

ESTABLISHING THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE. A NECESSITY IN THE REGIONAL CONTEXT OR A DIMINUTION OF COMPETENCES?

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Abstract: *Given the possible multiple jurisdictions for cross-border offences falling under the competence of the European Public Prosecutor's Office, it is essential to underline the advantages and disadvantages of this new single, strong, independent institution. The opportunity of establishing the European Public Prosecutor's Office derives, ipso facto, from the prejudice of about 5 million EUR in the European budget and also from the ex nunc benefits of all member states due to effectively combat the border crime phenomenon and the frauds from the own member states systems.*

Keywords: European Public Prosecutor's Office; regional context; European budget; fraud with EU funds

Introduction

In the context of the global and European financial crisis, we can remark an increase of austerity concerning the public money management putting the European Public Prosecutor's Office in a new perspective. Therefore, the member states must take responsibility in restoring the Union's budget and be aware of the crucial character of their intervention and effective operation in this sensitive matter concerning the Union's financial interests. Due to the adoption of the Lisbon Treaty, which sets out for the first time the concept of a European Public Prosecutor at the level of primary EU law, the establishment of this institution could be described *ad literam*, as one of the most topical issues under discussion in the European Union (EU).

This new concept of the European Public Prosecutor's Office (EPPO) could be best implemented and integrated in the current landscape of the European area of freedom, security and justice in order to promote an unified and consistent EU action against the offences affecting its financial interests including common

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prosecution priorities and harmonised levels of punishment. Moreover, the frequent international or cross-border dimension of this crime and its technical complexity seem to justify the coordination and centralisation of decisions at EU level. The independence of the EPPO seen as an agency capable of restoring trust in the Union's institutions, as well as its immunity from local political influence or prosecutorial instruction are key issues.

„There are more than 16 years since notorious fraud cases hit the mass-media.”

Taking as a starting point the statement of the Honourable Judge in the Pre-Trial Division of the International Criminal Court C. Van Den Wyngaert, member of the *Corpus Juris* project - the historical creation of the European Public Prosecutor's Office concept - the fact that a number of investigating judges and prosecutors sounded the alarm because of their efforts to engage in trans-border judicial cooperation in the fight against corruption and fraud, efforts susceptible of political interference exercised from the political sphere. This alarm was a “public outcry” for imperious change at a press conference in Geneva, hence it was called the *Appel de Genève* (Van Den Wyngaert, 2013, p.3). Moreover, the same judge claims that the European Public Prosecutor's Office should be integrated into one large judicial branch of the European Union which would imply the integration of the European Court of Justice, with a key role in the area of European criminal law and procedure.

1. Short narrative

The challenge of protecting the financial interests of the European Community has been present since 1976, appearing as an almost natural consequence of the Own Resources Decision (Summaries EU legislation, 2007). Any criminal protective measures, in order to be effective, require specific mechanisms and institutions. The legislative context and evolution of the idea of a United Europe did not seem conducive to the creation a self-standing institution, with its own powers necessary to protect the financial interests at the heart of the future European construction.

In 1988 the Anti-Fraud Coordination Unit (UCLAF) was created, which was intended in the first instance to work with national anti-fraud services in each Member State. Its job was limited to the exercise of functions and *in concreto* that of coordination and assistance, necessary to investigate cases of transnational organized fraud. *Ab initio* it was part of the General Secretariat of the European Commission, and then institutionally integrated in the Commission, the importance of UCLAF and later that of the Anti-Fraud Office (OLAF) has emerged gradually once its powers expanded. In this respect we remember that in 1995 (EC, 2015) UCLAF was able to start an investigation *ex officio* once it was notified about possible fraud offences. Moreover, even within the European Commission, directorates were required to report any suspicion of financial fraud arising in their areas of responsibility.

The signing of the Convention on the protection of the financial interests of the European Communities (or PIF Convention) in 1995, the entry into force of the Treaty of Amsterdam, and the resignation of the Commission led by Jacques Santer on March 15, 1999, due to alleged financial irregularities, created a favourable environment for the creation of a new anti-fraud body. This was done by adopting Decision No.1999/352 and Regulation No. 1073/1999 concerning the general rules applicable to OLAF investigations, as a response to a political emergency. The collapse of the Santer Commission was important because it was for the first time that the Parliament dared to attack the Commission, asserting itself as a true legislative power (EuroParlTV, 1999), and generating a series of changes in terms of accountability and control. As defined in the treaty, the creation of an area of freedom, security and justice in which the free movement of persons is guaranteed was actually targeted as one of EU objectives.

After that, the European Parliament, through a series of resolutions, and the European Commission, through a long process of consultations, have followed a convergent trajectory. The first turning point was the drafting of the *Corpus Juris*, which enshrined a general series of criminal provisions regarding the protection of the financial interests of the European Union. In essence, the main objective was that the Intergovernmental Conference in Nice overcomes the limits of classical judicial cooperation (Buneci *et al.*, 2008, p.108) and finds a cure for fragmentation in the European jurisdiction in criminal matters by creating an autonomous institution of the European Prosecutor. But the necessary period of time in order to examine the proposal and the reluctance on its practical consequences led to its rejection by the Heads of State and Government meeting in December 2000. Finally, based on the recommendations from the Council and the excerpts from the Intergovernmental Conference, the European Commission undertook Action Plan 2001-2003¹ for the protection of the Communities' financial interests (Summaries EU legislation, 2001) and debated specific problems related to the protection of the Community's interests. So, even before the publication of the Green Paper, the Committee of the Independent Experts (EC, 2015) and the OLAF Supervisory Committee (OLAF, 2005) recommended again the creation and implementation of a European Public Prosecutor as an independent entity.

Finally, on 11th of December 2001, the drawing-up of the Green Paper (ECC, 2001) the Commission of the European Communities initiated protective measures under the criminal law towards the financial interests affected by this initiative, but the tensions created and the failure of the Constitutional Treaty left almost pointless the autonomy of the institution. Only after signing the Lisbon Treaty one could foresee a new attempt to reconfigure clear objectives in this regard.

¹ See *Action Plan 2001-2003* available at: http://europa.eu/legislation_summaries/fight_against_fraud/protecting_european_communitys_financial_interests/133162_ro.htm



2. The background to the proposal of establishing an European Public Prosecutor's Office

In September 2012 the European Commission announced its proposal of establishing a team of prosecutors to combat cross-border crime, *ab initio*, consisting of smuggling, corruption and fraud with EU funds on a significant scale. The main frame of legal references on this matter was part of PIF Convention. Subsequently, its jurisdiction *rationae materiae* expanded including national fraud with EU funds and related crimes.

The extent of fraud with European funds which the Commission had stated publicly is estimated to 5 billion EUR annually. This is an unofficial figure due to the fact that not all member states report on the number of investigations that are carried out, or what measures shall be taken to recover the money. Given that the potential damage is considerable, these frauds, both cross-border and domestic, are not always investigated and prosecuted by competent national authorities whose law enforcement resources are often limited. Consequently, both the cross-border dimension of these crimes and the applicability of national law will most often escape the attention of national authorities. (EC, 2013, Regulation Proposal).

The current procedures for information transfer and cooperation to a closer and more effective coordination of investigations and prosecutions at the European level are not sufficient to combat cross-border crime, despite the strengthening of Eurojust, Europol and OLAF, suffering severe limitations due to the sharing of responsibilities or attributions between institutions belonging to different functional and territorial jurisdictions.

Currently, the EU has no authority regarding the prosecution of offences which affect the financial interests of the Union including its budget taking into consideration that at the moment only the member states have the exclusive competences in investigating and prosecuting them.

The Reform Treaty has come with a significant gain in integration matters aiming at a radical change of the fundamentals of treaties on the two bodies active in the field of police and judicial cooperation, Europol and Eurojust, complementing the possibility of establishing an EPPO. The relevant articles concerning these bodies, seen in the context of the "communitisation" of the third pillar, are marked by a new philosophy which is able to reform these two institutions in a substantial way. The reason of this new body, as explained by Viviane Reding, Vice President of the European Commission, resides in the following explanation: in order to protect the interests of the EU one cannot use fragmented means - for a "federal" budget you need federal tools (Reding, 2013, p. 5).

The novelty was the fact that those dispositions provide the European legislator with the authority to give new tasks and powers including the operational nature of both bodies and establish institutional corollary issues such as internal functioning, rules of parliamentary scrutiny exercised by the European Parliament together with the national parliaments of the member states and exercise judicial control by the European Court of Justice (Erkelens *et al.* 2015, p. 45).

Questions relating to the necessity and future development of the EPPO and Eurojust are fully valid, the fine line between the two being drawn through the provision of art. 85 (2) TFEU, which indicates the fact that Eurojust may not provide formal acts of judicial procedure and may not send anyone to trial, while the European Prosecutor's role is specifically to provide formal acts and obtain convictions. On the other hand, the purpose of establishing this office is to act before national judges in compliance with national criminal law, the legislature must find a compromise between the Union and national judicial resources (Erkelens *et al.* 2015, p. 41)

To summarize, despite the existence of Eurojust and Europol - which have a general mandate to facilitate the exchange of information and coordination of prosecutions and criminal investigations in national systems, the two bodies lack the power to conduct, themselves, acts of investigation and prosecution.

Moreover, one of the key arguments for the establishment of the "institution" of the European Prosecutor is that OLAF, a specialized structure in the fight against fraud with European funds, has the power to investigate frauds and activities adversely affecting the financial interests of the Union, but it is limited to strictly administrative investigations that do not always lead to trials. The statistics highlighted the fact that 50 % of investigations initiated by OLAF were not fulfilling their purpose as a direct consequence of the fact that investigations started by OLAF revealed that the fraud with EU funds did not always end in court - a *sine qua non* is that investigations be completed by national authorities, in this case by national courts. Still, OLAF annual reports support the conclusion EN 27 N that at present the national authorities with competence in the field of investigation and prosecution, are seemingly lacking the ability to achieve a certain level of protection and enforcement (OLAF, 2011).

In support of these arguments, we note that art. 280 of the EC Treaty expressly provides the protection of financial interests which must be effective and equivalent in all member states. Thus the European Community was forced to guarantee each member state and implicitly the European citizens as well, that fraud and corruption offences were sent to trial. Otherwise, it risked to publicly compromise the credibility of the judicial system in fulfilling its purpose.

Against this background, the failure to achieve a certain level of protection and effective application of investigations and prosecutions by the authorities of the member states requires bringing into question especially whether the Union has the required competence, as well as the compulsory interventions that are required in the matter here concerned. By its nature, the Union's financial system is managed at the EU level and therefore topics regarding member states legislation harmonization are more concentrated than other EU policies. Reasonably, they cannot be strictly managed by each member state (EC, 2013, p. 27).

Art. 86 of the Lisbon Treaty provides the legal framework to strengthen a new level of accusatory system whose role is to revise current deficiencies that are based exclusively on the national "efforts" to add consistency and better coordination in the field of combating and preventing fraud in Europe.



An argument which precludes the necessity of establishing an EPPO would be that if the member states supported the European Commission's regulation proposal, they would admit that at least on fraud with European funds, the Public Ministry and the judicial authorities at the national level are unable to perform investigation and prosecution of these types of crimes, that they are incompetent or that they simply have neglected this type of crime investigations and their governments are not willing or would not, literally, invest in improving the current situation. So they should accept that they need a European Prosecutor, an external body to act in an independent manner from any control, beyond the political realm and beyond the responsibility of governments and national parliaments, that there is a need for a institution that is clearly distinct from the national structures of judicial organization that already exist (Erkelens *et al.*, 2015, p.197).

This recognition, however, would involve exposing a member state whose Public Ministry seemingly fails to properly combat fraud, corruption and related crimes committed against the Union's financial interests, and would raise serious questions about the ability of the member-state's judiciary to discover fraud, corruption, organized crime in general. Given the fact that such transnational crimes are more complex than those at the national level, for which the member-state's authorities possess the necessary expertise (regarding procedural documents, investigations, prosecutions, other related actions), the European Prosecutor's Office would have exclusive jurisdiction in the field of crimes against the EU's financial interests.

Doubts about the performance of public prosecutors in the member states on this niche, fraud with EU funds, might, in the end, have a certain influence in the development of the Union's objectives in the field of Justice and Home Affairs. In order to achieve these objectives, the member-states' criminal justice systems must work properly. member states that joined the Union in 2004 have demonstrated their ability to live up to EU standards on matters such as the fight against corruption, fraud and organized crime, meeting the requirements formulated by the European Commission during the accession negotiations, notably those concerning justice, freedom and security.

In summary, the question is whether any of the member states, by supporting the European Commission's proposal and by implicitly accepting EPPO's interference in the national judicial organization, would admit that its capacity is *ipso facto* inadequate, insufficient or ineffective in the fight against crimes affecting the financial interests of the EU, although it might have successfully completed the transformation of its domestic judiciary, under EU pressures for harmonisation.

3. Federalism or reinforced cooperation?

The EPPO is often described by its nature as a federal tool. Its federal status stems from the character of the Union budget and of the need to protect the criminal prosecution authority which operates at a supranational level. Thus, the federal office shall be based on the fundamental assumption that violating the

interests of the EU as a whole should be treated as a problem of the whole community. Therefore, violations which harm the EU should be investigated throughout the EU by a specialized agency, with powers of investigation possible united with direct actions against suspects, and organized on a hierarchical structure of making a single decision. And such a clause is justified, no doubt, if we look at the structure of offences against the EU's financial interests, which have become significantly based on transnational networks that are not confined to the territory of a single member state.

Therefore, the Commission points out that because of this type of transnational criminality, the latter is not and actually cannot be treated with an effective national system of investigation and prosecution in criminal matters slowed down, this system being seemingly fragmented and ineffective. Furthermore, although the member states are required to penalise the financial abuses of the budget of the Union by the Convention concerning the protection of the financial interests of the European Communities (and additional protocols), they are far from achieving a unique standard for the protection of those interests. And these interests tend to pass on a backburner as importance in comparison with the direct financial interests of the member states. Tolerating this double-standard approach in prosecuting offences against the financial interests of the member states and of the EU would be a breach of the already existent obligations on their account, in the art. 325 alin. (2) TFEU. Legal provision requirements oblige member states to take the same measures to combat fraud committed against the financial interests of the Union and against their own financial interests (Erkelens *et al.*, 2015, p. 214).

We cannot, however, think at the EPPO as a clear example for federalist tendencies of the European Union. It is unprecedented that under art. 27 paragraph (1) of the Commission's proposal, both the European Prosecutor and the Delegated European Prosecutors will act directly in criminal proceedings — they have the same powers as national prosecutors relating to the prosecution and indictment. However, there are three solutions introduced in the legislative proposal that diminish the federal character of the institution.

Firstly, the *decentralized* structure of the Office, in close connection with the European Delegated Prosecutors from the national prosecutors. Secondly, the Commission did not propose a common federal system of criminal procedure, but is supported by national regulations sustained by automatic *mutual recognition* and a set of *principles of harmonization* (EC, 2013, Regulation Proposal).

Thirdly, it is not trying to introduce a system of criminal courts against the Union's financial interests, but remains limited only to a European Office competent only for investigation, prosecution and conviction of those responsible for committing fraud against the financial interests of the Union. Therefore, taking into account the model of the federal Office briefly presented above, the implications for the pattern and composition of the EPPO result rather from the use of reinforced cooperation. As, on the one hand, closer cooperation is a compromise designed to save the EPPO project and to enable its entering into force – in a more "diluted" manner or with a more diminished purpose – with the hope that it will



gain a broad recognition and thereby it will have its powers expanded in the future. On the other hand, the very logic of the Office would be challenged if it were to become just another territorially limited prosecution agency, like the national ones that are already operating within the European Union.

Furthermore, a Union divided into participative states and non-participative states, causes a partial applicability of the idea consisting in a single body able to take this competence in the field of investigation and follow-up within the member states to ensure a complex and effective decision-making. Judicial cooperation with non-participating states will not change in a fundamental manner: it will be achieved through existing legal mechanisms for cooperation but with a difference. It will replace the cooperation between two or more national judicial authorities of different member states with a new way of cooperation between the Office and the national judicial authorities of the non-participating Member States.

To sum up, the enhanced cooperation requires a new set of rules regarding the interaction and cooperation of the EPPO inside the Union, but free of its structure and competences. Therefore, it doesn't matter if there is a single member state that is non-participative, two or even more. The unity of the structure will be irrecoverably affected even if a single member state remains outside the European Public Prosecutor's Office.

4. The institutional structure

A hierarchical structure of the EPPO has more advantages in terms of efficiency, engaging a faster decision making process and a set of responsibilities that are much more clearly defined. The expected results would translate into significantly more convictions, as well as a better recovery of the prejudice created through defrauding the financial interests of the Union.

The institutional design of EPPO will determine its status, its prerogatives as well as its connection with other institutions at the union level. Since the first proposal referring to the establishment of this institution, launched and assumed by the *Corpus Juris*, there has been a general consensus on the necessity of its independence, in both directions: in relation to the national governments, as well as to the Union's institutions, in order to guarantee *ab initio*, a good governance and a fair *administration of the law* (Ligeti *et al.*, 2013, p. 12). Therefore, it diverges from the structure of the national systems, where the requirement of the prosecutor's independence can by no means be taken for granted: moreover, the prosecutor is generally accountable to the Ministry of Justice. Hierarchical subordination of the EPPO to any institution of the European Union or to national governments will raise serious questions about its legitimacy. The case for good governance concerns *stricto sensu*, avoiding possible political influences over the European Prosecutor's Office; the case for a fair administration of the law points to the need to avoid of any arbitrary utilisation of the powers conferred to the Prosecutor and to a greater protection of the member states in relation to EPPO decisions that might prove arbitrary. Similarly, no European institution should give instructions or exercise an effective control over the decisions of the European

Prosecutor, although there have been repeated calls for the member states' courts, rather than the European Court of Justice, to be granted the exercise of judicial control. Further, art. 3 paragraphs 1 and 2. (1) of the Commission proposal, in conjunction with art. 88 paragraph (3) TFEU are stating expressly that the authorisation and application of coercive measures will be the sole responsibility of the Member States in close cooperation with Europol, and in conjunction with art. 20 paragraph 1. (3) (a). (d) of the *Corpus Juris*, which pinpoints two aspects: *the measures relating to the notification of instituting judicial subject to authorization and those regarding the proofs do not.*

It is obvious that the objective of the Commission proposal is not to change what can be called a core feature of the Union, namely, that the latter, in itself, does not have coercive powers – as does the sovereign state – leaving them, as a compromise, to the member states (Erkelens *et al.*, 2015, p.127). This is justified by the need to achieve a balance between the independence of the Prosecutor and an effective democratic control exercised by an institution with a direct influence on citizens' rights and freedoms (Zwiers, 2011, p. 373).

Considerable attention in the context of the discussion regarding the establishment of such institutions is given to the European Prosecutor's relationship with national judicial systems, implying the need for a structural model to represent a minimum, a maximum, and an intermediate level of vertical integration.

Out of the two options - the centralized and the decentralized model for the EPPO - the European Commission opted for the latter. This is due to the fact that a fully centralised institution might not be feasible, today, given the outlook within the national judicial systems of the member states, and would undoubtedly hit insurmountable obstacles, taking into account the extensive powers granted to the Office, especially those referring to the training of national prosecutor's offices. Under the present circumstances, the institution in question will barely manage to take over the jurisdiction of the national authorities and to fulfil its objectives in an efficient manner, without having the support of the national judicial authorities (Erkelens *et al.*, 2015, p.170).

Without claiming to exhaust the entire range of theoretical models amenable to the future structure of the Office, three main models have been generally outlined in the literature (*collegiate model, centralized model, integrated model*), but a fourth was considered by the Commission: *the creation of EPPO within Eurojust* (EC, 2013, p. 32). This option involves creating a central Office within Eurojust, which would account for the structure of the European Prosecutor – Eurojust would act as a "mother agency." In institutional terms, it virtually would mean that Eurojust will literally accommodate the Office, by providing the infrastructure, framework and support services. Furthermore, Eurojust could provide the capacity and coordination relative to cross-border crimes which are prejudicial to the financial interests of the Union, and to those which are in close connection with other offences falling within the competence of Eurojust. The EPPO would have the exclusive power to conduct the investigations in cases dealing with the financial interests of the Union.



The EPPO's decision to initiate proceedings in national courts would require the approval of the College of Eurojust, which shall be composed of national members. Thus, the EPPO could not start prosecuting the suspects before the national courts, but instead would leave it to the national prosecutors, under the "lead" of the European Prosecutor.

Through this model, basically, the EPPO would become a part of Eurojust and would use its support functions (human resources, finance, IT, caseload). A limited number of staff will be transferred from OLAF to Eurojust, and the member states will have to allocate additional resources to the new institution. Finally, the role of Europol (Pradel *et al.*, 1999, p. 169) would remain unchanged: it will support Eurojust's efforts and hence those of the Office.

According to the second – collegiate model, EPPO would be structurally similar to Eurojust, so that the Office will be organised as a College of national members appointed by the member states, but with a clearer and stronger mandate for all members. The European Prosecutor's College would take most decisions regarding the investigation and prosecution of offences against the Union's financial interests committed on EU territory. A major drawback of this model is that national members would be granted more powers, as they should provide mandatory instructions to national prosecutors, as the model implies a close connection with the national judicial systems. The European Prosecutor will be directly entrusted with the task of conducting the investigation and prosecution of criminal offences, although, in practice, these activities will be coordinated by national delegated prosecutors, in EPPO's name. Eurojust's coordination function on this range of offences will be transferred to the European Prosecutor; moreover, it will create a specialised investigative department under the aegis of the new institution. The EPPO will be a legal entity separated from Eurojust, but nevertheless connected with it by the use of the latter's financial, administrative and operational resources. It also will benefit from the transfer of specialised staff from OLAF, which will provide administrative and investigative resources. While OLAF staff will continue to deal with functions that do not fall within the scope of the jurisdiction of the European Prosecutor, Europol will support the Office, in line with its ongoing general support and "intelligence" functions.

The third model, the one that has the most advantages, is the one of *integrated decentralisation*. Inspired by the principle of subsidiarity and based on the concept of decentralisation, the model advances a European Prosecutor's Office at the central level with a Chief Prosecutor who will exercise hierarchical supervision, and European Delegated Prosecutors (decentralised) belonging to the national systems and as such, located in member states, having full authority in the national legal system. The European Prosecutor will have *hierarchical power of instruction* over the delegated prosecutors.

In most cases, investigations and proceedings will be conducted at the decentralised level, but with the direct involvement of the European Prosecutor in the initiation of the investigation, and in sending the suspects for trial in national courts. Investigative measures will be conducted at the decentralised level, the led by the delegated prosecutors. A specialised investigative department at the central

level will also be created to coordinate investigative activities and, if necessary, to carry on itself investigative work, on behalf of EPPO, whose Delegated Prosecutors will in turn work with national criminal police units.

The European Public Prosecutor will be able to give instructions to the European Delegated Prosecutors, which, in turn, will cooperate with various national authorities (judicial and administrative, in particular) in order to carry out the instructions. The Office (acting through the delegated prosecutors) will be responsible for bringing the cases in the national courts. All the powers of the EPPO and those of Delegated European Prosecutors will be exerted in full compliance with the Charter of Fundamental Rights.

In this model, the European Public Prosecutor will be a legal entity distinct from Eurojust, but connected to it through the use of its operational, administrative and managerial resources. Moreover, the new institution will benefit from the transfer of specialised OLAF staff, while the rest of OLAF personnel will continue to fulfil functions that will be outside the jurisdiction of the European Prosecutor. Europol will also help in terms of analysis, general support and "intelligence".

In this model, all of the prosecutors and the rest of the staff from the Office will be recruited directly by the Prosecutor, while the Delegated European Prosecutors and the national investigators will continue to be recruited by the national authorities and dispatched to the EPPO headquarters. Consequently, the additional costs regarding transport, training, interpretation and translation will be borne by the European Public Prosecutor's Office (EC, 2013, p. 34).

Finally, the fourth, centralized model illustrates the creation of a Central Office with full legal and practical capacity to conduct investigations and prosecutions, independently of the similar activities at the national level. The investigative staff of the Office will have the prerogative to act on the ground without informing the member state's judicial authorities, except for the cases when prior authorisation is required. The EPPO staff will consist of a Chief Prosecutor, several prosecutors and staff at the central level, acting throughout the Union. The Centralized Office will act directly, by bringing the suspects before the national courts. In contrast with the collegiate, decentralised and integrated models, this will not be achieved by means of Delegated European Prosecutors nominated by the member states. All prosecutors and other personnel within the Office will be directly recruited.

The Office will be related to Eurojust (Craig and de Burca, 2008, p. 262) through organisational sharing of the latter's technical and support functions, such as HR, IT and the financial staff. A part of OLAF and Eurojust staff will be transferred to the Office to provide investigative and prosecution resources, pointing to the corresponding transfer of responsibilities from OLAF and Eurojust. Europol will provide support in terms of analysis, general support and "intelligence" (EC, 2013, p. 35).

All four options involve the creation of a close connection with Eurojust, since the Reform Treaty states that the European Public Prosecutor's Office is set up "from Eurojust". Under the umbrella of all four models, Eurojust and the Office will need to coexist and cooperate, but in a manner that takes into account the



differences in the functions and powers of each institution. Regarding the provision contained in art. 86 paragraf (2) TFEU – capable of generating numerous discussions and divergent interpretations – we briefly mention that it is preferable to adopt an interpretation based on the existence of two distinct institutions (with different powers, tasks and objectives) rather than of a logical and grammatical interpretation *stricto sensu*, which would see them merged in a single organisation, a perspective that was criticised over time (Council of the EU, 2002).

5. Judicial status and the organisation of the European Public Prosecutor's Office

By virtue of its role in providing consistency in the research activity and the prosecution of offences affecting the financial interests of the EU, the EPPO will be an independent body of the European Union with a decentralised structure and its own legal personality (EC, 2013, Regulation Proposal)

Its leadership will consist of the European Prosecutor, assisted by four deputies who will serve a 8-year term (EC, 2013, Regulation Proposal) without any possibility of renewal. The European Prosecutor will be appointed by simple majority by the Council, with the consent of the European Parliament, and may be removed from the Office in case of serious misconduct by the Court of Justice, on application by the Parliament, the Council or the Commission, institutions to which it is accountable, having to present annual reports (EC, 2013, Regulation Proposal).

In order to reduce costs and to make the criminal investigation and prosecution much more efficient, it was decided, in accordance with the principle of decentralisation that a European Delegated Prosecutor shall operate in every member state, for a 5-year renewable term. Each of them will act independently, without any obligations towards national authorities, although they will belong to the national judicial systems. The procedure for selecting and appointing the European Delegated Prosecutors requires that each member state submit a list of at least three candidates who enjoy a good reputation and a relevant professional experience at the EU level. In case they no longer fulfil the criteria applicable to the performance of their duties or they have been found guilty of serious misconduct, they can be dismissed by the European Public Prosecutor. On the other hand, should the national judicial authorities conclude that the Delegated Prosecutor is no longer professionally suitable, they are entitled to dismiss him or her only with the prior consent of the European Prosecutor.

In reality, the protection of this body from political influences was a necessity not only at European level, but also at the national one, as in most member states the prosecutors are under the authority of the Ministry of Justice. At the same time, the mechanism of protection of the member states from any arbitrary decision of the European Prosecutor should be functional, strongly asserting that no European institution should exercise any effective control over the Office; upholding the rights and freedoms of the citizens should, however, entail a minimal control over the EPPO by a EU institution.

According to art.11 of the regulation proposal of the EPPO, it has exclusive jurisdiction to investigate and prosecute offences against the financial interests of the Union. Such a jurisdiction would visibly affect the sovereignty of the member states, which would lose the right to investigate and prosecute similar acts.

The definition of "financial interests of the Union" in the draft Council regulation concerns all the revenues, expenses and assets covered, acquired by or owed to the Union budget and to the budgets of the institutions, organisms, offices and agencies established by virtue of the treaties, as well as to the budgets they manage and monitor.

However, if other offences are inextricably linked to those that fall within the scope of the Office material competence, and their joint investigation and prosecution are in the interest of a good administration of justice *in concreto*, they will be analysed together. The question of auxiliary competence becomes important in the context in which on the basis of the provisions of art. 13 of the regulation proposal in establishing the accessorial competence and in the occurrence of an eventual conflict of competences between the Office and the national authorities, the solution is not subject to any appeal (*de lege ferenda*, amending this article would be advisable). *Exempli gratia*, if an evasion crime regarding customs, worth 1 million EUR, that would involve several member states and non-EU countries, has not come to be prosecuted and convicted, and implicitly punished by any of the national authorities of the member states involved (EC, 2011).

Regarding the applicable procedural rules for the definition of competence, the option has been made for the criminal law systems of the member states. Thus, it will be left to the transposition and harmonisation mechanisms of each national public authority to stipulate the acts or omissions that affect the financial interests of the EU, as well as the subsequent sanctions. However, this offers no guarantees that, at the EU level, there will be a set of coherent and equitable rules regarding the enforcement of sanctions and the limitation period in terms of criminal liability. Consequently, there is a very high probability that, in such cases, according to the applicable provisions, criminal offenders would choose the place where to pursue criminal activity, using to their benefit the legislative vacuum.

The lack of clear statistics stating the need for the establishment of EPPO is due to the fact that OLAF, although it publishes annual reports containing relevant statistical information, does not receive enough data from the national authorities of the member states - their obligation is to report fraud in excess of 10000 EUR, which means that the offences under this threshold are not centralised at a European level (very few member states have statistics regarding the exact number of offences committed against the Union's financial interests- *exempli gratia* Romania and Poland collect this data type).

5.1. The admissibility of proofs

Of utmost importance is the identification of procedural framework on the admissibility of the evidence - in this case what rules of procedure will be applicable. One option would be to establish a combination of European law rules



and national rules of procedure, or rather a complete set of procedural rules of the European Community, in order to delimit the powers of investigation and prosecution of the EPPO. The answer lies in the willingness of the member states to "comunitise" all criminal procedures. Generally, attempts were made to avoid constructions like "supranational prosecutor's office" or "service of the European Prosecutor's Office" because they had a huge potential to create controversy and resistance among the member states.

Evidence administration and analysis will be established taking into account first of all the procedural guarantees relating to a fair trial and respect for the right to a real and effective defence. This will be a real challenge for the EPPO due to the fact that the proposal foresees a provision which ensures that evidence lawfully gathered in one member state shall be admissible in the courts of all participating member states, whether or not this is permitted in their procedural rules.

In analysing the levers to pursue judicial control of the acts of procedure adopted by the EPPO, it was motivated that, given the nature of this body, with a unique role in the European space, and in accordance with the provisions of art. 86 paragraph (3) TFEU, it is imperative to lay down special rules on the matter. However, even in the absence of such rules, it is still possible to have judicial control, as it is carried out at the level of each member state, in order to ensure a balance between the powers of the Union and the national powers. We emphasise, however, that national courts will not be able to refer the matter to the Court of Justice of the European Union to pronounce a preliminary decision concerning the assessment of the validity of acts of the EPPO (article 267 TFEU). As a matter of fact, the provisions of art. 36, in the manner in which it was formulated in the regulation proposal, stipulate that in a situation where national law becomes applicable in accordance with this regulation, such provisions shall be deemed for the purposes of the Union's legislation, art. 267 of the Treaty (EC, 2013, Regulation Proposal).

In analysing the hypothesis that one can assimilate the status of EPPO with the relevant national institutions, we can clearly distinguish that any acts of criminal investigation and prosecution by the Office will go beyond the control of the Court, with the opportunity, however, to approach it with preliminary questions concerning the interpretation of the regulation, including from the standpoint of the Charter of Fundamental Rights.

Once established, the national authorities will be requested by the European Public Prosecutor's Office to carry out investigations under its authority, meet deadlines, and ensure full cooperation and coordination with EPPO. Although the European Commission has announced its intention to also introduce, in parallel, a regulation reforming Eurojust, the legal and practical issues such as the resolution of conflicts of jurisdiction, admissibility of evidence, and defence rights are still topics which the initiative must also address. As Jan Albracht, Greens/EFA group spokesperson on justice and home affairs, stated defence rights are vital in "the importance of ensuring uniform and consistent rights for defendants so legal standards cannot be circumvented by picking and choosing the legal regime most favourable to a case" (Jan Albracht, 2015).



Conclusions

The legitimate goal of establishing a novel European actor, a European Public Prosecutor's Office, is subordinated to the obligation of the member states to combat criminal activities detrimental to the European Union and to effectively penalise fraud against the financial interests and the budget of the Union.

The prospect of the entry into force of this proposal puts the member states in a position to accept tacitly that later it could expand, *volens nolens*, EU jurisdiction to other offences with a pronounced cross-border character. In fact, does the EU want the creation of a supranational prosecutor's office, a real European Public Ministry with extensive powers and, consequently, an advanced level of integration on Pillar III?

In the event of a failure, the alarm signal will be perceived, perhaps leading to the adoption of a new regulatory framework – an effort that would be conducted so as to head off the opposition from member states.

To sum up, the European Public Prosecutor's Office will have an important role in taking on, assessing and monitoring the cases within its competence. Eurojust will continue to work, on the basis of its competence, independently from the EPPO and will be of substantial use in the cases management, together with the competent national authorities, and in bringing cases to the appropriate national courts. Finally, Eurojust works with the national authorities in the member states in a collegial and horizontal manner, facilitating an enhanced coordination and cooperation.

According to the experience of OLAF, offences against the financial interests of the Union are increasingly less confined to a single member state and tend to have a cross-border dimension. In these circumstances the European Public Prosecutor's Office would operate at a supranational level and would be, by its very nature, a *federal instrument*, given the federal character of the EU budget. As a consequence of the principle of subsidiarity, we observe, however, that the federal dimension of the institution itself is mitigated by a set of factors such as: the adoption of a decentralized model; the establishing of European Delegated Prosecutors that will remain national prosecutors under the control of national judicial systems; the special competence of the national courts and, ultimately, the judicial control exercised by the national courts.

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