

# A Decentralised European Public Prosecutor's Office: Contradiction in Terms – or Highly Workable Solution?

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## Article

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The creation of a European Public Prosecutor's Office seems now to be in sight, at least from an EU-constitutional point of view. However, there appear to be two major stumbling blocks, which can be summarised as austerity and complexity. Within the climate of financial austerity in the EU, the *Zeitgeist* provokes considerations of reduction and economy rather than expansion and creation of new EU institutions on a vertical scale. Finding a politically palatable solution will require not only political will (and/or a sudden event precipitating the need for an EPPO) but will also call for creativity in execution. All the more so, when one considers the complexity of the EU institutional structure and the fast-evolving nature of the European criminal law framework, which deepen the challenge.

From an EU-constitutional point of view, Arts. 85 and 86 of the Treaty on the Functioning of the European Union now appear in the chapter on judicial cooperation in criminal matters of the Treaty on the Functioning of the European Union.<sup>1</sup> They deal with the possible extension of Eurojust's powers<sup>2</sup> and with the conditions for the creation of a European Public Prosecutor's Office (EPPO). The need for the strengthening of Eurojust and for the creation of an EPPO is being argued through position papers and impact assessments. Nilsson<sup>3</sup> comments:

I believe that we will have to make a real impact assessment, and not only an evaluation on the functioning of Eurojust, and in particular see whether there is a need for an EPP in the light of how Eurojust works and how judicial cooperation in the protection of the financial interests of the Union works. Member States will not, at the present stage, be prepared to go through what will be the extremely complex and no doubt very lengthy discussions that will be required before an EPP can start to function, unless a real need has been demonstrated in an unambiguous manner.

Since the original model for European public prosecution was formulated in 1997, European criminal law has progressed. The EU now has a European Arrest Warrant<sup>4</sup> and a European Evidence Warrant,<sup>5</sup> even if the latter is restricted in functionality and has only been implemented by two Member States. A draft European Investigation Order<sup>6</sup> is now on the table to replace the European Evidence Warrant. More convergence is expected with a set of EU procedural rights: it has been argued that harmonisation was necessary to create the conditions of mutual trust necessary for the smooth functioning of mutual recognition. The Charter of EU Fundamental Rights is now an integral part of the EU Treaty, and the EU is on the road to becoming a party to the European Convention on Human Rights.<sup>7</sup>

Still on the legislative front, a 2011 Communication from the Commission on the protection of the financial interests of the European Union by criminal law and by administrative investigations states that "a reflection will be conducted on the strengthening of the role that bodies at a European level – including OLAF, Eurojust and – alternatively or cumulatively – a possible EPPO may play to better investigate, prosecute and assist in cases of crime at the expense of EU public money."<sup>8</sup> The Communication goes on to say "the European Union stands at a crossroads. Work needs to be undertaken at three levels: procedures, substantive criminal law and institutional aspects." One could argue that these three aspects are indeed developing – European Criminal Law is highly dynamic<sup>9</sup> – but it is in their coordination that the challenge rests.

Efforts to harmonise substantive criminal law are also going forward. There are plans to repeal at least parts of the PIF Convention<sup>10</sup> and its protocols<sup>11</sup> in favour of a directive dealing with substantive criminal law aspects. The original proposal for a directive on the criminal law protection of the Community's financial interests in 2001<sup>12</sup> had argued that the EU Member States were too slow in ratifying the PIF Convention and its protocols and that third pillar instruments needed to be replaced by a first pillar instrument (a directive), despite the limitations inherent in the then Art. 280(4) TEU. It proposed to introduce common definitions for offences such as fraud, corruption, and money laundering. Rules including a duty of the Member States to criminalise certain behaviour and the liability of legal persons were included as well as rules on penalties.

This proposal was subsequently heavily amended in 2002.<sup>13</sup> As of 2012, a new comprehensive draft based on Art. 325 TFEU is under discussion.

The Commission believes that the directive would allow for greater amounts of money to be recovered from criminals for the benefit of EU policy making. In addition to this directive, another proposed directive would in time harmonise procedure. Another instrument on administrative and criminal law cooperation between competent national authorities including OLAF has also been planned for the period leading up to 2013.

Institutional aspects are also evolving. Eurojust has recently been granted more powers and is awaiting a change to its legal framework connected with Art. 85 TFEU. Europol's legal framework has been amended. OLAF's legal framework has been under discussion since 2004. In addition, numerous suggestions have been advanced for the implementation of Arts. 85 and 86 TFEU. Options are therefore open.

Given this policy context, which way(s) forward for an EPPO? This paper argues that, in the implementation of Arts. 85/86 TFEU, a step-by-step approach should be possible. A half-way house between coordination on the one hand, and a vertical, centralised structure on the other, could present a pragmatic and yet effective compromise, which could perhaps be more appealing (or less repulsive) to the EU Member States.

In order to facilitate reflection, three 'scenarios' are summarised in Table 1 below and are discussed in the following sections of the paper. It is clear that many variations of these three scenarios would be possible, but here only ideal types have been retained: horizontal, decentralised, and vertical (see 2). Some legal, research, and historical background is given first.

## I. Two hats not better than one? Recalling the original proposal for a EPP

The original, classic, and ideal model of a European Public Prosecutor (EPP) can be found in the *Corpus Juris* study, directed by Delmas-Marty and published in 1997<sup>14</sup> as well as in a follow-up study in 2000.<sup>15</sup> In these early studies, a central EPP was envisaged (based on the French prosecuting model), with subordinated, delegated European Public Prosecutors responsible for the investigation and prosecution of EU fraud in the EU Member States.

These delegated prosecutors would wear two hats, in the sense that they would apply national law in national cases but would apply another set of EU-wide substantive and procedural criminal law rules for offences affecting the EU budget found in the *Corpus Juris*. The EPP would be independent from the Member States' governments and would have the authority to act on its own initiative. The procedure for appointment, it was suggested, would be nomination by the Commission and a decision by the Council under qualified majority. The office holder could have a non-renewal term of six years. The follow-up study of 2000, in particular, stressed at length the need to adopt an EPP, *inter alia* because of the complexity of horizontal cooperation, the diversity of competent authorities, the heterogeneous nature of legal instruments, the diversity of rules of evidence, and the lack of admissibility of evidence obtained abroad.<sup>16</sup> Some of these issues have now been dealt with outside the sphere of the EPP project, through mutual recognition instruments.

The Commission itself first mooted the idea of an EPP in 2000, stating that some harmonisation of criminal law would be necessary, although the proposal was not taken up in the Treaty of Nice. In 2001, a Commission Green Paper on the criminal law protection of the financial interests of the Community and the establishment of a European Prosecutor was published.<sup>17</sup>

The EPP proposal was controversial from the beginning because several Member States felt that such a post would undermine national sovereignty in justice matters. Some also felt that there were problems of accountability and of ensuring a fair trial for the accused and doubted the utility of the post. In 2003, a follow-up report summarised responses from the EU Member States to the Green Paper.<sup>18</sup> At that time, Belgium, Greece, The Netherlands, Portugal, and Spain were in favour of a European Public Prosecutor whilst Austria, Denmark, Finland, France, Ireland, and the United Kingdom were opposed. The remaining Member States, including Germany, Italy, Luxembourg, and Sweden, had their doubts.<sup>19</sup>

In 2005, the proposed Constitutional Treaty contained a provision enabling the Council to set up a European Public Prosecutor by means of a unanimous decision. The remit of the EPP would initially be limited to “combating crimes affecting the financial interests of the Union.”<sup>20</sup> However, the proposed Constitutional Treaty never came into force and the wording was amended in the Lisbon Treaty.

The Stockholm Programme mentions the EPPO in its part on criminal law:<sup>21</sup>

In the field of judicial cooperation, the European Council emphasises the need for Member States and Eurojust to implement thoroughly Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust, which, together with the Lisbon Treaty, offers an opportunity for the further development of Eurojust in the coming years, including in relation to initiation of investigations and resolving conflicts of competence. On the basis of an assessment of the implementation of this instrument, new possibilities could be considered in accordance with the relevant provisions of the Treaty, including giving further powers to the Eurojust national members, reinforcement of the powers of the College of Eurojust or the setting-up of a European Public Prosecutor.

The Action Plan of the Stockholm Programme foresees a legislative proposal for a regulation, providing Eurojust with powers to initiate investigations, making Eurojust’s internal structure more efficient and involving the European Parliament and national parliaments in the evaluation of Eurojust’s activities by 2012.<sup>22</sup> This will be followed by a Communication on the establishment of a European Public Prosecutor’s Office from Eurojust by 2013.<sup>23</sup>

The House of Lords, however, perceived a disparity between the Stockholm Programme and its Action Plan:

The Stockholm Programme was agreed by the European Council in 2009 and the Commission was invited to present an action plan in order to translate the aims and priorities of the programme into concrete points. As is made clear in the Government’s explanatory memorandum on the action plan, we believe that there are a number of aspects in which the action plan differs markedly from the agreed Stockholm Programme. It was because of this disparity that the Government signed up to the Council conclusions on the Stockholm Action Plan in June. These conclusions, as you will be aware, propose only those actions that fully conform to the Stockholm Programme. The conclusions in many ways sent a clear message to the Commission: that it should not underline the role of national governments in setting the agenda for the EU work on justice and home affairs by departing from the decisions of heads of government.<sup>24</sup>

In 2010, the European Parliament called on the Commission to consult interested stakeholders, including civil society, on all aspects related to the creation of an EPPO to combat crimes affecting the financial interests of the European Union and to step up the adoption of all necessary measures for establishing this office.<sup>25</sup> The same year, the European Commission presented to the European Parliament’s budgetary control committee a reflection paper on the reform of OLAF, which mentioned that the EPPO and the consolidation of the existing anti-fraud legislation needed a thorough impact assessment.

It is clear that any proposal for the creation of a further consolidation of Eurojust and/or the creation of an EPPO should take into account the mutual recognition *acquis*, which did not exist when the *Corpus Juris*

study was first conceived. A fresh perspective is needed, obviating the need for the “two hats” approach adopted in the original *Corpus Juris* study.

## II. Three scenarios for moving forward on Arts. 85/86 TFEU

Scenarios	New powers / structure	Institution-building	European Criminal Law	Budget	Possible advantages / disadvantages.
<p><u>Scenario 1.</u> Eurojust reinforced. Art. 85 TFEU (progressive increase of powers, consolidation)</p>	Reinforced coordination by Eurojust	No new institution; Eurojust is reinforced	Continued focus on mutual recognition	Member States administration only from EU budget	Close to the present development path of Eurojust. Politically palatable. But might not be much more effective than current arrangements?
<p><u>Scenario 2.</u></p> <p>Decentralised EPPO. Based on national resources (not above them). Horizontal integration.</p> <p>Art. 85 TFEU at first, making progress towards a more centralised model under Art. 86 TFEU possible.</p>	Reinforced cooperation; heads of national authorities are appointed as nationally-based European public prosecutors (NEPPs). At the EU level, they form a college, with a rotating chair. No overarching “head” at the European level.	“Soft centre” located in Eurojust, with rotating chair	Focus both on mutual recognition and harmonisation	EU budget partly financing EPPOs in Member States and financing rotating chair	Possibly the best basis for operational cooperation. However not widely discussed. Could be seen as a “spoiler” for scenarios 1 and 2.
<p><u>Scenario 3.</u></p> <p>Centralised EPPO based on Art. 86 TFEU.</p> <p>Vertical integration.</p> <p>Original <i>Corpus Juris</i>.</p>	Reinforced cooperation. The EPPO appoints certain national prosecutors as EEPs, subordinated to a central European office. Europol and OLAF also work for the central EPPO, staffed by EU officials.	A new, central institution “from Eurojust,” financed from the EU budget	Maximum harmonisation of criminal law.	EU budget	Considerable symbolic significance. Political resistance. Not all Member States involved. Queries over effectiveness.

## Scenario 1: Reinforced horizontal cooperation under Art. 85 TFEU

Art. 85(1) TFEU confirms the horizontal cooperation role of Eurojust. Its mission is to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases, on the basis of operations conducted and information supplied by the Member States' authorities and by Europol. This enshrines Eurojust's role in the Treaty and opens up possibilities:

In this context, the European Parliament and the Council by means of regulations adopted in accordance with the ordinary legislative procedure shall determine Eurojust's structure, operation, field of action and tasks. These tasks may include: (a) the initiation of criminal investigations, as well as proposing the initiation of prosecutions conducted by competent national authorities, particularly those relating to offences against the financial interest of the Union; (b) the coordination of investigations and prosecutions referred to in point (a); (c) the strengthening of judicial cooperation, including by resolution of conflicts of jurisdiction and by close cooperation with the European Judicial Network. Those regulations shall also determine arrangements for involving the European Parliament and national Parliaments in the evaluation of Eurojust's activities. (Art. 85(1) TFEU)

Art. 85(2) clarifies that, in the prosecutions referred to in paragraph 1, and without prejudice to Art. 86, formal acts of judicial procedure shall be carried out by the competent national officials. Art. 85(2), however, does not indicate the type of relationship there should be between the initiator of criminal investigations and prosecutions related to the financial interests of the European Union and the competent national authorities. The future structure of Eurojust is therefore left open.

### a) "Initiating" investigations and prosecutions

Art. 85 TFEU makes it clear that, although Eurojust's general powers may be reinforced as far as coordination and the resolution of conflicts is concerned, it may be granted a power to initiate investigations or prosecutions in the future in relation to offences against the financial interests of the EU. This power is of pivotal importance. One interpretation of Art. 85(a) is that Eurojust would initiate investigations and prosecutions in the area of the protection of the financial interests of the European Union, instructing national judicial officials to carry out formal acts of judicial procedure. A "softer" interpretation might be that Eurojust would consolidate its present possibility to request that judicial authorities should act, as discussed below.

At present, Eurojust may *request*<sup>26</sup> the competent authorities of the Member States concerned, that they should:

1. Undertake an investigation or prosecution of specific acts;
2. Accept that one of them may be in a better position to undertake an investigation or to prosecute specific acts;
3. Coordinate between the competent authorities of the Member States concerned;
4. Set up a joint investigation team in keeping with the relevant cooperation instruments;
5. Provide it with any information that is necessary for it to carry out its tasks;
6. Take special investigative measures;
7. Take any other measure justified for the investigation or prosecution.<sup>27</sup>

Art. 17(7) of the Framework Decision on the European Arrest Warrant<sup>28</sup> also requires Member States to notify Eurojust whenever they cannot execute a warrant on time. Eurojust can also advise in situations where there are multiple conflicting arrest warrants.<sup>29</sup>

It is not clear how successful Eurojust has been in the past in *ensuring*<sup>30</sup> that an investigation or prosecution be undertaken by a Member State authority, following a request. Zwiers has explored this issue:

Although neither the national members nor the College can properly initiate prosecutions under the Eurojust Decision, the agency's requests cannot be refused by the Member States without them owing an explanation (save for reasons of national security or hampering ongoing investigations). The former Eurojust President called Eurojust an 'empowered' network because of this semi-authority that its requests have. It is also suggested that Eurojust could seek political pressure on uncooperative Member States authorities by including data of compliance with its requests in its annual reports.<sup>31</sup>

Zwiers goes on to add that such requests were rare. In 2007, one request to investigate/prosecute and one request to cede jurisdiction were made by a national member, and one request to cede jurisdiction was made by the College.<sup>32</sup> Perhaps Eurojust should be given more time to develop the practice of asking Member States to initiate investigations and prosecutions and to monitor their responses through its Annual Report. This could form a useful aspect of reinforced horizontal cooperation (scenario 1).

How easy would it be for Eurojust to actually ensure that investigations or prosecutions are initiated? Eurojust's national members are seconded from the EU Member States. Neither national members nor the College have the power to investigate, prosecute, or bring to trial the suspects of criminal offences with a transnational dimension. This would therefore involve a radical change in Eurojust's relations with the Member States and in its legal framework.

At present, Eurojust has limited powers that can be exercised in urgent cases. Its national members can authorise and coordinate controlled deliveries in their Member State. They can also execute, in relation to their Member State, a request for or a decision on judicial cooperation, including in regard to instruments giving effect to the principle of mutual recognition. This (little used) capacity to act in urgent cases only applies whenever national members cannot identify or contact the competent national authority in a timely manner.

A national member may set up a Joint Investigation Team in keeping with the relevant cooperation instruments,<sup>33</sup> Eurojust may also do this, acting as a College.<sup>34</sup> National members of Eurojust can also take part in Joint Investigation Teams as a national competent authority or on behalf of Eurojust.<sup>35</sup>

There could be an incremental approach to the initiation of investigations and prosecutions. Nilsson has suggested that Eurojust could be granted a selective power to initiate investigations or prosecutions in urgent cases and/or in cases where a Joint Investigation Team is involved. This would serve to reinforce existing mechanisms and consolidate Eurojust (see scenario 1 in the table). This would also mean that, in the short term, Eurojust would be further consolidated and it would allow for new mechanisms to be tested.

Yet, to formally initiate criminal investigations and prosecutions in a more routine way, one must assume that Eurojust would need to have access to its own criminal investigation resources. At present, Europol only deals with information analysis whilst OLAF, a European Commission Directorate-General, carries out administrative investigations to further the protection of the financial interests of the European Union. Were OLAF investigations and Europol resources to be subordinated to Eurojust, so that it could initiate investigations and prosecutions, Eurojust could then become a type of EPPO under Art. 85 (1) (a) TFEU. It is unclear, however, whether this is what is intended, since Art. 86 TFEU makes provision for the creation of an EPPO from Eurojust on the basis of unanimity.

Given the wording of Art. 85 TFEU, it is also possible to conceive of a Eurojust with reinforced powers under Art. 85(1) (b) and (c) only (as a first step). It would entail a progressive reinforcement of Eurojust with respect to coordination and the resolution of conflicts. The initiation of investigations and prosecutions would be left to a later date – as soon as supporting legislation could be put in place – when this would add value to the function or coordination of criminal investigations and prosecutions currently exercised by Eurojust. The protection of the financial interests of the EU could benefit from a general reinforcement of Eurojust under Art. 85(1)(b) and (c). Eurojust could also start monitoring responses to the requests to investigate or prosecute that it sends to Member States' authorities.

This would be a cautious rather than an adventurous approach, which could leave room for future development, focused on the protection of the financial interests (as shown in scenario 1 in table 1 above), which includes a consolidation in the area of horizontal coordination.

## b) Coordinating investigations and prosecutions

A national coordination system has already been set up by Eurojust. National correspondents for Eurojust facilitate the transmission of information and the allocation of work to Eurojust and to the European Judicial Network. The correspondents also assist national members in identifying relevant authorities for the execution of requests for judicial cooperation and maintain close relations with the Europol national unit.<sup>36</sup> This system has only recently been put in place and needs to be put to the test. It could be valuable in urgent cases and perhaps it could be reinforced. For example, it could be envisaged that part of the (rather elaborate) contact point system in existence could focus on the protection of the financial interests of the EU.

Another way in which Eurojust could be consolidated is to provide for OLAF to compulsorily communicate certain cases to Eurojust. The latest draft of amended Regulation 1073/99 proposes that “where this may support and strengthen coordination and cooperation between national investigating and prosecuting authorities, or when the Office has forwarded to the competent authorities in the Member States information giving grounds for suspecting the existence of fraud, corruption and any other illegal activity referred to in Art. 1 in the form of serious crime, it shall transmit relevant information to Eurojust, whenever this information is within the mandate of Eurojust.”

## c) Resolving conflicts of jurisdiction

The ninth preamble to the Eurojust Decision states that the role of the College should be enhanced in cases of conflict of jurisdiction – and in cases of recurrent refusals or difficulties concerning the execution of requests for, and decisions

on, judicial cooperation.

At present, Eurojust (acting as a College) can resolve conflicts of jurisdiction between two or more Member States in relation to investigations and prosecutions<sup>37</sup> whenever Member States request assistance.<sup>38</sup> Where two or more national members cannot agree on how to resolve a case of conflict of jurisdiction, the College is asked to issue a written non-binding opinion on the case. The opinion of the College is then promptly forwarded to the Member States concerned.<sup>39</sup> Such opinions could become binding in relation to cases affecting the protection of the financial interests of the European Union.

Assuming a continuation of horizontal cooperation, no new institution would be created and Eurojust would continue to be financed according to present arrangements. One advantage would be the introduction of incremental changes and the possibility of monitoring the responses to such incremental changes from the Member States and OLAF.

Going beyond this, it is possible to envisage a decentralised model under Art. 85 TFEU, which would focus on reinforcing the Member States' capacity to deal with EU fraud.

## Scenario 2: A decentralised service under Art. 85 TFEU

Perhaps a flatter structure – more cooperative and (in operational terms) more integrated – could do more to encourage the protection of the financial interests of the EU (scenario 2 in table 1). Such a development could follow on from Scenario 1.

Heads of (relevant) prosecution services in the Member States could be designated as the national members of the EPPO (henceforth NEPPs – nationally-based European public prosecutors). They would be given a specific responsibility for the protection of the EU financial interests<sup>40</sup> by their governments (as agreed in the Council of the European Union under Art. 325 TFEU). Such an arrangement would overcome the potential weakness of designating national staff whose members do not have effective command over all the resources that might be needed. The important thing is not to detach the European level from national resources.

Each NEPP would designate a deputy and a staff to hold responsibilities on a day-to-day basis. The latter would maintain face-to-face relations with top-level prosecutors/managers who implement decisions to prosecute. The legal obligation would remain with the NEPPs for investigation and prosecution, which would mean that *all* national resources would have a role to play. This would be in keeping with Art. 85 TFEU, which requires that prosecutions be carried out by national prosecution authorities.

There is no reason why some of the heads, deputies, and staff should not have a desk in a central office (the EPPO in a physical sense). At other times, however, they could communicate with their peers in other Member States via secure telephone messaging systems and – when needed for clarification of issues – by means of video conferencing. The NEPPs would receive some financing from the EU budget to reinforce their action in the fight against EU fraud, as a recognition of the importance of this action in the Member States. A central coordination (a 'soft centre') could also be financed from the EU budget. From the point of view of costs, it is possible that some Member States might have less objections to this arrangement than to the financing an EPPO under Art. 86 TFEU.

A central office could share a secretariat with Eurojust and the European Judicial Network, at least initially, and could be chaired by the EU Member States on a rotating basis. However, the central office would not carry out investigations and would not therefore need to be subjected to judicial review (unlike an EPPO set up under Art. 86 TFEU – see scenario 3 below). As Inghelram pointed out, the requirement for judicial review "is based on the assumption that, in line with Art. 86(2) TFEU, an EPPO will itself be responsible for carrying out investigations, even if coercive measures related to these investigations are carried out by other authorities. Individuals affected by acts performed during such investigations therefore seem entitled, for the purposes of judicial review, to consider themselves affected by acts of the EPPO itself, as a general rule. The situation would be different if an EPPO only had the power to coordinate investigations carried out by others or the power to propose or suggest to other authorities that investigations be carried out."<sup>41</sup>

With a decentralised EPPO, the applicable rules concerning the admissibility of evidence and the procedural review of procedural measures could continue to be the rules adopted under mutual recognition. In that scenario, the adoption of measures, such as the European Investigation Order, would play an important role. But would this be enough to make a difference to the practical functioning of anti-fraud investigations and prosecution?

A decentralised EPPO could be seen more as giving further leverage to the progress already made by mutual recognition. It answers those concerned about subsidiarity and, in the present climate of austerity, it can be seen as being attentive to concerns over costs. Progression to a “vertical” EPPO (scenario 3 in table 1) could be considered with time, based on the progress of NEPPs throughout the EU. If so doing, the EPPO could build upon the NEPPs’ experience with investigations and prosecutions using the resources of the Member States.

One objection might be that such an arrangement would have consequences differing little from the present situation, in which – some of those active in Institutions allege – EU frauds are not taken as seriously as national frauds. That, however, would be to misunderstand the situation on two levels.

First, as practitioners know, it is *fraud in general* (i.e. including fraud at the national level) that is not always taken as seriously as other issues. This needs to and can be addressed through the present proposal. By conjoining the prosecution resources applied to national and to EU frauds, and by signalling the political importance of both, more vigorous action would be encouraged on both fronts. This path could have the advantage of highlighting and energising anti-fraud work in general. That could only be for the good, both in operational terms and as a step towards further steps, as outlined above.

Second, any division of operational work into separate agencies, arranged at different “levels,” is simply asking for inefficiency, misunderstanding, and delay. Better to contract the levels into just one; and that is most simply done by building on what is already there.

### Scenario 3: A “vertical” office under Art. 86 TFEU

The first paragraph of Art. 86 TFEU states that, in order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted with a special legislative procedure, may establish a European Public Prosecutor’s Office from Eurojust.

“From Eurojust” opens up a number of possibilities. The 2004 House of Lords enquiry on the EPP opined that (a) the EPP should oversee Eurojust;

(b) that Eurojust itself would take on the role of the European Public Prosecutor; or that the European Public Prosecutor, while a separate body, would join the Eurojust College as an extra member. However, Eurojust’s competence being much wider than the proposed initial competence of the EPP, it seems unlikely that the latter would oversee the former.

Current thinking is as follows:

1. The development of Eurojust and the creation of an EPPO could continue in parallel;
2. A step-by-step approach could include initially evaluating the revised Eurojust Decision, exploring further the developments under Art. 85 TFEU, and then discussing the establishment of an EPPO from Eurojust in accordance with Art. 86;
3. Possibly setting up a new institution, only loosely connected to Eurojust.

In any case, there would be a link with Eurojust.

Art. 86 also provides that the Council shall act unanimously after obtaining the consent of the European Parliament. This renders the creation of an EU-wide EPPO unlikely, as some Member States are reluctant and/or would have to opt in and/or submit an EPPO proposal for a referendum. Art. 86 TFEU goes on to say that, in the absence of unanimity in the Council, a group of at least nine Member States may request that the

draft regulation be referred to the European Council. In this case, the procedure in the Council would be suspended. After discussion, and in case of a consensus, the European Council would then refer the draft back to the Council for adoption within four months.

It is unclear at present whether there might be nine Member States interested in going forward, although Belgium, Luxembourg, The Netherlands, and Spain have recently expressed interest. The nine-Member-State “reinforced cooperation”- scenario seems the most likely and could proceed on the basis of Arts. 20(2) and 329(1) TEU. This would be contingent on a number of issues being resolved. Nilsson has argued that “setting aside any changes to their own Constitutions (and it is highly likely that nearly all Member States will have to do that) and the complicated procedures to achieve an enhanced cooperation, the Member States will still have to agree on (i) the general rules applicable to the EPPO, (ii) the conditions governing the performance of its functions, (iii) the rules of procedure applicable to its activities (iv) the rules of procedure governing the admissibility of evidence and (v) the rules applicable to the judicial review of procedural measures taken by the EPPO in the performance of its functions.”<sup>42</sup>

Some learned commentators have argued that harmonisation of criminal law needs to go much further in the context of Art. 86.<sup>43</sup> Art. 86(3) states that regulations will determine the general rules applicable to the European Public Prosecutor’s Office, the conditions governing the performance of its functions, the rules of procedure applicable to its activities as well as those governing the admissibility of evidence and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions. The revised proposal for a directive on the criminal law protection of the EU financial interests under Art. 325(4) TFEU may help to make progress on this count.

Another question concerns the articulation of activities of the European Public Prosecutor’s Office with the investigation and prosecution authorities of the Member States and with its EU partners, Europol and OLAF.

## Conclusion: progressive implementation of Arts. 85 and 86 TFEU

After Lisbon, the debate remains in a state of flux. Suggestions have included the following:

1. A progressive transformation of Eurojust, given the existing college and its national members more powers;
2. The creation of an EPPO distinct from Eurojust but using Eurojust expertise;
3. The creation of an EPPO as a specialised unit within Eurojust;
4. A merger of Eurojust and the EPPO, with their respective decision-making mechanisms.<sup>44</sup>

The Bruges Seminar<sup>45</sup> also suggested some other possible combinations: the EPPO could sit in the Eurojust College whenever matters related to the protection of the financial interests of the Union are discussed or nine national members from the participating states could become deputy European Public Prosecutors. The EPPO could also work as a “mini-college.” Suggestions are legion.

This paper has suggested that, in order to make practical progress, two questions need to be untangled: a legal and political question about the relations between Arts. 85 and 86 as well as a question that is not only legal and political but also more practically focused on effective (and cost-effective) use of investigative and prosecution resources.

This paper has argued that Arts. 85 and 86 TFEU allow for the possibility of a staged development of the investigation and prosecution of crimes to the detriment of the financial interests of the EU. Thus, it may be

possible to start off with a reinforcement of Eurojust whilst the legal instruments deemed to be necessary for the smooth running of a more centralised structure are being adopted.

Further progress and the adoption of the European Investigation Order, in particular, may then make it possible to extend an Art. 85-based EPPO to an Art. 86-based EPPO with a wider competence. Art. 86(4) TFEU states that the European Council may adopt a decision extending the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension. The European Council would act anonymously after obtaining the consent of the European Parliament and after consulting the Commission.

Alternatively, action under Art. 85 could move in the direction of a decentralised EPP, constituted by heads of national prosecution services. Designating them as national EPPs (NEPPs) would lend the resources they command to the protection of the financial interests of the EU. Implementing such a strategy would require some thought, especially considering the variations in structure, governance, accountability, and occupational culture of the prosecution services within Member States. However, it might turn out to be a quite direct route towards applying national prosecution (and, by implication, investigation) resources to the protection of EU financial interests. Decentralisation is discussed and indeed implemented in some other areas of EU policy (for example, competition), and there seems no reason not to consider it here, alongside proposals for a centralised EPPO and the "half-way house" that could be offered by Eurojust.

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1. O.J. C 115, 2008, Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union. ↵
  2. Eurojust was set up by Council Decision 2002/187/JHA (O.J. L 63, 2000, p. 1) as a body of the European Union to stimulate and to improve coordination and cooperation between competent judicial authorities of the Member States. This Decision was subsequently amended by Council Decision 2003/659/JHA (O.J. L 245, 2003, p. 44) and Council Decision 2009/426/JHA (O.J. L 138, 2009, p. 14). See [http://www.euro-just.europa.eu/press\\_releases/annual\\_reports/2010/Annual\\_Report\\_2010\\_EN.pdf](http://www.euro-just.europa.eu/press_releases/annual_reports/2010/Annual_Report_2010_EN.pdf) ↵
  3. H. Nilsson (2011) Judicial cooperation in the EU: Eurojust and the European Public Prosecutor. ↵
  4. Framework Decision 2002/584/JHA, O.J. L 190, 2002, p. 1. ↵
  5. Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters O.J. L 350, 2008, p. 72. ↵
  6. See, for example, J. Blackstock, The European Investigation Order, *New Journal of European Criminal Law*, 2010, Vol. 1, 4, pp. 481-498; A. Farries, The European Investigation Order, Stepping forward with care, *New Journal of European Criminal Law*, 2010, Vol. 1, 4, pp. 425-432. ↵
  7. S. White, The EU's accession to the Convention on Human Rights: A new era of closer cooperation between the Council of Europe and the EU? *New Journal of European Criminal Law*, 2010, Vol. 1, 4, pp. 425-432; T. Lock, A critical account of the accession of the European Union to the European Convention on Human Rights, *JUSTICE journal*, 2011, Vol. 8, No. 2, pp. 11-30; S. White, Accession of the European Union to the European Convention on Human Rights, *JUSTICE journal*, 2011, Vol. 8, No. 2, pp. 58-70. ↵
  8. COM(2011) 293, pp. 8-9. 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. ↵
  9. See V. Mitsilegas, *European Criminal Law – Modern studies in European Law*, 2009, No. 17, Hart Pubs; A. Klip, *European Criminal Law: An integrative approach*, Antwerp, Oxford, Portland: Intersentia (<http://www.intersentia.be/>), *Ius Communitatis* Vol 2, 2009. ↵
  10. Convention on the Protection of the European Communities' financial interests of 26 July 1995, O.J. C 316, 1995. ↵
  11. First Protocol of 27 September 1996 PJ 51996) C 313; Protocol of 29 November 1996, O.J. C 151, 1997; and Protocol of 19 June 1997 O.J. C 221, 1997. ↵
  12. COM(2001) 272. ↵
  13. COM(2002) 577. ↵
  14. M. Delmas-Marty, *Corpus Juris* introducing penal provisions for the purpose of the financial interests of the European Union, 1997, Paris, Economica; see also House of Lords, Prosecuting Fraud on the Community's finances – the *Corpus Juris*, 9th Report, 1998-99, HL Paper 62. ↵
  15. M. Delmas-Marty and J.A.E. Vervaele (2000) *The implementation of the Corpus Juris in the Member States*, Intersentia, Oxford, four volumes. ↵
  16. *Ibid.* First Volume, Chapter 1. ↵
  17. Commission of the European Communities, Green Paper on criminal protection of the Financial Interests of the Community and the establishment of a European prosecutor, 11 December, COM (2001) 715. ↵
  18. Commission of the European Communities, Follow-up report on the Green Paper on criminal protection of the Financial Interests of the Community and the establishment of a European prosecutor, 19 March, COM(2003)128. ↵
  19. European Parliament Study Directorate-General for Internal Policies Policy Department Budgetary Affairs, Improving coordination between the EU bodies competent in the area of police and judicial cooperation: moving towards a European Prosecutor, Study, 2011, p. 26. ↵
  20. <http://www.euractiv.com/en/future-eu/constitutional-treaty-key-elements-archived/article-128513>. ↵
  21. The Stockholm Programme – An open and secure Europe serving and protecting citizens, O.J. C 115, 2010, point 3.1.1, p. 13. ↵

22. The Stockholm Programme – An open and secure Europe serving and protecting citizens O.J. C 115, 2010, p. 1.↔
23. European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions – Delivering an area of freedom, security and justice to Europe's citizens – Action Plan Implementing the Stockholm Programme COM (2010) 171.↔
24. House of Lords, The Select Committee on the European Union, Sub-Committee F (Home Affairs) Implementation of the Stockholm Programme, Transcript of Evidence session No. 1, 13 October 2010. The evidence was given by James Brokenshire, MP, Parliamentary Under-Secretary of State and Minister for Crime Prevention, Home Office.↔
25. European Parliament, Resolution of 6 May 2010 on the protection of the Community's financial interests and the fight against fraud.↔
26. Author's emphasis.↔
27. Art. 6 of Council Decision 2009/426/JHA, *Ibid.*↔
28. Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, 2002/584/JHA, O.J. L 190, 2002, p. 1.↔
29. *Ibid.*, Art. 16(2).↔
30. Author's emphasis.↔
31. M. Zwiwers, *The European Public Prosecutor's Office – Analysis of a multi-level criminal justice system*, 2011, Intersentia, pp. 260.↔
32. *Ibid.*↔
33. *Ibid.*, Art. 6(1)(a)(iv).↔
34. N. 15, Art. 7(1)(a)(iv).↔
35. Art. 9f of Council Decision on the strengthening of Eurojust 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime amended by Council Decision 2003/659/JHA and by Council Decision 2009/426/JHA of 16 December 2008, O.J. L138, 2009, p.14 (consolidated version).↔
36. Art. 12(5) of the consolidated Eurojust Decision.↔
37. Art. 7(2) of the consolidated Eurojust Decision.↔
38. Art. 6(1)(c) of the consolidated Eurojust Decision.↔
39. Art. 7(2) of the consolidated Eurojust Decision.↔
40. According to a definition of "protection of the financial interests of the EU" defined in the EU Member States.↔
41. J. F.H. Inghelram, *Legal and Institutional Aspects of the European Anti-Fraud Office (OLAF) An analysis with a look forward to a European Public Prosecutor's Office*, 2011, Europa Law Publishing, pp. 263-264.↔
42. H. Nilsson, *Judicial cooperation in the EU: Eurojust and the European Public Prosecutor*, 2011, p. 5.↔
43. K. Ligeti, *The European Public Prosecutor's Office: How should the rules applicable to its procedure be determined?* EuCLR, 2011, 123-148.↔
44. Conseil D'Etat, *Réflexions sur l'institution d'un Parquet Européen – Etude adoptée le 24 février 2011 par l'Assemblée Générale du Conseil d'Etat.*↔
45. This strategic seminar called "Eurojust and the Lisbon Treaty: towards more effective action" was organised by Eurojust in cooperation with the Belgian Presidency of the Council of the European Union. It was held in Bruges, Belgium from 20-22 September 2010. Possible scenarios for the organisation of the EPPO and its relationship with Eurojust were discussed in workshop 6. See Council document 17625/10 CATS 105 EUROJUST 147 of 9 December 2011.↔

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## \* Author statement

Simone White is a Legal Officer in OLAF, the Anti-Fraud Office of the EU, and an Hon. Research Fellow at the Institute of Advanced Legal Studies in London. The views contained in this article are not intended to represent those of the European Commission. This paper summarises some of the issues raised at an IALS seminar held on 12 December 2011. Speakers included Aled Williams, Chairman of Eurojust; Peter Csonka, DG JUST European Commission; Professor John Spencer, Selwyn College Cambridge and Chair of the UK European Criminal Law Association; and Professor Katalina Ligeti and Valentina Covolo of the Department of Law at the University of Luxembourg. The author thanks Nicholas Dorn, Jan Inghelram, Lothar Kuhl, and Hans Nilsson for their comments on a draft.

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