From the SelectedWorks of Magdolna Hajdu

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Reflections and Questions with Reference to Establishment of European Public Prosecutor’s Office

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.“In accordance with the principle of proportionality, as set out in Article 5 of the Treaty on European Union, this Regulation does not go beyond what is necessary in order to achieve these objectives and ensures that its impact on the legal orders and the institutional structures of the Member States is the least intrusive possible.” Preamble (6) of the Proposal on the establishment of the European Public Prosecutor’s Office

Reflections and Questions with reference to establishment of European Public Prosecutor’s Office

1. Introduction

The European Commission proposed\(^1\) the new Council Regulation (hereafter: Proposal) on the establishment of European Public Prosecutor’s Office (hereafter: EPPO) and the reform of the Eurojust\(^2\) attached with the Communication on OLAF\(^3\) on 17 July 2013, to protect financial interests of the European Union in line with policy developed by European Commission in 2011.\(^4\)

\(^1\)COM(2013) 534 and 2013/0255 (APP)
Available at: [http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52013PC0534](http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52013PC0534)
\(^2\)The European Union’s Judicial Cooperation Unit,
Available at: [http://www.eurojust.europa.eu/Pages/home.aspx](http://www.eurojust.europa.eu/Pages/home.aspx)
\(^3\)European Anti-Fraud Office
Available at: [http://ec.europa.eu/anti_fraud/index_en.htm](http://ec.europa.eu/anti_fraud/index_en.htm)
\(^4\)Protection of European Union’s Financial Interests by Criminal and Administrative investigation, 26 May 2001, COM(2011) 293
2. Historical backgrounds, main preliminaries led to EPPO

The idea of the European Public Prosecutor dated back to 1996 when the European Commission entrusted an expert group with working out the European Criminal Codex. This effort was resulted the well known Corpus Juris Europae by the spring of 1997. This document contained some substantive criminal rules which might endanger financial interests of European Union (hereafter: EU) and also the idea of the establishment of the EPPO. The next significant step was the Green Paper of European Commission on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor’s Office. According to the Green Paper the EPPO would be an independent EU body which would stand beyond the EU member states’ investigative bodies with the competency of investigation crimes connecting to EU financial interests and also rose up for consideration further competencies such as protection of Euro, committed crime by EU officials and protection of Community’s interests on trademark. The Green Paper concerning the establishment of the EPPO follows the solutions of Corpus Juris Europae but played more attention to possible compromises might occur during establishment. The Green Paper also gave the Commission an opportunity to spell out its ideas looking beyond the preparatory studies. In its Communication of 29 September 2000, the Commission proposed only the essential characteristics of the European prosecutor (appointment, removal, duties and independence), leaving the rules and mechanisms governing the Prosecution Service’s operation to be regulated by secondary legislation.

At the same time there existed more radical views on changes which were not satisfied with slow changes of harmonization they aimed full-integration. Such a

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5 COM(2001) 715
kind was the Frankfurt Forum established by great experts of jurisprudence. They published their proposition in 11 points. According to theirs opinion the European Criminal Code and Procedural Code should be created on the base of unified state under the rule of law and should have to work out procedural standards and court control of institutional exert power step by step. The Europol and the OLAF should be controlled by independent court. The EU currently still not on that stage to achieve this idea.

The Treaty of Rome which known also as Constitution Treaty of EU but not came into force, kept the idea of establishment of the EPPO. Although during the texting were strong debates on the question of “how” which means obligatory or as a possibility of establishment on the base of co-operation of member states. The end of debate was a compromise; the Article III-175 ruled as a possibility and also kept the necessity unanimous vote of member state in the Council. The Treaty of Lisbon which followed the Rome Treaty but was not constitutional and just amended the Treaty on European Union and the Treaty Establishing the European Community took over this ruling. In its Article 69/E of the Treaty of Lisbon: “In order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust. The Council shall act unanimously after obtaining the consent of the European Parliament”. The European Commission’s current Proposal is based on this Article.

The EU Commission kept working on for the EPPO. From 2010 started to support three projects at the University of Luxembourg where a group of

6 Frankfurt 2001. Memebers of Frankfurt Forum were: Peter-Alexis Albrecht, Stefan Braum, Günter Frankenberg, Klaus Günther Wolfgang Naucke, Spiros Simitis
7 European Police
9 In unified text: Article 86(1) of the Treaty on the Functioning of the European Union
European criminal law experts has examined in detail current public prosecution systems in the Member States and has scrutinized proposals for a procedural framework for the EPPO. The objective of the first of these projects was to thoroughly analyze the twenty seven different national legal systems of investigation and prosecution. The study of the national systems served as a source of reference for the European model rules. This first project also contained a series of cross-cutting studies of key issues which will play a role when establishing the European Public Prosecutor’s Office. The two further studies, “EU model rules of criminal investigation and prosecution” and “EU model rules of evidence and procedural safeguards”, aimed to elaborate a draft set of European model rules of criminal procedure for the EPPO. According to the experts “the EPPO stepping from traditional judicial cooperation towards united and coordinated investigations throughout the entire territory of the EU”.

The National Parliament of member states has the right to declare their opinion on proposals in context of principle of subsidiarity. The principle of subsidiarity ruled by Article 5 of Treaty on European Union, means that the level of decision could be on EU level only when on the level of member states can not be achieved or the EU level is more effective way to reach the goal. Regarding to proposal on the EPPO 11 member states’ Parliament declared the harm of subsidiarity in spite of the European Commission in 3.2. of Explanatory Memorandum stated: “In accordance with the subsidiary principle, this objective can only be achieved at Union level by reason of its scale and effects. As stated

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10 The head of the group of experts was Professor Katalin Ligeti. Steering Committee: Charles Elsen, Prof. Ulrich Sieber, Prof. John R. Spencer, Prof. John A.E. Vervaele and Prof. Thomas Weigend
Working Group: Prof. Silvia Allegrezza, Prof. Martin Böse, Dr. András Csúri, Prof. Zlata Durdevic, Prof. Adán Nieto Martín, Dr. Johannes Martetschläger, Prof. Christian Schwarzenegger, Prof. Rosaria Sicurella, Dr. Juliette Tricot, Dr. Gisèle Vernimmen – Van Tiggelen, Dr. Marianne Wade, Prof. Anne Weyembergh and Prof. Eleonora Zielinska


13 E.g. the Parliament of Czech Republic, Great-Britain, Hungary, Ireland, Malta, Netherland, Sweden
above, the present situation, in which the prosecution of offences against the Union’s financial interests is exclusively in the hands of the authorities of the Member States is not satisfactory and does not sufficiently achieve the objective of fighting effectively against offences affecting the Union budget.”

In spite of this situation there is a strong political line to establish the EPPO and took this line closer to achieve this goal when European Parliament agreed with bringing into existence on 12 March 2014. The next step is debating by EU member’s representatives in the Council. In the absence of unanimity, a group of at least nine Member States may request that the draft regulation be referred to the European Council. In that case, the procedure in the Council shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council for adoption. Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft regulation concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorization to proceed with enhanced cooperation. Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

The question is: will the protested 11 States compromise during the debate in the Council or the others will establish the EPPO in the frame of enhanced cooperation without them.

What are the reasons led to reinforcing existence the EPPO? The Commission’s Communication on the protection of the financial interests of the European Union by criminal law and by administrative investigations (An integrated

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15 With 487 „yes”, 161 „no” and 30 absence
policy to safeguard taxpayers’ money)\textsuperscript{16} underlined “despite the progress made in the last 15 years, the level of protection for EU financial interests by criminal law still varies considerably across the Union. Criminal investigations into fraud and other crimes against the financial interests of the Union are characterized by a patchy legal and procedural framework: police, prosecutors and judges in the Member States decide on the basis of their own national rules whether and, if so, how they intervene to protect the EU budget. Despite the attempts to provide for minimum standards in this field, the situation has not changed noticeably”.

The Commission’s working document\textsuperscript{17} attached to the current Proposal detailed has the same view: although the member states have the obligation to fight against EU’s financial interests they do so but not efficiently. The Commission detailed the reasons of non-efficiency:

- Limits of existing measures: offences affecting the EU’s financial interests are genuine European crimes, the current institutional and legal framework almost solely based on the priorities and resources of national responses, which depend on the priorities and resources of national investigation, prosecution and judicial authorities.
- The powers of OLAF are limited to administrative investigations than in the case of suspect of committed crime the case transferred to member state’ national authority. As the evidences not collected by the rules of criminal investigation the procedure must be repeated. It is duplication.
- After the OLAF’ denunciation the member state denies to start criminal investigation.
- The measures of punishment are different in member states which leads improper protection also may allow for offenders escaping.

\textsuperscript{16} 26 May 2011, COM(2011) 293
\textsuperscript{17} SWD(2013)274 final
- The started criminal investigations are long-lasting sometimes because of cross-border feature of the case
- Problems of asset forfeiture especially when other member states are involving into the case.
- International criminal assistance is slow.

The European Commission states that these problems can be eliminated by establishing the EPPO. According to the Explanatory Memorandum attached to the Proposal the main objectives of the Proposal are\textsuperscript{18}:

- To contribute to the strengthening of the protection of the Union's financial interests and further development of an area of justice, and to enhance the trust of EU businesses and citizens in the Union’s institutions, while respecting all fundamental rights enshrined in the Charter of Fundamental Rights of the European Union.
- To establish a coherent European system for the investigation and prosecution of offences affecting the Union’s financial interests.
- To ensure a more efficient and effective investigation and prosecution of offences affecting the EU’s financial interests.
- To increase the number of prosecutions, leading to more convictions and recovery of fraudulently obtained Union funds.
- To ensure close cooperation and effective information exchange between the European and national competent authorities.
- To enhance deterrence of committing offences affecting the Union’s financial interests.

\textsuperscript{18} Available at: \url{http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52013PC0534}
Summarize the efforts above introduced and add to it that conservative estimates suggest some €500 million are stolen every year from the EU budget it’s clear that the need of efficient measures are exist. In my view with or without us the EPPO will start its work soon even if “the message sent to the European citizens is the following one: several legal goods, of tremendous importance to you (such as life, freedom, health etc.), are of secondary importance to us (European institutions and Member States). More important are our financial interests, and we chose a very powerful and revolutionary instrument (the EPPO) to protect these interests.”

To understand what the occurred problems we have to face are we need to analyze the Proposal.

3. Status and structure of the EPPO

The EPPO will establish as an independent body of EU with granting legal personality. The structure of it will be decentralized. The head of EPPO will be the European Prosecutor appointed by Council with the consent of the European Parliament for a term of - not renewable - eight years. The European Public Prosecutor will have four deputies. The actual work will be fulfilled by Delegated European Prosecutors in member states as the part of member states prosecution service. They will be appointed and dismissed by the European Prosecutor choosing from the three offered person by member state. The national Prosecutor General forced to appoint as national prosecutor the chosen European Delegated Prosecutor if he was not before and has not have the right to dismiss him during the time he is European Delegated Prosecutor even if according to the national law should do so (e.g. commits a crime). Their term will be five year which will be renewable. According to the Proposal the

19 The author is Hungarian.
investigations and prosecutions of the European Public Prosecutor’s Office shall be carried out by the European Delegated European Prosecutors under the direction and supervision of the European Public Prosecutor. As they also serve national prosecutor and they are part of the national prosecution on operative and functioning level they also may work on national cases. If the Delegated Prosecutor serves as a national prosecutor his official superior has the right to instruct him on the other hand if he fulfils the tasks derive from EPPO the only person who allowed instructing him is the European Prosecutor. In the event of conflicting assignments after consultation with the national prosecution, may instruct him to give priority the tasks of the EPPO. The European Public Prosecutor has the right to allocate resources and staff if necessary for the purpose of an investigation or prosecution\(^\text{21}\) namely other national’s prosecutor will carry out investigative action or instruct national investigative body without supervision the legality by national authority. This right of allocation also may result the situation where a prosecutor with other nationality will represent the charge before the court without knowledge of our national law. We have to keep in mind that according to current idea only one Delegated European Prosecutor will serve in each member state, he should supervise and instruct the investigation, file the charge and represent it before the court including appellate court, too. The investigation will be carried out by the national investigative body and/or that part of the OLAF which after separation will be transferred to the EPPO. The trial will be carried out by national courts.

With establishment of the EPPO is breaking the practice applied on the field of European judicial criminal co-operation and in context of specific crimes an independent EU body with supra-national features will replacing the different forms of co-operation.

\(^{21}\) Proposal Article 6 Section 8.
Concernments can be drawn up from two sides. On the one hand from EU and the other hand from national side and this includes constitutional considerations as well.

The EU after the Treaty of Lisbon stayed the ground of treaty-based co-operation of states where the member states resign a part of their sovereignty but strictly applying different forms of co-operation especially on the field of criminal co-operation. Beyond any doubt this is the most sensitive territory, the member states not easily give up their sovereignty. As the EPPO will exist the member states’ sovereignty will come to an end in those crimes where the EPPO will have competency – until the trial stage of the case. The national criminal claims of the state become indifferent. The Proposal left open the gate for the situation where the national investigative body as a part of national executive power acts under instruction of prosecutor with other nationality, or a prosecutor with other nationality carries out investigative action and EU officials will have the same rights, too. Although the main problem is not the loss of sovereignty but the unclear status of Delegated European Prosecutor and the absence of the “federal” stage.

The Union means association based on contract. We may indentify many unions of states all over the world and the history as well but there are just few where referencing to economic interest, aiming at fully integration. Details of this idea would led us too far, so lets turn back to the EPPO. As I mentioned above the EPPO has supra-national features but this is not a real supra-national body.

The criminal power is supra-national when on the level of union exists the legislative, judicial and executive power, tightenning this obvius proposition to criminal field we need legislative body, judicial body which applying criminal substantive and procedural law and need the system of execution the
judgements. On the other hand the judicial power requires investigative body, prosecution and court.

What the EU has - including the EPPO? The EU has legislative power, although there is no strict competency of it. The competency indentified as crimes which breach EU financial interests which meaning cleared up in Article 2 c): “financial interests of the Union’ means all revenues, expenditures and assets covered by, acquired through, or due to the Union budget and the budgets of institutions, bodies, offices and agencies established under the Treaties and budgets managed and monitored by them”. The taxative list of crime which is required by the continental law system still not exists. According to the Proposal Article 2 b) a separated directive will provide that, which is not a problem if it were coming into force by the time the EPPO stars its activity. The next question who will investigate. Basically the national criminal authorities and/or that part of OLAF which will be separated and transferred to EPPO or the Delegated Europen Prosecutor or European Public Prosecutor himself. The Europol which is European police office will just provide analytical support to a specific investigation conducted by the EPPO. The prosecution, including represeting the charge will be carried out by EPPO but before the national courts and sentence also will be executed by national institutions.

At the same time the supra-nationality of EPPO declared in Article 25 (1) as follows: “for the purpose of investigations and prosecutions conducted by the European Public Prosecutor’s Office, the territory of the Union's Member States shall be considered a single legal area in which the European Public Prosecutor’s Office may exercise its competence”. According to my view the supra-nationality of EPPO impaired because the status of Delegated European Prosecutor as he has „double-hat” namely acting also as a national prosecutor, too.
As there is just a little part of supra-national criminal power will exist the next question rising up is evident. Is it possible to establish criminal supra-national power successfully and efficiently bit by bit?

Criminal power of the state is enforced by national prosecution – that is the common ruling of European constitutions. Although at this moment the establishment of the EPPO causing constitutional conflict the constitutions can be modified.

4. The scope of competence of the EPPO

As mentioned above the EPPO will have competence in respect of the criminal offences affecting the financial interests of the Union. These strictly listed crimes will be ruled in new Directive which must be implemented by national law. The EPPO may exercise its competence if the specific crime committed in one or several Member States (territorial scope) or committed by one of their nationals or by Union staff member or members of the Institutions (personal scope).

Further this, according to the Article 13, the EPPO will have so called ancillary competence, too. The EPPO has the competence for investigating and prosecuting other crime if
- the committed crime other than the EPPO has the basic competence is inextricably linked with,
- their joint investigation and prosecution are in the interest of a good administration of justice the EPPO and
- the committed crime for which the EPPO has basic competence is preponderant and the other criminal offences are based on identical facts.
All above conditions must exist at the same time.

Before the decision on ancillary competence the EPPO and the national prosecution authorities will consult each other in order to determine which authority has competence. In case of disagreement the national judicial authority competent to decide on the attribution of competences concerning prosecution at national level shall decide on ancillary competence.

5. The Investigation

The Proposal does not contain any detailed rules of conducting investigation only give a list of measures of investigation that the EPPO may need to use and leave the other matters, in particular rules related to their execution to national law. Namely the investigative actions will fulfill in the frame of national law. Looks clear at the first moment but what really does it mean. As I mentioned earlier the part of the OLAF will have the right for taking investigative measures in national territories. How they will know the national law? It is also a question in spite of the investigation will led by Delegated European Prosecutor. Further this it may occur that the investigation conducting in one state but the court procedure will take place in another one. It is easily may occur when more than one state will involve into the case. Consequently the court during its procedure forced to apply foreign law. How it will be convinced of legality of gathered evidences? The Proposal tries to solve this problem with article 30 which is about admissibility of evidence. „Evidence presented by the European Public Prosecutor’s Office to the trial court, where the court considers that its admission would not adversely affect the fairness of the procedure or the rights of defense … shall be admitted in the trial without any validation or similar legal process even if the national law of the Member State where the court is located provides for different rules on the collection or presentation of evidence."

See: 19 of preamble of the Proposal
such evidence. Once the evidence is admitted, the competence of national courts to assess freely the evidence presented by the European Public Prosecutor’s Office at trial shall not be affected.”

According to my view this ruling not solves the problem since the court’s right to assess freely the evidence which is basic principle will be restricted, namely if the EPPO filing the charge – and not the national prosecution – the evidences gathered in the case have to be considered legally gathered, just because the EPPO filed the charge. I would like to note that there is no general directive in EU on admissibility of evidences although small part of it has already harmonized (e.g. measures related to translation and interpretation\textsuperscript{23}, information on rights and information about charges\textsuperscript{24}, right to legal advice and legal aid\textsuperscript{25}), so the main part of the criminal procedural law such as approval the coercive measure (e.g. in few states house search when the owner or his representatives presents needs the approval of prosecutor, in others need court decision, or in few state the investigative body fulfills it by own without need of any permission) is differs state by state. I think I am not too far to say this ruling might violate the principle of fair trial.

6. Prosecution before national courts

Before the court the European Public Prosecutor and the European Delegated Prosecutors will have the same powers as national public prosecutors.

When the competent European Delegated Prosecutor considers the investigation to be completed, he/she will submit a summary of the case with a draft


\textsuperscript{25} Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294, 06.11.2013, p. 1-12
indictment and the list of evidence to the European Public Prosecutor for review. The European Public Prosecutor may dismiss the case, may instruct the European Delegated Prosecutor to bring the case before the competent national court which is not necessary the same as the national court of Delegated European Prosecutor or may refer it back for further investigations.

As written in the Explanatory Memorandum by Committee attached to the Proposal the Council Regulation definitely aims to avoid the possibility of forum shopping. Forum shopping is a situation where a person involved into the case has a possibility to choose arbitrarily in which state will the criminal procedure take place. This situation occurs for example during the controlled delivery where the police will decide on in flagranti up to expectable punishment in specific state as the place of commitment will base the competency. The Section 4 Article 27 leave open the gate for European Public Prosecutor for choosing the state where to file the charge:

„The European Public Prosecutor shall choose, in close consultation with the European Delegated Prosecutor submitting the case and bearing in mind the proper administration of justice, the jurisdiction of trial and determine the competent national court taking into account the following criteria:

a) the place where the offence, or in case of several offences, the majority of the offences was committed;

b) the place where the accused person has his/her habitual residence;

c) the place where the evidence is located;

d) the place where the direct victims have their habitual residence.”

This ruling explicitly inhering the danger of forum shopping although conditions listed in a)-d) try to restrict but he is forced just “taking into account”. If one
specific case attaches to more than one state the European Public Prosecutor almost freely can chose the jurisdiction of trail.

The Article 28 of the Proposal lists the causes of dismissal of the case. These are not cover all the evident situation e.g. if the offender has a mental deseas. Overview the causes it worth to stop at Section 1 e Article 28. “the suspected person has already been finally acquitted or convicted of the same facts within the Union or the case has been dealt with in accordance with Article 29.” Which means that the principle of ne bis in idem is restricted to the territory of the EU.

The Section 1 of the Article 29 rules the „transaction” which is a special cause for dismissal of the case by European Public Prosecutor. “Where the case is not dismissed and it would serve the purpose of proper administration of justice, the European Public Prosecutor’s Office may, after the damage has been compensated, propose to the suspected person to pay a lump-sum fine which, once paid, entails the final dismissal of the case (transaction). If the suspected person agrees, he/she shall pay the lump sum fine to the Union.” According to Hungarian criminal law if the damage is compensated the court may discretionarily mitigate the sentence but it never means dismissal of the case and further this if the crime committed by the manner of businesslike or in conspiracy this rule can not be applied. As these crimes breach the EU interests we can agree with this ruling but there is another problem. This competence of European Public Prosecutor is a real sentence bargaining imposing a fine at the same time – without judicial control.

In my view mainly of the danger of forum shopping and the judicial competence the powers of the European Public Prosecutor should be carefully re-considered.

Also have to keep in mind that in the EU there are not just Member States with so called continental justice systems with inquisitional features but also
accusatorial Common Law type as well. The Proposal is seems not to correspond to either of systems.

Besides above misgivings there also skeptic voices even about existence of aided value and effectiveness on creating an EPPO protecting EU financial interests. Firstly, the total volume of fraud has at times been considered insufficient to justify the cost involved in establishing a new body and secondly, according to certain government sources, the number of fraud cases orded to competency of EPPO will too small to justify establishing the institution. I would add to it: the means of criminal regulations generally choosing as a finals for protection any interests.