The European Public Prosecutor's Office (EPPO) – Past, Present, and Future

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Article

ABSTRACT

This article first gives a brief historic overview of the long road to the establishment of the European Public Prosecutor's Office (EPPO), starting with the first ideas at the meeting of the Presidents of the European Criminal Law Associations in 1995 and worked out in more detail in the Corpus Juris drafts in 1997 and 1999. The driving force was ultimately the instalment of a legal basis in the 2007 Lisbon Treaty, which paved the way for the 2013 Commission legislative proposal and the final Council decision on the Regulation establishing the EPPO by means of enhanced cooperation in 2017. The article also argues that objections to the established scheme – especially those raised by the non-participating countries and national parliaments during negotiation of the Commission proposal – should not be ignored. These objections mainly refer to infringements of the principles of subsidiarity and proportionality. According to the author, the arguments against subsidiarity are unfounded; however, the question remains as to whether the proportionality principle has been upheld, considering the limitation of the EPPO to prosecute PIF offences only. In order to reconcile with proportionality, the author advocates extending the EPPO's competence to environmental crime. He draws several parallels to the situation involving PIF and calls on politicians, civil society organisations, and legal experts to think about the inclusion of crimes against the environment into EPPO's portfolio.

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I. Introduction

"Eppur si muove! The Earth revolves around the sun and law also moves on!" With these words, Prof. *Mireille Delmas-Marty* introduced the 1999 Corpus Juris "Florence proposal."[1] Who would have thought that, in a gloomy atmosphere of continuously alleged crisis and invoked European disillusion, the European Union would create a new jurisdictional central body: the European Public Prosecutor's Office (EPPO)? Of course, after the Corpus Juris group of eminent European experts proposed it in 1997, we waited in expectation for another 20 years. In this case, "*perseverare*" was not "*diabolicum*."

Indeed, as stated by Commissioners *Guenter H. Oettinger* and *Véra Jourovà* in the Guest Editorial for eucrim 3/2017, the European Public Prosecutor's Office established by Council Regulation (EU) 2017/1939[2] by means of enhanced cooperation will become an essential part of the existing legal architecture for the protection of the Union's financial interests (PIF). The new body was initially supported by 20 EU Member States;[3] the Netherlands and Malta joined the enhanced cooperation scheme in 2018.[4] The EPPO will be responsible for investigating, prosecuting, and bringing to judgement the perpetrators of criminal offences affecting the financial interests of the European Union as provided for in Directive (EU) 2017/1371 of the European Parliament and the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law – the "PIF Directive."[5]

The main characteristic of the EPPO as agreed by the Council in 2017 is its structure, consisting of both a central and a decentral level. The central level (with an office in Luxembourg) comprises the European Chief Prosecutor and European Prosecutors, forming the EPPO College. Their operational work is organised in Permanent Chambers that will direct and supervise the European Delegated Prosecutors (EDPs) located in the participating Member States. They are the main actors when investigating, prosecuting, and bringing the EPPO's cases to judgment before the competent national courts. The EPPO is intended to be an effective European response to the fragmentation and heterogeneity of the EU's judicial and prosecutorial space in the PIF area.

II. Genesis of the EPPO

In 1995, the Presidents of the European Criminal Law Associations convened at Urbino University (Italy) to celebrate, in a solemn ceremony, the award of the "Laurea Honoris Causa in scienze politiche" to Mrs. *Diemut Theato*, at the time acting president of the budgetary control committee of the European Parliament. At the (subsequent) Presidents' meeting, the idea of a European legal area for the protection of the financial interests of the European Communities was launched. To this end, the European Commission's General Directorate for financial control entrusted a group of experts (under the direction of Prof. *Mireille Delmas-Marty*) with the task of elaborating guiding principles in relation to the criminal law protection of the Union's financial interests within the framework of a single European legal area. The group delivered its project report in 1997. It became well-known under the title "Corpus Juris (introducing penal provisions for the purpose of the financial interests of the European Union)."[6] The Corpus Juris maintains the traditional distinction between criminal law (special and general parts) and criminal procedure. Whereas the first 17 Articles are dedicated to substantive criminal law issues, Articles 18 to 35 contain principles of and rules on criminal procedure, including the proposal for creation of a European public prosecutor. The Corpus Juris was intended to apply across the entire territory of EU Member States. However, the Corpus Juris also included a subsidiarity clause, making national law applicable where there is a lacuna in the Corpus. It focused on the procedure before trial, the latter being left to the national judiciary, with the European public

prosecutor present during the trial stage in order to ensure continuity of the proceedings and equality of treatment among those being judged, in spite of the differences between national systems.

The Corpus Juris 2000 ("Florence proposal") is a follow-up to the 1997 project, with the aim of analysing the feasibility of the Corpus Juris in relation to the legislations of the Member States. The report encompasses four volumes, including a final synthesis with a revised version of the Corpus Juris. This revised version maintains the original structure with the 35 articles. Another follow-up study was concluded in 2003: the study on "Penal and Administrative Sanctions, Settlement, Whistleblowing and Corpus Juris in the Candidate Countries," coordinated by the Academy of European Law (ERA), with Prof. *Christine Van den Wyngaert* as scientific coordinator. It scrutinized the potential reception of the Corpus Juris in the legal systems of the Central and Eastern European candidate countries.[7]

In December 2001, the Commission took a further important step towards the creation of the European Public Prosecutor in its Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Public Prosecutor.[8] The Green Paper sought practical solutions in implementing the ambitious and innovative European Public Prosecutor project. The Commission notes that the authors of the Corpus Juris proposed a high level of harmonisation of the substantive criminal law, but considers that such harmonisation must be proportionate to the specific objective of the criminal protection of the Community financial interests. The debate is restricted to the minimum requirement for the European Public Prosecutor to be able to operate effectively.

The Corpus Juris and, in particular, the subsequent shaping of the EPPO has been prevalent for many years and has been frequently discussed in the European Parliament and in the Members States by national parliaments, government officials, and academics. It even generated great interest among academics in Latin America and in China and was used as model for the revision of penal codes in Central and Eastern European countries before their accession to the European Union.

III. The Path to the Final Decision

1. The legal basis in the Lisbon Treaty and the 2013 Commission proposal

After the European Council had rejected taking up the European Public Prosecutor concept into the Nice Treaty, the reform of the EU treaties in 2007 provided for the long sought after legal basis for the EPPO. According to Art. 86 TFEU (introduced by the Lisbon Treaty), the Council – by a unanimous decision after obtaining the consent of the European Parliament – may establish the European Public Prosecutor's Office "from Eurojust." It also allows for the initiative of a group of at least nine Member States to seek a Council decision and to establish the EPPO by way of enhanced cooperation. Although controversy on the necessity of an EPPO emerged after entry into force of the Lisbon Treaty on 1 December 2009, the Commission remained committed to the EPPO project and carried out further preparatory work, including expert workshops, stakeholder consultations, and the commission of further scientific studies.[9] The latter included, for instance, the EuroNEEDS study by the Max Planck Institute for Foreign and International Criminal Law that explored the potential benefits to be gained from a European Public Prosecutor.[10] It also included the project carried out by the University of Luxembourg, under the direction of Prof. *Katalin Ligeti*, which developed model procedural rules for the European public prosecutor.[11] The Commission finally presented its proposal for a regulation setting up the European Public Prosecutor's Office in July 2013.[12] It designed the EPPO as an independent Union body with competence to direct, coordinate, and supervise criminal investigations and to prosecute suspects in national courts in accordance with a common prosecution policy. As for the definition

of criminal offences affecting the financial interests of the Union, the EPPO proposal simply referred to the solutions of the proposed PIF directive.[13]

2. The 2017 Council Decision

The text adopted by the Council in Regulation 2017/1939 is far from the Commission proposal, the monocratic model having been transformed into a rather complex structure. One cannot help observing that the driving principle of the Union legislator was that "all national legal systems and traditions of the Member States be represented in the EPPO." The Member States' intention was to keep the EPPO functioning under strict scrutiny while maintaining the national judiciary under their guidance. The entire criminal investigative operation remains with the national enforcement authorities. Nevertheless, the EPPO concept was saved, even if it is associated with complex conceptual and operational mechanisms. The EPPO will become operational by the end of 2020.

We should bear in mind, however, that the EPPO has not met the agreement of all EU Member States. Next to Denmark, Ireland and the United Kingdom with their special position of participation in legislation in the area of freedom, security and justice, Sweden, Poland and Hungary are still opposing the new supranational body. Not to forget that parliaments from 12 Member States voiced concerns within the so-called yellow card procedure following the Commission proposal. In essence, the main objections put forward were the breach of the subsidiarity and proportionality principles (Art. 5 TEU). The following section briefly comments on these arguments and explores whether these objections are justified.

a) Subsidiarity

Since the end of the 1980s and the early 1990s, the Commission established a number of on-the-spot contacts with the judiciary in the Member States. These missions have repeatedly made evident that the treatment of files concerning cases of fraud against the financial interests of the EU budget was not considered a priority by the national public prosecutors. The reasons invoked were the complexity of European legislation, poor assistance from the national departments managing EU funds, difficulties cooperating with colleagues in other Member States in cases of transnational fraud, "Brussels being far away," etc. This situation has not fundamentally changed after almost three decades! European money is still considered "*res nullius*" instead of "*res omnium*". National prosecutors tend not to give the same level of priority to cases of damage to EU interests as to cases where national interests are concerned. The greater difficulty of investigating European fraud cases, low public interest, the length of time involved, and the low probability of a successful outcome are still invoked. This leads to a very poor conviction rate in the Member States.

Within its competence, only a centralised body like the EPPO will be able to systematically follow up cases until they are brought to court. As a result, the number of convictions and amounts of money recovered will increase. The deterrent effect for potential fraudsters must not be ignored. In conclusion, we can assert that the principle of subsidiarity has not been infringed, since the objectives of the treaties in the area of EU fraud cannot be sufficiently achieved by Member States alone, and that the proposed action is better implemented at Union level.

b) Proportionality

The composition of the European budget has fundamentally changed since the 1990s when the project of a European financial public prosecution service was launched. At that time, around 70% of the EU budget went to agriculture. One third of this amount was for export refunds to third countries and agriculture levies cashed for imports on the revenues side. Large-scale fraud was perpetrated, which had very sophisticated

transnational dimensions (carousels). Coordination and cooperation among national investigation services, the police, and public prosecutors were indispensable. Estimates of the financial impact of fraud indicated a figure at 10% of the budget. On the basis of several common agriculture policy reforms, direct aid to farmers and market-related expenditures constitute the bulk of the common agricultural policy (CAP) budget, which nowadays amounts to less than one third of the general budget. From official Commission documents, it transpires that the true dimension of defrauded EU money today would no longer justify proposing such a sophisticated body as the EPPO. The new competences deriving from the PIF Directive apparently lead to the same conclusion. Indeed, VAT fraud will come within EPPO's competence if it is connected with the territory of two or more Member States and the total damage is at least €10 million. Member States will continue to keep the leading role in this area, however, meaning that the EPPO's field of action is limited.

IV. New Competences for the EPPO?

The question then arises as to whether the creation of the EPPO exceeds what is necessary to achieve the objectives of the treaties if its competences remain confined to the protection of the EU budget. Respect for the proportionality principle could be specifically questioned, since that which is foreseen is a complex and cost-intensive machinery, far removed from the pellucid quality of the Corpus Juris and the simplicity of the 2013 Commission proposal. New tasks for the EPPO therefore seem advisable to corroborate the creation of a new European body. Arguably, the protection of the environment would be an appropriate area of extension.

EU environmental law represents a relevant corpus of detailed norms and constitutes an extraordinary laboratory of European integration. Conceived in the absence of a legal basis, the action of the European institutions currently covers an almost complete legal space. It is an imponent, complex, and challenging legislation. The term environment refers to the entire spectrum of natural and artificial elements surrounding life. Environmental law means legislation aiming at fighting air pollution, waste proliferation, water pollution, and climate change, and it contributes to the protection of biodiversity. Current EU legislation also enables environmental democracy and the repartition of responsibilities in case of damage. In the beginning, it was an anthropocentric concept, but now it protects the environment *per se*. EU legislation is composed of more than 700 legal acts, both sectoral and transversal. It interacts permanently with national and international laws. It is a catalyst for the development of national and international norms.

As in the PIF area, environmental crimes are mainly punished within the framework of national legislations. In the light of the jurisprudence of the European Court of Justice, EU Directive 2008/99/EC on the protection of the environment through criminal law[14] and EU Directive 2009/123/EC on ship-source pollution[15] have attempted to introduce criminal law harmonisation. Another parallel to the PIF area is that the EU legislator has – one must say, regrettably – confined itself to minimalist intervention. Environmental crimes are usually serious offences and are often forms of transnational crime perpetrated by networks operating across the 28 national jurisdictions whose legal and operational instruments vary from one EU Member State to the other. Europol and Eurojust are hampered by their limited powers; there is no European office like OLAF (the European Anti-Fraud Office) operating in this field. As in the PIF area, environmental crimes do not seem to be a priority for national law enforcement authorities. And as with PIF crimes, crimes against nature seem victimless. The time is ripe to launch a campaign to extend the competences of the EPPO to the protection of the environment, as far as the EU territory is concerned, and to consider cooperation with international law enforcement authorities. The environment, like the budget, can be considered a "European good." Undoubtedly, environmental crimes would fit into the list of crimes enumerated in Art. 83 TFEU as an area of potential competence for the EPPO.

In his State of the Union address on 12 September 2018, Commission President *Jean-Claude Juncker* announced that the European Commission was proposing, that very day, to extend the responsibilities of the newly established EPPO to include the fight against terrorist offences affecting more than one Member State.[16] With a view to the Sibiu Summit in May 2019, the Commission invited the European Council to take this initiative forward together with the European Parliament. The Commission's proposal to extend the competence of the EPPO is highly welcome, because it will address the concerns voiced over the principle of proportionality.

At the same time, the initiative is a unique opportunity to extend the scope of the debate to include the protection of the environment. Indeed, there is broad conviction in specialised circles that environmental crime should reasonably be considered among the sectors favoured for a future extension of the material scope of the EPPO, because of its very nature and, above all, the relevance of environmental protection in EU policies. The European Court of Justice considers the environment an essential subject of general interest to the European Union, an essential objective of the European order. Moreover, academics are of the opinion that, in concrete cases, when an environmental crime results in being linked with a PIF crime, the EPPO is already competent for investigation, prosecuting, and bringing to justice the suspected criminals involved.

V. Conclusions

The Commission's initiative to extend the EPPO's competences to terrorism should be seized to launch a campaign to add environmental crime to the EPPO's portfolio. Such a debate should be conducted among all stakeholders, at both the political and legal expert levels, in close cooperation with the DGs Justice and Environment, and with the support of the European Criminal Law Associations. Since the subject of the extension was not treated at the Sibiu summit in May 2019, time is of essence to convince all stakeholders of the necessity to act!

The initiative could be linked to the ongoing debates inside the United Nation institutions on the initiatives of European and international civil society on the crime of ecocide. This concept refers to the destructive impact of humanity on its own natural environment and to the massive damage to and destruction of ecosystems. This initiative should also include adding this crime to the Statute of Rome, as a consequence of which the International Criminal Court would be entitled to prosecute.

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1. M. Delmas-Marty, "Foreword", in: M. Delmas-Marty and J.A.E. Vervaele (eds.), *The implementation of the Corpus Juris in the Member States, Volume I*, Intersentia 2000, p. 7.↩
2. O.J. L 283, 31.10.2017, 1.↩
3. The original participating Member States are: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Portugal, Romania, Slovakia, Slovenia, and Spain.↩
4. Cf. T. Wahl, "Netherlands and Malta Join EPPO", (2018) *eucrim*, 85.↩
5. O.J. L 198, 28.07.2017, 29. For an overview of the Directive, see A. Juszczak and E. Sason, "The Directive on the Fight against Fraud to the Union's Financial Interests by Means of Criminal Law (PFI Directive)", (2017) *eucrim*, 80 et seq.↩
6. Ed. Economica Paris, 1997.↩
7. P. Cullen (ed.), *Enlarging the Fight against Fraud in the European Union: Penal and Administrative Sanctions, Settlement, Whistleblowing and Corpus Juris in the Candidate Countries*, Bundesanzeiger-Verlag 2004.↩
8. COM(2001) 715 final.↩
9. L. Kuhl, "The European Public Prosecutor's Office – More Effective, Equivalent and Independent Criminal Prosecution against Fraud", (2017) *eucrim*, 135.↩
10. Cf. M. Wade, "A European public prosecutor: potential and pitfalls", (2013) 59 Crime Law Soc Change, 439.↩
11. Cf. K. Ligeti (ed.), *Toward a Prosecutor for the European Union, Volume 1. A comparative analysis*, Hart Publishing 2013.↩
12. COM(2013) 534 final.↩
13. COM(2012) 363 final.↩
14. *O.J.* L 328, 6.12.2008, 28.↩
15. *O.J.* L 280, 27.10.2009, 52.↩
16. Cf. T. Wahl, "COM Communication Extending EPPO Competence" (2018) *eucrim*, 86.↩

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