

**Outline for a conference assessing the Commission proposal to establish a European Public Prosecution Office (EPPO)**

*Criminal Law protection of European financial interests: a shared constitutional responsibility of the EU and its Member States?*

**ABSTRACT**

*The Lisbon Treaty allows the Union to establish a European Public Prosecution Office (EPPO) (Article 86 TFEU). The EPPO shall be a new instrument to help combat crimes affecting the financial interests of the Union. The concerned provisions fall within the EU policy Area of Freedom, Security and Justice (AFSJ). Traditionally this area was governed by intergovernmental procedures and methods. Criminal law instruments were designed to enhance intergovernmental cooperation between judicial authorities of the Member States. This all changed fundamentally with the entry into force of the Lisbon Treaty. Under this Treaty the Union is sharing competences with Member States in the AFSJ and in most instances the community method is applied. Intergovernmental cooperation no longer prevails (with some exceptions). The creation of an EPPO could even mark a step into the direction of a Union bestowed with the exercise of criminal law competences. This raises many constitutional, institutional and legal questions. Probably this summer (2013) the Commission will come forward with a legislative proposal pertaining to the setting up of an EPPO. A conference organised by the T.M.C. Asser Instituut will provide a first assessment of the Commission proposal by addressing a selection of issues arising from it.*

**1. Introduction: previous history**

Article 86 TFEU confers the competence on the Union to establish a European Public Prosecution Office (EPPO).<sup>1</sup> The Office is poised to become the spearhead in combating crimes such as fraud and corruption that affect the financial interests of the Union. Although the provision is brand new, the ideas and proposals to devise a criminal law instrument directed at protecting EU financial interests are already 37 years old. In 1976 the Commission proposed – without success – to insert a provision on this issue in the Treaty.<sup>2</sup> The allocation of own resources to the Community did give rise to such an approach. The years thereafter saw new legal developments like the Convention on the protection of the financial interests (1995)<sup>3</sup> and a new provision in the Amsterdam Treaty which led to the setting up of OLAF<sup>4</sup>. OLAF makes part of the Commission and has the task of conducting “*external administrative investigations for the purpose of strengthening the fight against fraud, corruption and any other illegal activity adversely affecting the Community's financial interests*”. OLAF therefore is of an administrative nature only; no judicial powers have been conferred on OLAF.

While emphasising the scale and impact of fraud cases against the Community's financial interests the Commission continued its quest for providing criminal law measures especially by means of European Prosecutor to help protect these interests. To that end the Commission issued in 2001 a Green Paper on this matter.<sup>5</sup> Preparatory work of almost ten years preceded the Green

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<sup>1</sup> Article 86 (1) TFEU, first two sentences:

*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.*

<sup>2</sup> COM(76)418, OJC 222, 22.9.1976.

<sup>3</sup> OJC 316, 27.11.1995, 49. This Convention entered into force on 17 October 2002.

<sup>4</sup> Office de Lutte Anti-Fraude (OLAF), based upon Article 280 TEC and established by a Commission Decision of 28 April 1999 (OJL 136, 31 May 1999, 20).

<sup>5</sup> GREEN PAPER on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor (COM (2001) 715 final), of 11 December 2001. See: [http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001\\_0715en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0715en01.pdf) (accessed March 2013).

Paper. The most important part of that work consisted of the rather famous “Corpus Juris” entailing a set of rules for the criminal law protection of the Community’s financial interests.<sup>6</sup> The Corpus Juris was not just the outcome of an intellectual undertaking but based on a comparative study of national criminal law systems (of those days).

Besides these efforts aimed at providing impetus to the EU debate on this issue, EPPO was also subject of negotiations at the institutional level, concerning the drafting of new Treaty texts. During the Intergovernmental Conference (IGC) in Nice (2000) the Commission vainly proposed an introduction of a new provision regarding an appointment of a European Public Prosecutor and the conditions for the exercise of its functions.<sup>7</sup> The idea of creating an EPPO was taken up again by the 2004 IGC and got inserted in the Constitutional Treaty. With some amendments it finally landed in the Lisbon Treaty (Article 86 TFEU).

## 2. First developments after the entering into force of the Lisbon Treaty

With the entering into force of the Lisbon Treaty in December 2009 the question arose as to whether the Council would be prepared to consider the adoption of regulations to establish an EPPO *from* Eurojust as provided by Article 86 TFEU. In accordance with institutional competences it was of course up to the Commission to take a legislative initiative. The non-obligatory nature of Article 86 TFEU as a “may” provision raised the question of an extent to which such an initiative would be supported by the Member States and whether the number of support in states would be sufficient. The digits are important as well because the same article provides that in case of disagreement at least nine Member States can go ahead on the basis of an enhanced cooperation procedure.

The Stockholm Programme, the third multi-annual programme policy programme in the Area of Freedom, Security and Justice (FSJ), provided in December 2009 the first opportunity for the (formally European) Council to give its opinion on this new provision.<sup>8</sup> It did so; though rather “tongue in cheek”. In a very open and non-binding way the European Council stated in fact that the setting up of an EPPO was not among its first priorities. This would depend very much on further developments in the area of judicial cooperation and strengthening the further development of Eurojust:

*“In the field of judicial cooperation, the European Council emphasises the need for Member States and Eurojust to implement thoroughly Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust, which, together with the Lisbon Treaty, offers an opportunity for the further development of Eurojust in the coming years, including in relation to initiation of investigations and resolving conflicts of competence. On the basis of an assessment of the implementation of this instrument, new possibilities could be considered in accordance with the relevant provisions of the Treaty, including giving further powers to the Eurojust national members, reinforcement of the powers of the College of Eurojust or the setting-up of a European Public Prosecutor.”<sup>9</sup>*

In other words, only in a non-descript future and after the workings and effects of the new Eurojust Decision had been assessed, the new possibilities offered by the Treaty could be considered. These possibilities were about giving further powers to Eurojust and setting up EPPO. But for the time being, improving the judicial cooperation between Member States would constitute their priority. Enhancing the structure of Eurojust could serve such an objective. This

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<sup>6</sup>Revised version of the Corpus Juris known as the “Florence version” of May 1999. See: [http://ec.europa.eu/anti\\_fraud/documents/fwk-green-paper-corpus/corpus\\_juris\\_en.pdf](http://ec.europa.eu/anti_fraud/documents/fwk-green-paper-corpus/corpus_juris_en.pdf) (accessed at 2 May 2013).

<sup>7</sup> Additional Commission contribution to the Intergovernmental Conference on institutional reforms – The criminal protection of the Community’s financial interests: A European Prosecutor. 29.9.2000, COM(2000) 608.

<sup>8</sup> *The Stockholm Programme – an open and secure Europe serving and protecting citizens*. Adopted by the European Council on 10/11 December 2009, OJC 115/1, 4.5.2010.

<sup>9</sup> *Ibid*, last paragraph of chapter 3.1.1 on *Criminal law*.



may happen on the basis of Article 85 TFEU which stipulates that by means of regulations the structure, operation, field of action and tasks of Eurojust shall be determined.

Not in every respect this vision matched the views held by the Commission on this issue. On several occasions the Commission made clear that the EPPO belonged to its main concerns and that it should be furthered on the basis of a clear time line. Shortly after the adoption of the Stockholm programme, the Vice-president of the Commission, Viviane Reding, has already displayed her resoluteness. In a speech in March 2010 she stated: *“I firmly intend to make a proposal for establishing the European Public Prosecutor in the course of my mandate.”*<sup>10</sup>

Therefore, not surprisingly, the setting up of EPPO is provided in the Action Plan, drawn up by the Commission with a view to implement the Stockholm Programme<sup>11</sup> (though the action of the Commission was not very much to the liking of the Council<sup>12</sup>). Without providing further explanation the Action Plan announced:

*“The Commission will prepare the establishment of a European Public Prosecutor's Office from Eurojust, with the responsibility to investigate, prosecute and bring to judgement offences against the Union's financial interests. In doing so, the Commission will further reflect on the cooperation with all the actors involved, including the European Anti-Fraud Office (OLAF).”*<sup>13</sup>

The ANNEX attached to this Action Plan includes a Communication on the establishment of an EPPO (scheduled for 2013, see p.19) and proposals for a Regulation providing Eurojust with powers to initiate investigations (scheduled for 2012, see p.18).

### 3. Council and Commission positions

It may be concluded from the first two paragraphs that the Commission already insisted on the importance of providing effective protection of EU financials interests for a long time and that these interests should be defended through criminal law instruments, especially by establishing a European public prosecutor. Member States appeared all the way to be less impressed by problems of fraud and corruption undermining those interests. And even less by the necessity of putting in place such a new Office. However Commission and Council alike seem to share a view that the development of an EPPO should be closely connected to the strengthening of Eurojust. In this respect two major differences should be underlined. One difference is relating to the pace of change and another to the perspective and context.

The Council wants to see Eurojust developing gradually and mainly as an instrument of intergovernmental judicial cooperation. Thereby it is pointing to the powers conferred on the Union, on the basis of Article 85 TFEU, to the effect that it *may* assign to Eurojust new tasks such as: (1) the power to initiate criminal investigations as well as proposing the initiation of prosecutions conducted by competent national authorities<sup>14</sup>, and (2) the coordination of investigations and prosecutions as referred to in the preceding point<sup>15</sup>.<sup>16</sup> The Council underlines

<sup>10</sup> *The Future of European Criminal Justice under the Lisbon Treaty*, SPEECH/10/89 Event Date: 12/03/2010. See: [http://europa.eu/rapid/press-release\\_SPEECH-10-89\\_en.htm?locale=en](http://europa.eu/rapid/press-release_SPEECH-10-89_en.htm?locale=en)

<sup>11</sup> Delivering an area of freedom, security and justice for Europe's citizens; Action Plan Implementing the Stockholm Programme. COM(2010) 171 final, 20.4.2010.

<sup>12</sup> The Commission presented the Action Plan to the Council in April 2010. In accordance with diplomatic practices, the general feeling of the Council about the Plan was formulated in covered terms: *“Ministers welcomed the Commission paper, stressed, however, that the action plan should more closely mirror the objectives set out in the Stockholm Programme itself.”* See: PRESS RELEASE 3008th Council meeting Justice and Home Affairs, Brussels, 23 April 2010, p.8.

<sup>13</sup> Ibid footnote 11, p. 5.

<sup>14</sup> Article 85, paragraph 1, (a).

<sup>15</sup> Article 85, paragraph 1, (b).

<sup>16</sup> It should be taken note of that according to paragraph 2 of Article 85 TFEU the “prosecutions”, mentioned in the first paragraph of this Article, are without prejudice to Article 86 (regarding the establishment of an EPPO).

the necessity to give priority to the further development of Eurojust, within the context of judicial cooperation.

Along such lines a “college-type” EPPO (terminology originally coined by Prof. Katalin Ligeti) could gradually emerge.<sup>17</sup> According to this typology this means:

- The EPPO would be a collegial body composed of prosecutors appointed by the Member States.
- Decisions would be taken by (a majority of) the College on instructing (only) competent national authorities to initiate investigations and conduct prosecutions.
- The national prosecutors are working on the base of their respective national criminal procedural laws.
- Evidence collected by the national authorities would be sent to the EPPO and made available to the other EPPO-states.<sup>18</sup>

However, the Commission prefers to shift into higher gear as soon as possible. In its various communications so far the Commission does not associate EPPO with Eurojust under Article 85, but envisages establishing an EPPO *from Eurojust* making use of the new separate legal basis provided by Article 86 TFEU. The context of judicial cooperation is apparently not shared by the Commission, while stressing the importance of defending the Union and its interests.

#### 4. The way ahead: the taking of the initiative by the Commission

Notwithstanding these distinct positions, the Commission did move on, along the initially lines as laid down in her implementing plan of the Stockholm Programme. In its Work Programme 2013 the Commission reported that it would come forward in the course of 2013 with a legislative proposal regarding the setting up of an EPPO.<sup>19</sup> As always, the Commission prepared to undertake this task in close cooperation with the Member States and their officials.<sup>20</sup> Within this framework Vice-President Reding delivered in June 2012 a speech at a meeting of Prosecutor Generals and Directors of Public Prosecution of the European Union. The meeting was devoted to discussions on ways to ensure more effectively the protection of the European financial interests.<sup>21</sup> Vice-President Reding came forward with a policy package entailing three main steps to help ensure that the European Union budget is effectively protected against criminals. The first step concerns an anti-fraud Directive which will see upon harmonising the definition of fraud and providing for minimum penalties. Secondly, procedural obstacles to investigations or prosecutions concerning fraud to the detriment of the financial interests of the European Union have to be gradually eliminated. And the third step is to put in place the EPPO.

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<sup>17</sup> Professor Katalin Ligeti and Dr. Michele Simonato (University of Luxembourg) discern three possible models for an EPPO: 1) a *College-type* model, 2) a *centralised* model and 3) an *integrated* EPPO. See Katalin Ligeti and Michele Simonato, *The European Public Prosecutor's Office: towards a truly European Prosecution Service?*, New Journal of European Criminal Law, Vol.4, Issue 1-2, 2013, pp.7-21.

<sup>18</sup> Ibid

<sup>19</sup> Commission Work Programme 2013, COM(2012) 629 final, 23.10.2012, p.9. See also the ANNEX to the Work programme, point 48 (p. 9).

<sup>20</sup> The Commission launched an on-line questionnaire for practitioners on the prosecution of European Union fraud and the establishment of the European Public Prosecutor's Office. Further the Commission organised and participated in different consultations with Member States and other stakeholders, among others in the form of expert meetings. See *Infra*, footnote 21, p. 6 and 8.

<sup>21</sup> Viviane Reding Vice-President of the Commission, EU Justice Commissioner: *The future legal and institutional framework of combating fraud against the EU's financial interests*. Brussels, 26 June 2012. See: [http://ec.europa.eu/commission\\_2010-2014/reding/pdf/speeches/20120626speech-fraud-legal-framework\\_en.pdf](http://ec.europa.eu/commission_2010-2014/reding/pdf/speeches/20120626speech-fraud-legal-framework_en.pdf) (accessed May 2013).

In the most recent speech held at a hearing of the European Parliament in March 2013 Vice-President Viviane Reding emphasised again the necessity of this policy package. She explained that whilst 90% of the Union budget is managed by national authorities, the protection of the Union's financial interests differs significantly from one Member State to another. And the "flagship" of her integrated policy in this specific domain of the AFSJ consists of EPPO.<sup>22</sup> She announced that the Commission proposal, aimed at establishing EPPO from Eurojust on the basis of Article 86 TFEU, is planned for the summer of 2013. It will be accompanied by a proposal to reform Eurojust. According to Ms Reding the Eurojust reforms will tackle the institutional and practical links with EPPO. But the Eurojust reforms will not be directed at providing powers in the policy area of protecting the EU's financial interests.

She envisages an integrated and yet decentralised EPPO system: "*Integrated*" means that the EPPO will be a European office; "*decentralised*" means that the EPPO will be embedded operationally in the Member States. The EPPO shall directly investigate, prosecute and bring to justice throughout the Union territory offences against the Union's financial interests, hand in hand with national law enforcement and judicial authorities. For this to happen, we must organise the relations between EPPO and the national authorities in a way that avoids overlaps and duplication in their work."<sup>23</sup>

In the terms of Prof. Ligeti's typology Reding's description could amount to an "integrated" EPPO model displaying among others the following features:

- The EPPO is a single EU-body with a hierarchical structure.
- The EPPO has a two-layer structure:
  - a central office assisted by and instructing
  - delegated prosecutors embedded also in their national criminal justice systems (in other words wearing a 'double' – national and EU – hat).
- The EPPO relies on national investigation bodies (may have, however, also investigators in the central Office).
- The integrated model could work both on the bases of national criminal procedural law or a harmonised set of procedural rules.<sup>24</sup>

This integrated model seems also to resemble rather closely to the structure of a European Public Prosecutor described and designed in the 2001 Green Paper of the Commission.<sup>25</sup>

Even without proposals being available, these previewed indications make it abundantly clear that the launch of the very first autonomous criminal law instrument on the level of the Union is bound to raise fundamental issues of division of competences between the Union and the Member States, tricky questions of subsidiarity and of proportionality as well as intriguing issues of procedure and protection of fundamental rights.

##### 5. Timing, venue, character and main perspective and topics of the conference

If anything becomes clear from the history concerning the EPPO as a key instrument to protect the Union's financial interests, it is the overwhelming number of questions and topics generated by it. Choices have to be made. The specific point in time has also to be taken into account.

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<sup>22</sup> Viviane Reding Vice-President of the European Commission, responsible for Justice, Fundamental Rights and Citizenship, *Strengthening the basis for EU criminal law and judicial cooperation*. Speech delivered at a Hearing of the Joint CRIM – LIBE Committees of the European Parliament; Brussels, 19 March 2013. See: <http://www.europarl.europa.eu/document/activities/cont/201303/20130321ATT63607/20130321ATT63607EN.pdf> (accessed 4 April 2013).

<sup>23</sup> Ibid, p. 10.

<sup>24</sup> See *Supra* footnote 17.

<sup>25</sup> See *Supra* footnote 5, p. 88 -90.

Furthermore the conferences and seminars already devoted to this issue or expected to be taking place this year need to be considered.<sup>26</sup> Finally, the seminar will be of a one-day format.

**Timing of the conference:** the basic idea of the seminar is to offer a first and most instantaneous opportunity to the Academia together with representatives of the EU Member States and EU institutions to evaluate the freshly published proposal of the Commission concerning the EPPO. All preceding conferences could not deal with Commission proposal on this issue. According to our latest information the Commission is planning to publish its legislative proposal in July 2013 and to present it at the JHA Council (probably) in October 2013.<sup>27</sup> Given the fact that the incoming LT Presidency of the Council is planning a (invitational) two-day conference on the EPPO proposals of the Commission in September 2013<sup>28</sup> it has been determined that the seminar will be held on Friday 6 September 2013.

**Venue of the conference:** it is proposed to hold the seminar in The Hague, within the premises of the T.M.C. Asser Institute. The Hague provides a significant venue. It is the seat of Eurojust, from which EPPO has to be established. Secondly, the City of The Hague always strongly conveys its position as “legal capital of the world”.

**Main character of the conference:** Unlike the LT conference this seminar will be open to involved experts stemming from the Academia, officials from the Member States governments and its judicial authorities as well as officials from the EU institutions and legal practitioners. That way it will offer a meeting point to these experts exchanging their views on the basis of differing outlooks and providing together a first assessment of the Commission’s proposals. The scope of the seminar will be demarcated and the number of topics has to remain restricted.

**Main objective of the conference:** this seminar will provide a first academic evaluation of the Commission’s proposals on setting up EPPO through providing an opportunity to discuss and assess legal matters combined with a debate on issues of principle and policy, linked to establishing an Office of such high judicial profile.

**Main topics of the conference:**

The analysis provided in the preceding paragraphs sheds some light on the fundamental issues with regard to the positioning and the powers of this new office. These issues are related to questions regarding the distribution of competences between Union and Member States and questions ensuing thereof, especially related the constitutional principles of subsidiarity and proportionality<sup>29</sup> and fundamental questions related to the framework of enhanced cooperation.

It has been made clear that Commission and Council are holding different views on these issues. The vital question to be dealt with during this seminar will be to what extent the Commission proposals are capable of striking a balance acceptable to both the Union and its Member States.

The first session of the conference is entitled: *The Commission proposal: an extended arm or a two headed dragon?* The Commission proposals will be presented. More particularly these will be scrutinised from the viewpoint of the principles of subsidiarity, conferral of competences and proportionality. Both principles are governing the relationship between the Union and its Member States. The impact analysis, to be delivered by the Commission, would need to provide evidence that Member States were and are not sufficiently capable to prevent and combat

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<sup>26</sup> The incoming Lithuanian (LT) Presidency of the Council is planning to hold an invitational conference on the establishment of the EPPO on 16-17 September, 2013, in Vilnius. Eurojust did hold a conference on 12 and 13 November 2012 in The Hague (“10 Years Of Eurojust”) spending half a day to EPPO. Almost at the same time, 7-9 November 2012, OLAF did hold a conference in Berlin entitled: “Cooperation of a future European Public Prosecutor’s Office with National Prosecution Services”. The 7<sup>th</sup> European Jurists’ Forum organised a conference in Barcelona from 18-20 April 2013 during which half a day was being spend to EPPO (see: <http://www.ejf2013.com/web/ejf2013/benvinguda> ). In Italy two conferences were being held on EPPO in June 2013, one in Rome and the other in Catania (Sicily).

<sup>27</sup> Information drawn from Brussels’ sources.

<sup>28</sup> See *Supra* Footnote 26

<sup>29</sup> Both principles are laid down in Article 5 TEU.

effectively EU fraud (appropriations and expenditure) and other offences harming EU's financial interests.<sup>30</sup> Proportionality issues deal with questions as to whether the proposed structure of the Office and its competences are proportionate and do not exceed what is necessary to achieve the defined objectives. The choice of the model as referred to above may be crucial to whether the proposal would prove to be workable in practice.

The second session on *Legal bases and procedures for EPPO operations and judicial review* will focus on the division of rules of substance and procedure governing EPPO operations between the Union and the national level. Which extent of unification and harmonisation of those rules in Article 86 based instruments is proposed and which role may be reserved for model rules developed so far? Further, the impact of existing legal instruments and arrangements, including e.g. preliminary procedures concerning the interpretation of EU rules and direct EU review under Article 263 TFEU, will be explored, in particular in relation to pre-trial investigations by EPPO.

The third session, entitled *From Eurojust to EPPO: a reversal of the constitutional perspective?*, purports to discuss the relationship between Article 85 TFEU, providing for a more member state oriented Eurojust, and Article 86 TFEU, apparently drafted with a view to a genuinely autonomous EU Office. What could be the relationship between the institutional operationalization of these two provisions from a constitutional perspective? Furthermore, intriguing questions may be raised of how an EPPO would find its place and be able to effectively function within a multilevel system of administration of justice, not only as between the Union and the Member States, but also as within certain Member States.

The fourth session focusses on enhanced cooperation: *How Feasible is Enhanced Cooperation for EPPO?* Enhanced cooperation will become most probably the framework within which EPPO would have to function. Firstly, particular issues of establishing enhanced cooperation under Article 86 TFEU will be examined. Secondly, the implications of enhanced cooperation for the choice of the EPPO model and its operation must be considered, as well as the pitfalls of EPPO jurisdiction trying to investigate and bring to justice cases in an area between non-participating Member States and third countries.

Finally, a forum composed of some speakers and other stakeholders will review and discuss with the audience remaining issues and perspectives.

The Hague (NL), T.M.C. ASSER Institute, May 2013

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<sup>30</sup>The German *Bundesrat*, for example, is of the opinion that up until now the necessity of an EPPO has not been sufficiently proven. See: *Beschluss des Bundesrates*, p.2. Drucksache 334/11, 08/07/2011. Available at: [http://ec.europa.eu/dgs/secretariat\\_general/relations/relations\\_other/npo/docs/germany/2011/com20110293/com20110293\\_bundesrat\\_opinion\\_de.pdf](http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/germany/2011/com20110293/com20110293_bundesrat_opinion_de.pdf)