

Naming and Shaping: The Changing Structure of Actors involved in the Protection of EU Finances

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I. Introduction

The idea of a centralised supranational public prosecutor originates from a revolutionary dream of experts envisaged in the renowned *Corpus Juris*¹ project (1997) and its follow-up study² (2000). The Treaty on the Functioning of the European Union (TFEU) provided the legal basis for a possible establishment of a European Public Prosecutor's Office (EPPO),³ and the concept since then has gained further support *inter alia* through the Action Plan of the Stockholm programme and the recently conducted EPPO Study.⁴ The synergies and effects of academic research and political realism over little more than a decade are readily apparent.

The brief provision provided for in the TFEU, however, can be said to have caused more confusion than clarity. The design of the EPPO as well as the impact of its establishment and its scope of competence on the current EU actors in the field was left unclear. This requires a regular scientific analysis of the subject matter in order to be able to offer well-founded proposals that clarify structures, competences, and provide for more transparency and economy in this field, taking into account the existing investigative and prosecutorial resources.

As several relevant aspects are still uncertain and depend both on future discussions and on EU legislation, this article focuses primarily on *current questions* of the potential future design of judicial cooperation in criminal matters at the European level, following a possible establishment of the EPPO. In the analysis, potential concurrent competences and conflicts of jurisdiction of the present EU actors and the future EPPO shall be identified.

II. Background

Criminal law on a European level belongs to the most dynamically evolving and transformative fields of European law. The *Corpus Juris* project identified the harmonisation of criminal laws as an essential precondition and method by which to establish a common European criminal law understanding.⁵ Harmonisation, however, became more and more difficult on practical grounds as, since the end of the *Corpus Juris* study, several new states have joined the Union. Furthermore, starting with the Tampere multi-annual programme (1999), *mutual recognition* was defined as the "cornerstone of judicial cooperation in criminal matters."⁶ It aimed, among other goals, to temper fears over further harmonisation in criminal law, which was thought to "endanger" state sovereignty.⁷ Mutual recognition was later confirmed by the Hague (2005) and the current Stockholm (2010) multi-annual programmes and in this way transformed the traditional concept of request-based judicial cooperation.⁸

Nonetheless, *practice* swiftly showed that mutual trust is not automatically given, as neither mutual legal assistance nor mutual recognition were able to overcome the diversity of the European judicial area. Thus, setting up the EPPO would indeed require certain levels of harmonisation (or at least minimum standards) regarding specific aspects of criminal law and criminal procedure (e.g., the gathering of evidence) to provide a basis for mutual trust.⁹ The legal basis for such harmonisation was provided for the first time in Art. 82 (2) of the Lisbon Treaty.

Since the *Corpus Juris* project, further relevant *academic* contributions have been undertaken. Among them comparative analyses of different aspects of criminal procedure were provided in the "European criminal procedures" study¹⁰ conducted by Delmas Marty and Spencer as well as in the "Rethinking criminal justice" study¹¹ and the ongoing project on "National Criminal Law in a Comparative Legal Context" by Sieber at the Max-Planck Institute.¹² The *fiches belges* of the European Judicial Network provides for a further important

database. Highly valuable data was gathered and presented most recently in the EPPO study conducted by Ligeti, which was based on a comparative analysis of 27 national reports covering general aspects of criminal procedure, the attribution of investigative and prosecutorial powers, and the associated procedural safeguards of the Member States of the Union.¹³ The EPPO study focused primarily on establishing a body of rules with a model character regarding the powers of the EPPO and the applicable procedural safeguards. The results of this study will shape the future understanding of judicial cooperation in criminal matters in Europe and the identification of problematic issues regarding the potential interrelations and competences in this field.

III. Questions

Ever since the idea of an EPPO emerged, it generated discussion on its status and institutional settings, its scope of competence (solely the Union's financial interests or broader powers related to other serious crimes?), the applicable rules of procedure (common body of rules or equivalent standards?), and potential organisational schemes. Questions were posed about the admissibility of evidence gathered by the EPPO before the national courts (danger of "forum shopping" due to the differing standards in the Member States) and the judicial review of its actions (guarantees and safeguards, which fora, etc.).

The prospect of establishing a European Public Prosecutor's Office is however only one facet in the complex field that provides for the adequate protection of the financial interests of the Union. At the horizontal level, Community institutions have been active in the field for quite some time. The most relevant EU actors at present in this area are Europol, Eurojust, and OLAF, the latter already being equipped with investigative powers, if only for administrative matters.¹⁴ This raises questions about the future structural and functional changes within this field, possible synergies, and the overlaps of tasks and competences.

Keeping the above in mind, the assumed *primary added values* of the EPPO (as an investigative and prosecutorial body) may be summarised as being the possibility of vertical judicial cooperation in criminal matters, with a (theoretically) EU-wide competence,¹⁵ and the opportunity to redesign the existing legal framework in a coherent and comprehensive manner. It may operate as a hierarchically structured supranational body within, and conform to, the objectives of the area of freedom, security and justice, embedded in the national legal systems of the Member States.¹⁶ The setup of the EPPO may help to rationalise the current mechanisms, with several EU actors having competence in this field.

Questions arise as to what could be a reasonable division of powers between the existing (OLAF, Europol, Eurojust) and the possible future EU actors in the field of protecting the financial interests of the EU? How could possible overlaps be avoided and the extension of competences assisted? Could this reform lead to the merging or to the disappearance of current actors? Should the EPPO necessarily be a completely new institution or would broader and restructured competences of the existing actors satisfy the needs? Which actions of the future EPPO should underlie what judicial review and by whom?

IV. Analysis

The short provisions in the TFEU – as already mentioned – do not provide for a clear understanding but rather for ambiguity. Therefore, it is essential to identify what is clear and what seems obscure when reading the provisions of the Treaty. The classification of the problematic issues below is by no means complete. It focuses solely on central issues relevant to the future of EU actors in the field and their potential relations with the EPPO and with each other, respectively.

1. EU actors with competence to protect the financial interest of the Union

a) Legal basis

The Treaty provides for the strengthening of Eurojust by the potential extensions of its competence with the right to “initiate investigations [...] particularly, [...] relating to offences against the financial interests of the Union” (Art. 85. (1) a) and c)). At the same time, it argues in support of the *establishment of the EPPO*, which shall be established “from” Eurojust (Art. 86). The Treaty explicitly mentions Europol in several articles but remains silent on OLAF.

b) Possible consequences

Questions immediately arise concerning the future role and status of Eurojust, as the phrasing (“from”) and the cross references provide for enormous ambiguities. Given its potential future power to initiate criminal investigations, Eurojust itself could transform into the EPPO under Art. 85(1)(a) TFEU.¹⁷ A contradictory interpretation, however, may result in the dissolution of Eurojust, namely if the powers of Eurojust are conferred to a completely new institution: the EPPO.

OLAF’s situation seems unclear, as the Treaty remains silent on the administrative investigation body of the Commission. Nevertheless, Art. 325 TFEU does refer to the key role of the Union (and of the Commission) in combating fraud and protecting the Union’s financial interests. Therefore, it is to be assumed that, most evidently for internal investigations, the future EPPO cannot allow the benefits arising from the existing apparatus, practice, and partners of OLAF to be abandoned, whether inside or outside of its institutional framework.¹⁸

Europol’s future seems secure, as the Treaty refers to it explicitly in several articles and especially in liaison with the future EPPO (Art. 86 (2)), which will definitely rely on Europol’s data compilation.

Accordingly, the competence and future structure of the existing actors will be determined by the method of establishment (unanimous, enhanced cooperation, opt-out), internal structure (centralised, decentralised, college type), degree of (in)dependence, and competences (narrow or broad spectrum) of the future EPPO.

2. The approach to establishing the EPPO

a) Legal basis

The following is clear on the way to establish the EPPO. The Treaty allows for the establishment of the EPPO both by unanimous decision and as an enhanced cooperation¹⁹ of at least nine Member States (Art. 86 (1) TFEU). Additionally, regardless of how the EPPO is established, the Stockholm programme requires the prior thorough implementation of the Council decision on Eurojust by all Member States.²⁰

b) Possible consequences

Taking into account the complexity of the issue and the different cultural and legal backgrounds provided by the Member States’ legislation, not to mention sensitive political considerations, it is hardly imaginable that the EPPO will be established by unanimous decision. The EPPO will therefore presumably be established by enhanced cooperation. Consequently, the office will commence its work in a highly complex context, with different actors to coordinate (national judicial authorities, involved or not involved in the “EPPO-cooperation,” EU Member States; and third states). As a result, different legal frameworks will apply (future EPPO rules of procedure, the mutual recognition acquis, other EU instruments, agreements with third states). This

starting point will allow for essentially strengthening the future role of Eurojust, taking into account its wealth of experience and existing apparatus in the coordination of judicial cooperation.

The requirement of a thorough implementation of the Eurojust decision in the Stockholm programme further raises the question as to whether the EPPO will be established in a parallel or step-by-step manner. The former would mean that the development of Eurojust and the creation of an EPPO would take place in a complementary manner. The latter would allow for the establishment of the EPPO only following further developments of Eurojust under Art. 85 TFEU and subsequent to the implementation of the Eurojust decision.

3. Conflicts of competence

a) Legal basis

The Treaty grants the EPPO *concrete* competence for crimes affecting the financial interests of the Union and provides for the possibility to extend these powers to serious crimes having a cross-border dimension (Art. 86 (1) TFEU). Further, the Treaty provides for *general* EU competence to combat fraud and any other illegal activities affecting the financial interests of the Union through deterrent measures that afford effective protection (Art. 325 (1) TFEU).

b) Possible consequences

The provisions do not provide for any criteria how to define *serious crimes* within the scope of competence of the EPPO. This would facilitate identifying the synergies and potential conflicts of jurisdictions with current actors. Additionally the Treaty remains silent on whether the EPPO should have complementary or exclusive competence in these cases.

Nevertheless, if the EPPO is to be set up by enhanced cooperation, its competence will at first most likely be limited to crimes against the financial interests of the Union. Such initial restriction of the scope of its activities might also contribute to preventing conflicts of authority with national prosecution services.²¹

The answers to the above questions could once again significantly affect the competences and future of all existing actors in the field of judicial cooperation in criminal matters. Potential different effects may be demonstrated by the example of Eurojust. A *broad and exclusive competence* of the EPPO for serious crimes may weaken Eurojust's position as presently the most important coordinator in serious criminal cases with a cross-border dimension. However, a *complementary competence* could strengthen Eurojust's coordinating role, especially in an enhanced cooperation scenario or if the respective suspect is involved both in crimes against the financial interests of the Union and other cross-border crimes.

4. Relationship of the EPPO and the national judicial authorities

The circle of relevant actors would be incomplete without attention being paid to the EPPO's relations to judicial authorities at the national level. This is simply one of the decisive reasons why it is so difficult to create an ideal model and rules of procedure for the future EPPO. Within a closed scheme (e.g., EU framework), it is easier to provide for coherence. However, European judicial cooperation is an interacting, open system with actors at different levels. Whichever way the EPPO would be established (as a clearly supranational body or as a supranational body embedded in national laws), it will unquestionably rely on the support of the national judicial authorities. Therefore, it is to be assumed that it will have a decentralised structure with delegates in the Member States providing for more flexibility.²²

An important question in this context is whether the *gathered information* will circulate between these actors. Will only the national authorities be obliged to give information regarding a case to the EPPO? What happens with the gathered information if the EPPO decides against prosecution in the respective case? Could the national authorities gain the information gathered by the EPPO for the purpose of prosecution at the national level?

Additionally *constitutional rights* linked to criminal procedure must be analysed in detail, as proposals breaching constitutional rights may cost the support of the respective Member States for the EPPO.

One of the most sensitive issues with regard to the EPPO's relationship to national judicial authorities is the *judicial review* of its actions. Which acts of the EPPO should underlie what kind of judicial review and via which forum? To demonstrate the complexity of the subject matter, the author makes use of a comparative analysis that he elaborated upon information gathered within the EPPO project. The analysis focused only on the aspect of *judicial assessment of decisions on committing a case to trial* in the Member States.²³

According to the analysis, the 27 national legislations can be divided into two equal groups on the basis of the judicial review of decisions on committing a case to trial. Only half of the Member States require for a judicial assessment of the decision on pressing charges. This review mostly covers formal (legal) and substantial (evidential) requirements such as obstacles of procedure or whether the indictment is based on sufficient evidence. These assessments mainly result in a) accusation, b) sending back the charges for amendment or c) terminating the case.

As we can see, the judicial assessment of indictments may have the most varied consequences. However, this possibility only exists in half the Member States, which allows us to argue in different ways. If the EPPO's indictment would underlie the judicial review of national courts, it would provide for a higher level of legal certainty (at least for those Member States providing for this possibility). It may, however, force or misguide the future EPPO to engage in "forum shopping," i.e., to choose a state of trial where the indictment will not be subject to the judicial review of a national court.

On the basis of the above comparison – limited to judicial review of indictment and not generally to the activities of the EPPO – it may lead to a proposal for a direct accusatorial competence of the future EPPO *without* further judicial assessments. Even if it provides room for debates – and the example here was presented without any further contextual deliberations – even such a proposal could be founded and justified *upon the current legislation of the Member States* regarding judicial review of indictment.

Finally, the related crucial procedural question of what *forum* shall provide judicial review (essential in regard to the future model of the EPPO) is completely open. Should it take place at the European level (special pre-trial chamber of the European Court of Justice) or at the national level (national judges or centralised national judges especially for this purpose)? On the one hand, such a special chamber of the ECJ does not currently exist; on the other hand, and systematically thinking, one may basically question whether the model of a national court reviewing decisions of even only a partly supranational body is logical in a necessarily hierarchical system?

V. Conclusions

Based on the above elucidations, the design of the future EPPO and its relations to current EU bodies depend on several interacting factors. It is to be presumed that the final design of the EPPO, with respect to its conferred competences, may decidedly influence (and modify) the present landscape of EU actors in the field of judicial cooperation in criminal matters (and especially in protecting the financial interest of the Union). Therefore, the pros and cons of the different potential models as well as their effects are to be

assessed and clearly structured in order to minimise redundant overlaps and ensure efficiency. It is the responsibility of legal academia to analyse all scenarios that would enable the relevant stakeholders to elaborate best possible solutions.

1. Corpus Juris portant dispositions pénales pour la protection des intérêts financiers de l'Union européenne, sous la direction de Mireille Delmas-Marty, Paris 1997. *Economica*.↔
2. *M. Delmas-Marty/J. Vervaele* (eds.), *The Implementation of the Corpus Juris in the Member States: Penal Provisions for the Protection of European Finances*, 4 volumes, Intersentia, Antwerp 2000.↔
3. Art. 86 TFEU foresees an EPPO "for investigating, prosecuting and bringing to judgment [...] the perpetrators of, and accomplices in, offences against the Union's financial interests."↔
4. EU model rules of evidence and procedural safeguards for the procedure of the proposed European Public Prosecutor's Office. Homepage: <http://www.eppo-project.eu/>.↔
5. The study saw harmonisation as a preliminary step in the unification of laws in the respective area. See also *L. Kuhl*, *The future of the European Union's financial interests. Financial criminal law investigations under the lead of a European Prosecutor's Office*, eucrim 3-4/2008, p. 187.↔
6. Presidency Conclusions, Tampere European Council, 15th and 16th October, 1999, points 33-37. The as yet adopted instruments based on mutual recognition cover *all stages* but only *certain aspects* of criminal procedure. *K. Ligeti*, *The European Public Prosecutor's Office: How Should the Rules Applicable to its Procedures be Determined?*, *European Criminal Law Review*, Vol. 2, 2011, p. 143.↔
7. *K. Ligeti*, *op. cit.*, pp. 144-145.↔
8. The Hague Programme: Strengthening freedom, security and justice in the European Union (2005/C 53/01); The Stockholm Programme – An open and secure Europe serving and protecting citizens (2010 C 115/01).↔
9. *L. Kuhl*, *op. cit.*, p. 189.; *J. Vervaele*, *The Shaping and Reshaping of Eurojust and OLAF. Investigative Judicial Powers in the European Judicial Area*, eucrim 3-4/2008, p. 184.; *V. Mitsilegas*, *EU Criminal Law 1st ed.* Oxford 2009, p. 124; *K. Ligeti*, *op. cit.*, p. 146.↔
10. *M. Delmas-Marty/ J. Spencer* (eds.), *European criminal procedures*, Cambridge Univ. Press, 2002↔
11. *U. Sieber/M. Wade* (eds.), *Structures and Perspectives for European Criminal Justice*, Duncker & Humblot, Berlin (forthcoming 2012).↔
12. *U. Sieber et al.* (eds.): *National Criminal Law in a Comparative Legal Context*. Berlin, Duncker & Humblot, 2011.↔
13. *K. Ligeti*, *op. cit.*, pp. 123-148.↔
14. *L. Kuhl*, *op. cit.*, p. 191.↔
15. Problems will arise *in practice* due to the way in which the EPPO will be set up. It has to be assumed that, initially, it will be established by enhanced cooperation between a number of the Member States. Thus, at first the EPPO will not have real EU-wide competence. See also IV.2.b.↔
16. *K. Ligeti*, *op. cit.*, p. 142.↔
17. *Vervaele* describes Eurojust as the "embryo" of the EPPO. *J. Vervaele*, *op. cit.*, p. 185., *Kuhl*, however, excludes a "complete institutional and functional merger whereby Eurojust would fully participate in the powers of the European Public Prosecutor's Office" under Art. 85 TFEU. *L. Kuhl*, *op. cit.*, p. 190. *Ligeti* deduces from the fact that Arts. 85 and 86 TFEU fall under different legislative procedures that the Member States require a higher threshold for the setting up of the EPPO, and she therefore doubts the possibility of a progressive setup of the EPPO from Eurojust. *K. Ligeti*, *op. cit.*, p. 134.↔
18. See *S. White*, *From Europol, to Eurojust, towards a European Public Prosecutor...* Where does OLAF fit in?, eucrim 2/2012, *Kuhl*, *op. cit.*, pp. 190-191.↔
19. Provided for in Arts. 326 to 334 TFEU.↔
20. Communication from the Commission to the European Parliament and Council, The European Economic and Social Committee and the Committee of the Regions. COM (2010) 171 final, 20th April, 2010, p. 2. The evaluation of the implementation is foreseen in 2012.↔
21. *L. Kuhl*, *op. cit.*, p. 189.↔
22. This once again may strengthen the current position of Eurojust whose workflow relies on its national members.↔
23. *A. Csúri*, *Committing the case to trial*, in: *Ligeti*, (ed.): *Toward a Prosecutor for the European Union*. Vol. 2: *Draft Rules of procedure*, Oxford, (forthcoming 2013).↔

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