

**UNIVERSITY OF TIMISOARA
FACULTY OF LAW**

**UNIVERSITY OF PÉCS
FACULTY OF LAW**

**JOURNAL OF EASTERN-EUROPEAN CRIMINAL LAW
No. 2/2015**

**Edited biannually by courtesy of the Criminal Law
Departments within the Law Faculties of the West University
of Timisoara and the University of Pécs**



II. FORMS OF ECONOMIC CRIME

A European Public Prosecutor Office against Euro-financial Crimes: Which Future?

Prof. dr. ROBERTO E. KOSTORIS

Dean of PhD School of Law

University of Padova

Vicepresident of the Italian Association of Scholars of Criminal Procedure

Abstract:

The establishment of a European Public Prosecutor's Office for the fight against the crimes affecting the financial interests of the Union constitutes a complex and rough path. The article focuses on the fundamental steps of this route until now, from the provisions of the Treaty of Lisbon, to the Commission's proposal, to its redrafts, above all that one of April 2014 under the Greek Presidency. What emerges is a too complex and elephantine body, ill-suited to an efficient fight against euro-financial crimes. However, some slender lights seem to appear in the more recent developments of this path.

Keywords: *European Public Prosecutor's Office; European prosecutions; European investigations; euro-financial crimes; rules of evidence; college; Chief Prosecutor; Permanent Chambers; European prosecutors; European Delegated Prosecutors*

1. The idea to establish a EPPO

As in this Congress we are talking about economic crimes, we have to remember that some of the most important economic crimes are committed against European economic interests, and that there is the idea to establish an European Public Prosecutor's Office (EPPO) to fight them.

It is indeed an ancient idea: it was born almost twenty years ago, when a group of scholars, by request of the European Commission, elaborated in 1997-2000 a project, the *Corpus juris*, to protect the economic interests of the Union.

Now the possibility to establish such an office is explicitly provided by art. 86 of the Treaty on the functioning of the European Union (Treaty of Lisbon), which points out that the structure and the functioning of such a body must be referred to a specific regulation. And, for this purpose, on 17th of July 2013 the European Commission have elaborated a proposal of regulation.

2. Arguments against and for the establishment of a European Public Prosecutor

Before considering the actual state of play, let's see which reasons can arise in favor or against the establishment of such a body.

The critical issue is, as usual, politic and it is firstly linked to the fact that the European Union has been conceived as an incomplete entity. The European Union is, indeed, structured as an autonomous legal system, but not as a federal State, to which the individual States are subjected. A State therefore provided with an autonomous and complete judicial system for the prosecution and punishment of “federal” crimes. Namely, with its own prosecutors, its own law enforcement agencies, its own judges. The Member States of the European Union have certainly given part of their sovereignty to the Union; they have created centralized bodies, including even the Court of Justice, which however has a competence limited to assure the compliance and the homogeneity of the Union law by the Member States. However, the crucial step hasn’t been taken: precisely, the federal one. Under this point of view, there could be a substantial objection to the establishment of an EPPO, lacking a federal structure. If the Member States haven’t taken that step, it means that they don’t want interferences in their sovereign prerogatives, first of all in the administration of justice. In this view, a European Public Prosecutor’s Office should appear as an unjustified para-federal body.

It is surely a coherent objection. And, as we will see, this purpose to maintain the control on the power to punish by the States is heavily influencing the path of the proposal of regulation of the Commission.

On the other hand, we can oppose to this objection a pragmatic approach, less respectful of the purity of the architectures. We can affirm that euro-financial crimes affect, together with the financial interests of the European Union, also the interests of all the Member States, both as such, and as Member States of the European Union. That these crimes bring enormous damages to the European Union funds and consequently to all European citizens. And that these economic damages are much less acceptable in the present difficult economic times. And, above all, that the individual States haven’t shown to efficiently fight with their own resources this type of crimes. And that it should be therefore encouraged the idea to establish for prosecution of these crimes a European Public Prosecutor’s Office, which could move easily in all the European area, have a united strategy, and, for this reason, could presumably achieve much better results. Moreover, history proves that the steps forward in the path of European integration have often been realized through initiatives brought out of the usual patterns: it would be a good reason for looking forward with confidence even in this case.

Unfortunately, the history of the proposal of regulation on EPPO of July 2013 so far shows that the jealousies of the States, which heavily brake on this project, prevail.

And here I connect with the title of my speech: which future can we imagine for such a body if the assumptions are those which I have outlined? We can reveal the answer in advance: we cannot expect a lot if the EPPO will be established according to the approach that arises in the rewritings of the proposal of regulation. And on the contrary, we will have to be careful that the establishment of a “weak” body don’t rebound on the path of the development of the criminal judicial cooperation. A body not enough efficient and strong wouldn’t be respectful of the principle of subsidiarity¹. The States could easily object that its activity wouldn’t realize the necessary qualitative leap compared to the prosecution that States already carry out. It would represent the end of the EPPO’s project and an impasse for the development of judicial cooperation. We

¹ See Roberto E. Kostoris, *The Perspective to Establish a European Public Prosecutor’s Office, Lights and Shadows of a Work in Progress*, in *Toward Scientific Criminal Law Theories. CCLS Tenth Anniversary Anthology of Papers from International Academic Partners*, Beijing, Law Press – China, 2015, p. 784

would remain bound to the former vision of cooperation between individual States, with just the coordination of centralized bodies as Europol and Eurojust.

Perhaps, some lights however come from the very last developments of this path (drafts of May/October 2015).

3. Art. 86 TFEU and the Commission's proposal of regulation of 17 July 2013

Let's try to summarize the main stages of this path.

a) We shall start from art. 86 TFEU, as we said. It provides the possibility to establish an EPPO in order to investigate and prosecute euro-financial crimes, referring with regard to powers and structure of this body to a regulation which will have to be adopted unanimously by the Member States, or, otherwise, at least by nine States with an enhanced cooperation.

Art. 86 already put a precise limit: while the investigations will be carried out at Union level, the trials will be held at national level, in front of the national judicial authorities of the Member States. It is the logical consequence which I mentioned at the beginning about the lack of an autonomous judicial system of the Union.

b) On this basis, on 17 July 2013 the Commission presented a proposal of regulation and establishment of EPPO².

The general framework of this proposal was good.

The territory of the various European States was considered a unique common area for EPPO's investigations. Then, EPPO is deemed as a body with a light centralization. At the central level there is a Chief Prosecutor, and his Deputies. Then, there is a decentralized level with the Delegated Prosecutors allocated in the various Member States, that could also have the role of national prosecutors: so they are bodies that can have two hats. The EPPO is set up as an independent body, which is accountable to the European Parliament, the Council and the European Commission of its general activities, in particular by producing an annual report of them. The competence of this body is exclusive for the euro-financial crimes. It was however provided that – with regard to rules of evidence – the rules of the State (or the States) in which the investigations of EPPO should be carried out should be applied. Therefore, the proposal hadn't provided for common rules of evidence, but for the possible application of rules even very different, depending on the State in which each investigative act is carried out.

Apart from that, that structure showed a slim organization, had the virtue of a common directorial mind and ensured with its hierarchical structure a strong chain of command.

The weakness – besides evidence rules – was that it didn't have its own autonomous investigative structure, because the Delegated Prosecutors, which have the concrete management of the investigations, wouldn't have been able to carry out them alone, but they would have had to rely on the national investigative authorities, that, furthermore, would have applied national rules.

c) Many Member States criticized this model, because it was deemed as not respectful of the principle of subsidiarity, since it wouldn't have shown a better capacity to fight euro-financial crimes compared to the Member States. After these criticisms, the Commission states to maintain the proposal, but to rethink it. Hence various drafts have followed.

² COM (2013) 534 final 17 July 2013.

4. The EPPO's structure in the draft of 14 May 2014: a bureaucratic tool

The draft that changes more the proposal of regulation was written under the Greek Presidency on 14 May 2014³.

It was established an extremely complex structure. It remains the idea of a two level structure of EPPO, one centralized and one decentralized. However, the centralized level doesn't concern only the Chief Prosecutor and his Deputies, but a double body.

This central level should be based no more on a hierarchical structure but on a collegial one. On the one hand, there is the College, which is constituted by the Chief Prosecutor, his Deputies and the European Prosecutors, one for each Member State, so that each State is represented in the college. On the other hand, Permanent Chambers are established: each one includes the Chief Prosecutor or one of his Deputies and some permanent members.

The decentralized level remains. Its structure is composed of the Delegated Prosecutors, at least two for each State, that are located in their respective Member States. The relationship between the College, the Permanent Chambers and the European Prosecutors, which not only are members of the college, but act also as individual organs, as transmission belt between the Delegated Prosecutors and the Permanent Chambers, is extremely complex and confused.

On the one hand, the College has only the task of general monitoring of the activities of the Prosecutor's Office and to take strategic decisions on policies concerning the prosecution. But it isn't involved in the investigations. On the other hand, the Permanent Chamber directs and monitors the investigations and prosecutions, ensure the coordination and implementation of the strategic decisions adopted by the College. So the Chambers deal with the cases that are assigned to them by the Chief Prosecutor. It is appointed by them a rapporteur who follows the dossier, reports it to the Chamber and, after consultation with the Prosecutors of the States concerned, proposes the adoption of decisions to the Chamber. The Permanent Chambers are competent for the single case; European Prosecutors supervise investigations and prosecutions involving their Member States on behalf of the permanent Chamber competent for the case and according to its directives. However, the specific activity of investigation and prosecution is not up to the Chambers but to the Delegated Prosecutors, under the supervision of the competent European Prosecutors. These Delegated Prosecutors refer to the competent European Prosecutor and to the Permanent Chamber designated for the case and make proposals concerning the decisions that the Chamber will have to adopt. For their part, the European Prosecutor of the involved State represent the transmission belt between the Delegated Prosecutors and the competent Chamber. Hence the Chambers are decision-making bodies on investigations and prosecutions, but they do not carry out them directly; the Delegated Prosecutors which are responsible instead of manage them cannot take decisions independently in key fields.

As we can see, the relationship between these bodies is very complex. This situation affects the efficiency and timeliness. There is no more a strong chain of command, as in the original proposal of regulation of 2013.

There are also new issues: for example, with which criteria a case shall be allocated to a Permanent Chamber and how, if necessary, it moves. In the idea which inspires this

³ Council of the European Union, 14 may 2014, doc 9478/1/14 REV 1.

structure it's not hard to note the will of the member States not to be passively subjected to the management of prosecution and punishment on their territories by a European prosecutor. So, some mechanisms of cross-control are provided in EPPO and, through its own European Prosecutors, the States can have their say on investigations and actions that are carried out inside their boundaries.

The offset is really heavy, because these mutual controls and this allocation of roles between the Chambers, the European Prosecutors and the Delegated Prosecutors realize an elephantine structure that does not seem able to ensure prompt and effective investigations.

Moreover, the competence of the EPPO is no longer considered exclusive, but concurrent, and the law applicable to the investigations is no longer that of the State in which the single investigative act is carried out, but that of the State where is located the European Delegated Prosecutor responsible for the investigations and prosecutions. But this seems to be an improvement compared to the normative fragmentation that characterized the draft proposed by the Commission.

5. Some slender lights above the horizon?

The subsequent drafts laid down under the Italian and Latvian Presidencies aims to coordinate the structural statement given by the draft of the Greek Presidency with the rules of investigation and prosecution.

We have nevertheless to focus on last evolutions, precisely on the document 12621/15 of the Luxembourgish Presidency of 5 October 2015⁴, where some advances indeed seem to be made.

In the frame of the same structure of the body, the Presidency has elaborated a compromise package on some key provisions covering investigation measures, cross border investigations and evidence, that aims to ensure both more efficiency of the Office and the safeguard of the rights of the suspects and accused persons. A compromise which has been welcomed by the delegations of Member States and that the Presidency considers could be agreed upon by them.

In particular, in this context, in the cases where the offence is punishable by maximum penalty of at least four years of imprisonment, Member States shall ensure that the European Delegated Prosecutors are entitled to order or request some important investigative measures, like search, freezing, including freezing of assets, interception of electronic communications, preservation of traffic data and production of any relevant object and document. In addition, the Delegated Prosecutors shall also be entitled to request or to order any other measure in their Member State which are available to prosecutors under national law in similar national cases.

It is indeed not so much: the EPPO's structure as definite under Greek Presidency remains, but this shows that something is moving, even if, perhaps, it isn't still sufficient to be quite optimist on the future of EPPO's building.

Bibliography

M. Böse, *Ein Europäischer Ermittlungsrichter- Perspektiven des präventiven Rechtsschutzes bei Errichtung einer Europäischen Staatsanwaltschaft*, in *Rechtswissenschaft. Zeitschrift für rechtswissenschaftliche Forschung*, 2012, 172;

⁴ See CUNCIL OF THE EUROPEAN UNION, Presidency, 5 October 2015, doc. 12621/15 REV 1.

L. Camaldo (ed.), *L'istituzione del Procuratore europeo e la tutela penale degli interessi finanziari dell'Unione Europea*, 2014;

A. Damaskou, *The European Public Prosecutor's Office. A Ground-Breaking New Institution of the EU Legal Order*, in *New Journal of European Criminal Law*, 2015, 5, 126;

M. Delmas Marty and J.A.E. Vervaele (eds.), *The implementation of the Corpus Juris in the Member States: Penal provisions for the Protection of European Finances* (four vol.), 2000;

J.M. Fernando Aparicio, *El nacimiento del fiscal europeo*, in *Revista de derecho comunitario europeo*, 17, 2004, 231;

G. Grasso, G. Illuminati, R. Sicurella, S. Allegrezza (eds.), *Le sfide dell'attuazione di una procura europea: definizione di regole comuni e loro impatto sugli ordinamenti interni*, 2013;

L. Hamran and E. Szabova, *European Public Prosecutor's Office – Cui Bono?*, in *New Journal of European Criminal Law*, 1-2, 2013, 23;

R.E. Kostoris, *The Perspective to Establish a European Public Prosecutor's Office, Lights and Shadows of a Work in Progress*, in *Toward Scientific Criminal Law Theories. CCLS Tenth Anniversary Anthology of Papers from International Academic Partners*, Beijing, Law Press – China, 2015, 784;

R.E. Kostoris, *Pubblico ministero europeo e indagini nazionalizzate*, in *Cassazione penale*, 2013, 4738;

L. Kuhl, *The future of the European Union's financial interests*, in *Eucrim*, 2008, 186;

K. Ligeti (ed.), *Towards a Prosecutor for the European Union*, vol. I, *A comparative analysis*, 2013;

K. Ligeti and M. Simonato, *The European Public Prosecutor's Office: Towards a true European Prosecution Service?*, in *New Journal of European Criminal Law*, 2013, 1-2, 19;

H.G. Nilsson, *Judicial cooperation in the EU. Eurojust and the European Public Prosecutor*, in E. Guild, S. Carrera, A. Eggenschwiler (eds.), *The Area of Freedom, Security and Justice Ten Years on: Successes and Future Challenges Under the Stockholm Programme*, 2011, 73;

J.R. Spencer, *Who's afraid of the big, bad European Public Prosecutor?*, in *Cambridge Yearbook of European Legal Studies*, 2012, 363;

C. Van Den Wyngaert, *Eurojust and the European Public Prosecutor in the Corpus Juris Model: Water and Fire?* In N. Walker (ed.) *Europe's Area of Freedom, Security and Justice*, 2004, 231;

S. White, *Towards a Decentralized European Public Prosecutor's Office*, in *New Journal of European Criminal Law*, 2013, 1-2, 23;

J.A.E. Vervaele, *“Quel statut pour le Ministère Public? European Enforcement Agencies in the Area of Freedom, Security and Justice”*, in Cour de Cassation (ed.), *Quelles Perspectives pour un Ministère Public Européen?*, 2010, 171;

M. Zwiers, *The European Public Prosecutor's Office: Analysis of a Multilevel Criminal Justice System*, 2011.