations will be in vain because they all depend on the national authorities' prioritization. Is there any positive effect of the work of OLAF?

⁷ "EUROJUST". Online. Available: http://ec.europa.eu/justice/criminal/judicial-cooperation/eurojust/index_en.htm.

⁸ White, Simone and Dorn Nicholas. "Towards a decentralized European Public Prosecutor's Office". Amicus Curiae Issue 89, spring 2012 Online. Available: <http://sas-space.sas.ac.uk/4676/1/1673-2136-1-SM.pdf> pg. 4.

⁹ "Impact Assessment Accompanying the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office". Commission Staff Working Document. Brussels, 17.7.2013 Online. Available: http://ec.europa.eu/justice/criminal/files/eppo_impact_assessment_en.pdf pg. 8.

¹⁰ Bocăniță, Tache. "The Need of the European Public Prosecutor's Office in the Context of Strengthening the Integration". Legal Sciences in the New Millennium. The 9th EDITION OF THE INTERNATIONAL CONFERENCE EUROPEAN INTEGRATION REALITIES AND PERSPECTIVES. Online. Available: <http://proceedings.univ-danubius.ro/index.php/eirp/article/view/1504/1672> pg. 71.

¹¹ "Impact Assessment Accompanying the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office". Commission Staff Working Document. Brussels, 17.7.2013 Online. Available: http://ec.europa.eu/justice/criminal/files/eppo_impact_assessment_en.pdf pg. 9.

¹² *Ibid*, pg. 12.

¹³ "European Anti-Fraud Office. OLAF in figures". Online. Available: https://ec.europa.eu/anti-fraud/investigations/fraud-figures_en pg. 1.

Obviously the work OLAF does it is purely to inform and present the cases to the national authorities but it is up to them whether they will go on with the investigation and prosecution in the courts.

3. Pursuing towards the idea for a European Public Prosecutor's Office

The idea for a European Public Prosecutor (EPP) can be found in the *Corpus Juris*. The idea was created based on the French prosecuting model. It was envisioned that the EPP will function with European Public Prosecutors responsible for the investigation and prosecution of fraud in the member states. They would wear two hats because they would apply national law in national cases but would also apply another set of EU rules for EU budget crimes. The EPP would be independent from the Member States and would have the authority to act on its own initiative. The procedure for creating an EPP would be nomination by the Commission and Council decision with qualified majority. The Commission proposed the idea of an EPP in 2000. In 2001 was proposed a "Green Paper on the criminal law protection of the financial interests of the Community and the establishment of the European Prosecutor". The proposal for some member states was controversial because they thought it would sabotage national sovereignty in justice. Others believed that there were problems of accountability and fair trial.¹⁴ Only national authorities can investigate and prosecute EU fraud if EPPO does not exist. While the existing EU bodies focus on coordination, exchange of information and administrative investigations.¹⁵

4. The European Public Prosecutor's Office (EPPO)

The Treaty of Lisbon offered the legal basis for the establishment of the European Public Prosecutor's Office (EPPO) and it re opened the debate on the EPPO that started with the presentation in 2000 of 'Corpus Juris'. According to Article 86 of TFUE, EPPO is responsible for investigating, prosecuting and bringing to judgment criminal cases of course in accordance with Europol. It will have the functions of prosecutor in the courts of the members combining European and national law in a unified approach. The EPPO will have jurisdiction in transnational crimes, for all offences against the financial interest of the EU. It will have competence in cross border and is meant to go beyond the cooperation and its power will not be limited to the coordination of authorities in the investigating of certain crimes.¹⁶ The European Public Prosecutor office will be decentralized and independent prosecution office with the authority to investigate,

¹⁴ White, Simone and Dorn Nicholas. "Towards a decentralized European Public Prosecutor's Office". Amicus Curiae Issue 89, spring 2012 Online. Available: <http://sas-space.sas.ac.uk/4676/1/1673-2136-1-SM.pdf> pg.5

¹⁵ VEROUX, Giovanna Maria. "(EPPO) European Public Prosecutor: are the EU Member States slowly stifling an European project...?" April, 11 2015 European Area of Freedom Security & Justice Online. Available: <https://free-group.eu/2015/04/11/epo-european-public-prosecuto-ar-the-eu-member-states-slowly-stifling-an-european-project/> pg. 1

¹⁶ Santalo Pol. "The EU Internal Security after the Treaty of Lisbon: innovations, benefits and drawbacks". December 18, 2016. Online. Available: <http://www.polsantalo.com/the-eu-internal-security-after-the-trety-of-lisbon-innovations-benefits-and-drawbacks/> pg. 2

prosecute and bring to justice crimes like fraud, corruption or cross-border VAT fraud (Value added tax). There will be a single office across participating member states.¹⁷

The need for a public prosecutor is alarming because the existing EU bodies like the OLAF (European Anti-Fraud Office), Eurojust (European agency for criminal justice cooperation) and the Europol (European Police Office) cannot conduct criminal investigations or prosecute fraud cases. National law enforcement efforts are divided across Member States, they do not care to deal with crimes against the EU budget. Only around 50% of the judicial recommendations presented by OLAF to the national prosecution authorities lead to a verdict. And the low number of prosecutions leads to low recovery of amounts lost to fraud.¹⁸ This is a low percentage of verdicts leading to the questioning of the OLAF competences, although the main problem is not in OLAF's work but it is in its jurisdictions and second it is due to the unwillingness of the national authorities to work on such cases and to make them their priorities.

This points at another susceptible idea that maybe some national authorities are connected with networks and specific groups and they have benefit of such low verdicts and low interest in prosecuting this kinds of fraud. "The network model activities of the organized criminal groups makes it more difficult to detect and combat it by the gov't and judicial authorities, this element adding to the lack of adequate legislation".¹⁹ Therefore there is always a possibility of such cases even do the suspicions towards authorities to be part of such networks are low.

For the above reasons EPPO will have a joint European investigation and prosecution strategy where prosecutors will carry their investigations, they will be coordinated, there will be fast exchange of information and joint investigations, fast freezing of assets, and requests for arrests of the suspects. EPPO will use member states capacities and will use expertise in areas such as crime analysis, tax, accounting, or IT. It will be managed on two levels central and decentralized: the central level will consist of the European Chief Prosecutor, 20 European Prosecutors (one per participating member state) two of whom as deputies for the European Chief prosecutor, administrative director, technical and investigative staff. The decentralized level will consist of European Delegated Prosecutors located in the participating member states. The central level will supervise the investigations and prosecutions at the national level.²⁰ The EPPO will have homogenous investigation powers integrated into the national law system. The rights of the persons involved in the investigation will be guaranteed based on national law, Union law and the Charter of fundamental rights. The EPPO will enable Member States and the Union to work together for the protection of the European Taxpayers money. The value of the EPPO will be:

¹⁷ "Frequently Asked Questions on the European Public Prosecutor's Office" European Commission-Fact Sheet. Brussels 8 June 2017 Online. Available: http://europa.eu/rapid/press-release_MEMO-17-1551_en.htm pg. 1.

¹⁸ *Ibid*, pg. 1.

¹⁹ Stănilă, Laura. "New Field of action for organized crime: Trafficking in human cells, tissues and embryos. New challenges for Romania". НАУЧНО-СТРУЧНИ СКУП СА МЕЂУНАРОДНИМ УЧЕШЋЕМ Тара, 26 – 29. мај 2015. СУПРОТСТАВЉАЊЕ САВРЕМЕНИМ ОБЛИЦИМА КРИМИНАЛИТЕТА – АНАЛИЗА СТАЊА, ЕВРОПСКИ СТАНДАРДИ И МЕРЕ ЗА УНАПРЕЂЕЊЕ Том 2 ЗБОРНИК РАДОВА Online. Available: http://www.nst.org.rs/sites/default/files/docs/Tara_2015_Tom_2.pdf Pg. 308.

²⁰ "Frequently Asked Questions on the European Public Prosecutor's Office" European Commission-Fact Sheet. Brussels 8 June 2017 Online. Available: http://europa.eu/rapid/press-release_MEMO-17-1551_en.htm pg. 2.

- Genuine European prosecution policy;
- Uniform, consistent and systematic approach while linking in with MS' judicial systems;
- Investigates and prosecutes all EU fraud cases;
- Continuity in complex and cross border cases;
- Stronger deference and prevention effect.²¹

The EPPO will rely on national rules of investigation and procedure which will apply if the regulation does not provide for specific provisions.²²

On 8 June 2017 20 EU members reached agreement for the establishment of the EPPO and they are: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Portugal, Romania, Slovakia, Spain and Slovenia. The other EU member states can join whenever they will feel comfortable in doing so.²³

5. Pros and Cons for the EPPO

Pros for EPPO are that it will reduce problems with different legal systems. Up till now the Member States were responsible for themselves for such investigations and prosecutions supported by Eurojust and EUROPOL but in practice this is not efficient enough.²⁴ Establishing EPPO will bring benefits with the increase in the number of prosecutions in national courts. Also the decentralized and centralized options bring benefits. With the decentralized options, doubling the number of convictions will lead to a reduction of damage of around 10%. This option will provide the most benefits over 20 years and assumed total of 3200 million euros. The central option is with benefit of about 2900 million euros in the period of 20 years.²⁵

Bocănială states many cons for the EPPO. There should be clear goals and rules on the functioning of the EPPO, because it would be assigned "excessive freedom" in terms of jurisdiction, there is a need to define the entire area of the EU jurisdiction under the competence of the EPPO investigation. The investigating instruments and measures of the EPPO should be homogenous, clearly identified and consistent with the laws of the member states, it is also believed that the proposed regulation is not according to the principle of subsidiarity.²⁶

²¹ "European Public Prosecutor's Office". European Commission. Online. Available: http://ec.europa.eu/justice/criminal/judicial-cooperation/public-prosecutor/index_en.htm pg. 2.

²² *Ibid*, pg. 2.

²³ "Frequently Asked Questions on the European Public Prosecutor's Office" European Commission-Fact Sheet. Brussels 8 June 2017 Online. Available: http://europa.eu/rapid/press-release_MEMO-17-1551_en.htm pg. 2.

²⁴ "Impact Assessment Accompanying the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office". Commission Staff Working Document. Brussels, 17.7.2013 Online. Available: http://ec.europa.eu/justice/criminal/files/epo_impact_assessment_en.pdf pg. 4.

²⁵ *Ibid*, pg. 5.

²⁶ Bocănială, Tache. "The Need of the European Public Prosecutor's Office in the Context of Strengthening the Integration". Legal Sciences in the New Millennium. The 9th EDITION OF THE INTERNATIONAL CONFERENCE EUROPEAN INTEGRATION REALITIES AND PERSPECTIVES. Online. Available: <http://proceedings.univ-danubius.ro/index.php/eirp/article/view/1504/1672> pg. 74-75.

6. Cons with a subsidiarity arguments

Under Protocol 2 of the Lisbon Treaty on the principles of proportionality and subsidiarity the proposal of EPPO was sent to national parliaments within the umbrella of the Early Warning Mechanisms (EWM). The Lisbon treaty introduced the EWM as a form of political control. The procedure gives the Member States the chance to express their opinion of the draft legislative texts if there are more Member States that do have any remarks than the draft is analyzed again. In the case of the EPPO the Commission dismissed all the National Parliament's arguments for subsidiarity and it did not revise the original text.²⁷ Article 86 of TFEU provides a legal basis for the establishment of EPPO. The first paragraph of the provision states that the Council, may establish an EPPO from Eurojust. If there is no consensus, Article 86 allows the regulation to be approved if at least nine Member States agree on a proposal.²⁸ Therefore EPPO was created with all legal and legislative measures even though all the Member States did not agree on the draft text.

The House of Representatives in UK believes that investigation, prosecution and trial are a national ability. Transferring this competences to another body (in regards to EPPO) would decrease the sovereignty of the national state. In order to fix the breach of sovereignty it is crucial that the competences are laid out. The democratic legitimacy of the investigators and prosecutors is essential.²⁹

Defining the Subsidiarity principles in regards to EPPO:

- Investigation and prosecution regarding fraud is (primarily) the responsibility of national authorities;
- The power to investigate and prosecute offences which damage the financial interests of the Union are insufficiently defined, making it impossible to determine the scale of a breach of sovereignty (legality principle);
- Democratic control of the investigative and prosecution authorities must be possible. The proposed assessment by the European parliament on the basis of an annual report is inadequate;
- As the actual investigation and prosecution actions (and trial) are carried out in the Member States itself, these actions should be democratically controlled by bodies in the relevant Member States;
- With the aid of Eurojust and OLAF the investigation and prosecution fraud affecting EU funds can also be organized without an EPPO;
- The intended objective the effective combat of fraud with EU funds- can also be realized without a breach of sovereignty of the Member States by the foundation of an EPPO as formulated below.³⁰

²⁷ Wiczorek, Irene. "The EPPO draft Regulation Passes the First Subsidiarity Test: An Analysis and Interpretation of the European Commission's Hasty Approach to National Parliament's Subsidiarity Arguments". German Law Journal Vol.16 No.05 2015 Online. Available: https://static1.squarespace.com/static/56330ad3e4b0733dcc0c8495/t/56c0598401dbaed289e1412d/1455446406130/8.16.5_Eu_ropcan+Public+Prosecutor_Wiczorek_FINAL.pdf pg. 1248.

²⁸ *Ibid*, pg. 1250.

²⁹ "House of Representatives of the State General position paper with regard to the establishment of a European Public Prosecutor's Office (EPPO). Tweede Kamer Der Staten-Generaal Online. Available: www.tweedekamer.nl/.../document?...Position%20paper%20European%20Public%20.. Pg. 1.

³⁰ *Ibid*, pg. 2.

The House of Representative does not agree with the creation of the EPPO since it is obvious that it believes that it is breaching the subsidiarity.

To continue with, the Member States do not share the Commission's vision of a European Public Prosecutor and the impact that the EPPO may have on their national criminal justice systems and sovereignty. It remains to be seen whether OLAF will be incorporated within the EPPO and how the relationship between EPPO and Eurojust will develop.³¹ In any rule of law based criminal justice system it is of crucial importance that state power to investigate, prosecute, and punish are granted by law, but also controlled and commanded. This control is the essence of the rule of law, as the nation state has to guarantee both the liberty and the security of the citizens. This has not only consequences for the way criminal law is executed but also giving the power to investigative and prosecutorial judicial authorities such as prosecutors.³²

EPPO is still doubted because of the vague picture it gives in the aims at tackling financial crimes, and because the agencies like Eurojust, Europol and OLAF are competent to carry out administrative investigations on fraud crimes and their legal instruments have been expanded. Instead of creating a new body with an unclear value without the compliance of all the member states it could be more appropriate to complement the current instrument and bodies. The functioning of the EPPO will be characterized by a degree of networking between EU law and national law. The bottom line of the matter is self-evident: "the more national law is brought to the fore to regulate the functioning of the EPPO the more the supra national nature of the Office is watered down."³³

7. Conclusion

The European Union in order to protect its financial interests and to safeguard the taxpayer's money created Eurojust which tackles cross border judicial cooperation, but it cannot conduct a criminal investigation or prosecution. EUROPOL is another agency that supports investigations of financial crimes through analysis and information exchange. It has no operational powers and as Eurojust it cannot conduct criminal investigations. OLAF is a body that can conduct administrative anti-fraud investigations but it cannot conduct criminal investigations. Therefore the European Commission created EPPO in order to be able to investigate, prosecute and judge criminal cases in accordance with Europol. It will function as a prosecutor in the courts of the member states combining European and national law. Despite many states disapproval of the EPPO due to the belief of weakening the sovereignty in the legal system of the member states and the power to reflect in national legislation, the need for a European Public

³¹ Ligeti, Katalin and Marletta Angelo. "THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE: WHAT ROLE FOR OLAF IN THE FUTURE?" Online. Available: https://www.pravo.unizg.hr/_download/repository/4_-The_European_Public_Prosecutor%27s_Office--_what_role_for_OLAF_in_the_future.pdf pg. 62.

³² VARVALE, A.E. JOHN. "THE MATERIAL SCOPE OF COMPETENCE OF THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE: A HARMONISED NATIONAL PATCHWORK?" INSTITUTE FOR RESEARCH INTO EUROPEAN CRIMINAL LAW CENTROSTUDI DI DIRITTO PENALE EUROPEO. Online. Available: www.dirittopenaleeuropeo.it pg. 1.

³³ Giuffrida, Fabio. "The European Public Prosecutor's Office: King without kingdom?" Research report No 2017/03, February 2017 Online. Available: http://aei.pitt.edu/84218/1/RR2017-03_EPPO.pdf pg. 37-38.

Prosecutor is necessary because it will lead to creation of steady prosecution policy and lower the cases of financial fraud.

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