

The Cost(s) of Non-Europe in the Area of Freedom, Security and Justice

The European Public Prosecutor's Office as a Guardian of the European Taxpayers' Money

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I. Introduction

After many years of reflection and preparation, negotiations on the European Commission's proposal for a Regulation on the establishment of the European Public Prosecutor's Office (hereinafter EPPO)¹ commenced three years ago.² The proposal is well known to readers of the eucrim journal.

During the course of negotiations in the Council of the European Union, the proposal has evolved substantially and in a number of ways, now envisaging a collegiate structure, shared competences between the EPPO and national authorities, and wide autonomy on the part of the European Delegated Prosecutors handling the cases, accompanied by supervisory powers vested in the European Prosecutors at the central level.³

Despite the various changes made during the Council negotiations, the core objective of the EPPO remains unchanged: to set up a single European prosecution office, equipped with full investigatory and prosecutorial powers, to fight crimes affecting the financial interests of the Union⁴ in an efficient and coherent manner.

After three years of negotiations – and almost 40 years after the idea of a “European judicial space” had been formulated by the then President of France, Valerie Giscard d'Estaing⁵ – it may be that, finally, at the end of this year, an agreement will be reached on the EPPO's foundation. This requires clarity on what is at stake and the objective it should achieve.

II. Which Costs Are at Stake?

In the same way that Member States provide for comprehensive measures and legal provisions to protect their national budgets, including through criminal law, the European Union is determined to ensure, in the same way, an effective and uniform protection of its budget. This cannot be limited to administrative or civil law only, as fraud must also be deterred and sanctioned by means of criminal law. The duty to protect the Union's financial interests follows directly from the Treaty and concerns both the Union and the Member States equally (Art. 325 TFEU).

III. What do we need to protect?

The EU budget for the year 2016 foresees a total of €288 billion⁶ with revenues and expenditure included. On the revenue side, the total revenues amount to more than €144 billion⁷ and include Member States' contributions, which account for more than 85% of the revenues,⁸ as well as the Union's traditional own resources resulting from, e.g., customs duties on imports from outside the EU or sugar levies.⁹ On the expenditure side, the total attributions of Union expenditures correspond to the amount of revenues, i.e., €144 billion,¹⁰ earmarking the largest amount for “smart and inclusive growth” and “sustainable growth: natural resources,” accounting for 45% and 38% of the expenditures respectively.¹¹ A large part thereof is disbursed by way of subsidies or grants to beneficiaries, in the majority of cases indirectly, i.e., through the involvement of national or local authorities in the Member States managing the funds.

In view of the amounts described, one may assume that there is a serious risk that crimes such as fraud, corruption, money laundering, or VAT carousel fraud affect the financial interests of the Union, both on the revenue side as well as on the expenditure side. The question, of course, is what does that damage amount to? This depends on the method of calculation.

In 2015, the EU Anti-Fraud Office (OLAF) recommended a total of €888 million for financial recovery as a result of fraudulent irregularities,¹² although it remains unknown how much has ultimately been recovered.

The amounts presented by OLAF have at times been referred to as constituting “only a glimpse”¹³ of the real scope of EU fraud. According to the preparatory study for the Commission’s Impact Assessment for the EPPO, VAT fraud and cigarette smuggling are each estimated to cost the EU budget some €1 billion per year. On the spending side, a “low-risk” assumption comes to more than €4 billion each year, although, as the study admits, it is not possible to calculate the exact damage with certainty.¹⁴

However, VAT fraud appears in a different league altogether. Given the sheer extent of the total VAT revenues of the EU-28 (almost €1000 billion),¹⁵ the impact of VAT fraud on national budgets, and hence the EU, is grossly underestimated, even if there is growing awareness that it results in an illegal diminution of the resources available to the EU budget and thus falls under the scope of the PIF Convention, as recognised by the Court of Justice.¹⁶

While reliable figures on the magnitude of VAT fraud in the EU are scarce, several studies suggest that the amounts involved range from €20 billion¹⁷ to €100 billion¹⁸ per year. A recent study estimates that cross-border VAT fraud alone accounts for €50 billion in loss of revenue each year.¹⁹ Another approach to the magnitude of VAT fraud is to look at the VAT Gap. The VAT Gap is defined as the difference between the theoretical VAT liability and the collections of VAT, in any country and in any year (in absolute or percentage terms).²⁰ The most recent study on the VAT Gap, published in May 2015,²¹ states that the overall VAT Gap in the EU-26²² reached €168 billion (which is an increase of €2.8 billion in absolute terms, but constant at 15.2% compared with the previous year). The VAT Gap does not constitute VAT fraud alone, as it provides an estimate of revenue loss due to fraud and evasion, tax avoidance, bankruptcies, financial insolvencies as well as miscalculations; it may nonetheless be considered an indicator of the overall effectiveness of VAT enforcement and compliance measures. Moreover, VAT fraud undermines the functioning of the internal market and prevents fair competition, which may also have a considerable adverse financial impact. Lastly, crimes affecting the financial interests of the Union, including VAT fraud, also tend to attract structures of organised crime, as illustrated in the European Parliament Study on the Economic, Financial & Social Impacts of Organised Crime in the EU in 2013.²³

It follows from the above that crimes affecting the financial interests of the Union are likely to cause damage that is significantly higher than the figures OLAF suggest. Further, the damage to national budgets resulting from VAT fraud seems significant. Overall, the damage caused each year is in the range of several billions or, more likely, in the tens of billions of Euros. This loss is ultimately to the detriment of the European taxpayer.

IV. Why Is Our Current System of Fighting Union Fraud Not Good Enough?

Although the EU developed various instruments in the area of criminal law over the past 20 years that may be conducive to fighting crimes affecting the Union’s financial interests – particularly with the creation of Euro-pol,²⁴ Eurojust,²⁵ and the Anti-Fraud Office (OLAF)²⁶ – none of the Union bodies mentioned has been granted any criminal investigation and prosecution powers that would enable them to effectively fight crimes affecting the Union’s financial interests. This had not been contemplated until the idea of EPPO emerged.

While Europol primarily collects, processes, and exchanges information and coordinates the investigative action of the Member States’ police authorities,²⁷ Eurojust – Europol’s judicial sister – supports coordination and cooperation between national investigating and prosecuting authorities and contributes to strengthening judicial cooperation.²⁸ Neither of them can by itself undertake, or compel national authorities to undertake, criminal investigations. While OLAF may conduct administrative investigations, which has led to some considerable successes,²⁹ its powers cannot in any way be compared with the full investigatory or prosec-

utorial powers of a police service or a public prosecution office. In addition, OLAF's recommendations on the follow-up of a case do not bind the Member States' authorities.³⁰

This means that, to date, the protection of the Union's financial interests is primarily left in the hands of competent national authorities in the Member States. In view of the likely significant scope of crimes affecting the financial interests of the Union, as described above, there seems to be a stark discrepancy between the cases reported by Member States and the scale of the problem. Despite the obligations under Art. 325 TFEU to protect the Union's financial interests, objective and clear statistical information demonstrates that the Treaty objective of an effective, deterrent, and equivalent level of protection is not achieved in general across the Union.³¹ Overall, national criminal proceedings seem neither effective nor equivalent, and the degree of successful prosecution varies from Member State to Member State. In the period between 2006 and 2011, conviction rates concerning cases transferred by OLAF to Member States' judicial authorities ranged from 19.2% to 91.7%,³² while the indictment rate varied from 17% to 75% for the period between 2007 and 2014 (not including Member States with rates of 0% and 100%).³³

In view of the aforesaid, it is not surprising that the creation of the EPPO has been on the European agenda for more than 20 years.³⁴

V. Our Need for a Novel European Approach to Fighting Crimes Affecting the Financial Interests of the Union

The Commission has been advocating the establishment of a European Public Prosecutor's Office since 2000, but its proposal to create a treaty basis was rejected in the context of the Intergovernmental Conference of Nice. Its proposal of July 2013, using the legal basis ultimately created by Art. 86 TFEU, underwent several significant changes during the negotiations in the Council (and the negotiations are not yet fully finished); it will therefore be crucial to thoroughly scrutinise the text upon its completion. However, the EPPO's core features, as foreseen in the Commission proposal, remain. In contrast to the rather fragmented approach currently in place, the EPPO will be conceived as a European prosecutorial body, equipped with full investigatory and prosecutorial powers and operating as a single office across all participating Member States. It will have the power to start criminal investigations and to prosecute fraudsters. This is what distinguishes it from national authorities and the EU bodies OLAF and Eurojust. With the EPPO in place, the current duplication of work between OLAF and national authorities will also be avoided.

The EPPO follows an integrated approach, whereby European Prosecutors at the central level and European Delegated Prosecutors located in all participating Member States are to work hand in hand with national law enforcement authorities. It will fill the gap that currently exists between national criminal authorities whose competences stop at national borders and Union bodies that do not have the power to conduct criminal investigations. The EPPO will ensure that European and national law enforcement efforts are combined in a unified, seamless, and efficient manner.

The Office will be fully independent in conducting its work and will place its focus entirely on the fight against crimes affecting the financial interests of the Union – its activities will stem from a unified prosecution policy across the participating Member States when it comes to Union fraud.

As a single office operating across the EU, the EPPO will be best placed to recognise the full dimensions of criminal conduct, beyond national borders. This may lead to a better detection rate, not only but in particular as regards cross-border cases. Being one single office will also allow for the pooling of expertise and

experience in tackling complex and lengthy financial crimes, in particular VAT carousel fraud. This may, in turn, lead to a far higher quality of the investigations and prosecutions and hence greater effectiveness.

On the basis of the current text, the EPPO will also benefit from a common toolbox of investigation measures, which will complement the instruments available under national law. In particular, in cross-border situations, the EPPO will not need to revert to instruments of mutual legal assistance and mutual recognition but will operate as a single office across all participating Member States.

The strong investigation powers of the EPPO are balanced with robust safeguards to guarantee the rights of the persons involved in the EPPO's investigations, which are laid down in national law and Union law, including the Charter of Fundamental Rights. Finally, the EPPO will be subject to comprehensive judicial review, primarily by the national courts but also the Court of Justice of the European Union, e.g., through preliminary rulings pursuant to Art. 267 TFEU.

To draw a preliminary summary: The EPPO will ensure a consistent and efficient protection of the EU budget throughout the Union. It is anticipated that this will increase conviction and recovery rates and counter the weak deterrent effect of the current fragmented and at times porous system. The EPPO will thus facilitate the recovery of the estimated enormous damage of several billion or tens of billions of Euros – provided that the features, described above, remain safeguarded in the text of the Regulation.

What is the way forward? Following the Justice Council in June 2016, there is now political endorsement for the entire text of the Regulation.³⁵ Further amendment to the text will surely be necessary in order to obtain the European Parliament's consent. The Parliament has consistently underlined the need for a stronger protection of the Union's financial interests and supports the creation of a strong, independent, and efficient EPPO. In its two Interim Reports³⁶ on the EPPO, the Parliament particularly stressed the need for a clear division of competences between the EPPO and national authorities as well as a clear "priority competence" for the EPPO: the EPPO must become competent for crimes affecting the financial interests of the Union, particularly also for VAT fraud – which has recently also been highlighted by the European Court of Auditors.³⁷ Organisationally, the Parliament underlined the need for an equal distribution of workload within the Office – the EPPO must resist the temptation of a "prosecution along national lines", not only for efficiency reasons. The Parliament also, quite rightly, reiterated the need to enhance the procedural rights of suspects and other persons involved in the EPPO's proceedings, including provision of the necessary legal aid in EPPO proceedings. The Parliament also reiterated that a comprehensive level of judicial review is a *conditio sine qua non* for the EPPO. I expect that the Slovak Presidency will consolidate the text of the Regulation and reach agreement on it by the end of this year.

VI. Conclusion

We are at a crucial phase now in the negotiations on the EPPO. The consolidation of the text of the Regulation by the end of the year will determine the fate and success of the EPPO.

For the EPPO to become the guardian of European taxpayers' money, the EU legislator needs to ensure that the EPPO becomes a strong, independent, and efficient prosecution office with the features laid out in the Commission's proposal and as described above.

The EU legislator must particularly ensure that the EPPO's material competence is safeguarded. The EPPO must become competent for the crimes for which it is being set up: crimes affecting the financial interests of the Union. Diminishing the EPPO's material competence over these crimes will not only counter the very rationale of establishing the EPPO but will also lead to parallel investigations, potential disputes over competences, and eventually gaps in the protection of the financial interests of the Union. In the same vein,

crimes affecting the financial interests of the Union must include VAT fraud – at least the most serious forms of VAT fraud, such as VAT carousel fraud in all its forms, as well as VAT fraud committed by criminal organisations. This requires swift agreement on the Directive on the fight against fraud affecting the Union's financial interests by means of criminal law, since the Directive, which has been in the legislative procedure since 2012, is inextricably linked with the EPPO – the EPPO will derive its material competence from that Directive.

The costs of non-Europe – the failure to establish the EPPO – in this important area of freedom, security and justice would be directly to the detriment of the Union, the Member States, and European taxpayers. The EPPO will be, and must be, a leap forward in the protection of the Union's financial interests. But the EPPO is more than that. The foundation of a unified Europe is built on common values, such as securing lasting peace, justice, equality, freedom, and security as well as solidarity. The EPPO will also be about bringing justice to Europe and about solidarity – sharing the advantages (such as prosperity, growth, and development) and the burdens equally and justly among all its Members.

We cannot afford the costs of non-Europe!

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1. Proposal of 17 July 2013, COM(2013) 534 final.↵
 2. On the initial proposal in general, cf. V. Alexandrova, "Presentation of the Commission's Proposal on the Establishment of the European Public Prosecutor's Office", in: L.H. Erkelens et al. (eds.), *The European Public Prosecutor's Office: An Extended Arm or a Two-Headed Dragon?*, The Hague 2015), pp. 11 et. seq.↵
 3. Cf. the text of the Luxembourg Presidency of 22 December 2015 (Council doc. 15100/15).↵
 4. Cf. the Convention on the protection of the European Communities' financial interests (95/C 316/03) and the Commission proposal for a Directive on the fight against fraud to the Union's financial interests by means of criminal law, COM(2012) 363 final.↵
 5. Cf. an extract of his speech at: <http://www.cvce.eu/content/publication/2005/9/19/c7f7171f-f73a-4ab4-829e-faa221acaeca/publishable_fr.pdf>.↵
 6. Definitive adoption (EU, Euratom) 2016/150 of the European Union's general budget for the financial year 2016, O.J. L 48, 24.2.2016, 1.↵
 7. Ibid.↵
 8. Ibid. Resulting from value added tax-based contributions and contributions on the basis of Member States' gross national income. For the year 2016, the foreseen VAT-based own resources will amount to more than €18 billion, while the Gross National Income-based own resources amount to almost €105 billion.↵
 9. Ibid. Traditional own resources accounted for approx. 13% of the total revenues.↵
 10. Ibid.↵
 11. Ibid.↵
 12. Olaf Report 2015, <http://ec.europa.eu/anti-fraud/sites/antifraud/files/olaf_report_2015_en.pdf>.↵
 13. House of Lords EU Committee, 12th Report of Session 2012–13 on the "The Fight Against Fraud on the EU's Finances", published 17 April 2013.↵
 14. Commission Staff Working Document, Impact Assessment accompanying the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office (SWD(2013) 275 final), p. 7.↵
 15. Figure for 2014. Source: Eurostat, cf. <http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=gov_10a_taxag&lang=en>.↵
 16. Case C-105/14, *Taricco and others*, 8 September 2015, para 41.↵
 17. F. Borselli, *Organised VAT fraud: features, magnitude, policy perspectives*, Banca d'Italia Occasional Papers 106, October 2011, p. 16.↵
 18. Interview with Chris Perryman, Project Manager and senior specialist, Focal Point MTIC, Europol, cf.: <http://www.eurojust.europa.eu/doclibrary/corporate/newsletter/eurojust%20news%20issue%2011%20%28march%202014%29%20on%20mtic%20fraud/eurojustnews_issue11_2014-03-en.pdf>, thereby referring to the Joint Report of the Belgian, Dutch, and German Courts of Auditors on "Intra-Community VAT fraud", of 2009, p. 6, which in turn makes reference to the Economic Committee of the European Parliament in 2003 without specifying further.↵
 19. Final Report, Implementing the 'destination principle' to intra-EU B2B supplies of goods, Feasibility and Economic Evaluation Study, Ernst & Young, Contract: TAXUD/2013/DE/319, 30 June 2015.↵
 20. Cf. Study to quantify and analyse the VAT Gap in the EU Member States, 2015 Report, available at: <http://ec.europa.eu/taxation_customs/resources/documents/common/publications/studies/vat_gap2013.pdf>.↵
 21. Ibid.↵
 22. Figures for Croatia and Cyprus not available due to incomplete national account statistics.↵
 23. The study can be found under: <http://ec.europa.eu/taxation_customs/resources/documents/common/publications/studies/vat_gap2013.pdf>.↵
 24. The Convention of 26 July 1995 on the establishment of a European Police Office (Europol Convention), came into force on 1 October 1998. It was replaced by the Council Decision of 6 April 2009 establishing the European Police Office (EUROPOL) as of 1 January 2010, O.J. L121, 15.5.2009, 37.↵
 25. Eurojust was set up with Council Decision 2002/187/JHA of 28 February 2002 as subsequently amended. The legislative proposal COM(2013) 535 final of 17 July 2013 on Eurojust, which is currently under negotiation, is based on Art. 85 TFEU and aims at making Eurojust operational and

reducing the administrative burden of the national members of Eurojust. The legal basis, however, does not allow for entrusting Eurojust with any investigative or prosecutorial powers.↵

26. Regulation No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF). OLAF (l'Office européen de lutte antifraude) was initially established with Commission Decision 1999/352/EC, ECSC, Euratom of 28 April 1999 (O.J. L 136, 31.5.1999,20).↵
27. Cf. Art. 88 TFEU.↵
28. Cf. Art. 85 TFEU.↵
29. Cf. details at <http://ec.europa.eu/anti_fraud/investigations/fraud-in-figures/index_en.htm>.↵
30. On the nature of the OLAF recommendations, cf. Art. 11 of Regulation No 883/2013..↵
31. OLAF Report 2011, pp. 18-20.↵
32. OLAF Report 2011, table 6, p. 20. Cf. also the Commission Communication on the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office with regard to the principle of subsidiarity, in accordance with Protocol No 2 of 27 November 2013, COM(2013) 851 final.↵
33. OLAF Report 2014, p. 24.↵
34. For the historical background on the EPPO, cf. K. Ligeti and M. Simonato, "The European Public Prosecutor's Office: Towards a truly European Prosecution Service?", *New Journal of European Criminal Law*, 4 (2013), p. 7 with further references. In 1976 already, the European Commission submitted to the Council a draft text amending the Treaties establishing the European Communities so as to permit the adoption of common rules on the protection under criminal law of the financial interests of the Communities and the prosecution of infringements of the provisions of those Treaties, cf. O.J. C 222, 22.9.1976, pp. 2–17.↵
35. With the only issue for in-depth discussion being the provisions on judicial review and, respectively, on relations with non-participating Member States and third countries.↵
36. European Parliament resolution of 12 March 2014 on the proposal for a Council regulation on the establishment of the European Public Prosecutor's Office, P7_TA(2014)0234 and European Parliament resolution of 29 April 2015 on the proposal for a Council regulation on the establishment of the European Public Prosecutor's Office, P8_TA(2015)0173.↵
37. ECA special report No 24/2015 "Tackling intra-Community VAT fraud: More action needed", 3.3.2016 (http://www.eca.europa.eu/Lists/ECADocuments/SR15_24/SR_VAT_FRAUD_EN.pdf).↵

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