

International conference

**EPPO and OLAF investigations:
the judicial review and procedural guarantees**

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Background Paper

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1. STATE OF PLAY

1.1 Reasons for establishing EPPO

The legal basis for the European Public Prosecutor's Office stems from Article 86 TFEU. This basis is reinforced by Article 325 TFEU (in conjunction with Article 83 TFEU which provides a stimulus for the identification of substantive criminal law regulations).

The institution of EPPO is necessary for several reasons:

- Actions detrimental to the financial interests of the Union harm not only the EU as a whole but also the interests of its citizens

- **The establishment of the euro area strengthens the need for EPPO** since the single currency creates closer ties and so requires a greater degree of common *governance* of financial crimes. **Therefore, some form of enhanced cooperation, which includes at least the euro countries, should be envisaged**

- At present, the fragmentation of the criminal area in the EU, and the differentiation in procedures regarding the *an* and the *quomodo* of the responses that different Member States give to criminal cases, creates adverse consequences for the effectiveness of the fight against financial crimes.

More generally, it is a question of framing EPPO in the context of the European Area of Freedom, Security and Justice (AFSJ), where there is a need to reduce the disadvantages that result from imbalances between the national and supranational dimensions. In fact, the debate on this issue is dominated by a fundamental question: **Should the AFSJ be understood as a legally "unified" area according to the principle so-called "territoriality" or a "common" area among Member States?** How, then, should the principle of *mutual recognition* be extended? This originated, not coincidentally, in Tampere in October 1999 in relation to the AFSJ. Article 82 TFEU, which underpins criminal justice cooperation, is built on mutual recognition. It would seem necessary to make progress in this area from the perspective of a uniform system of guarantees.

1.2 Open issues

Specifically, the following issues should be addressed:

a) The role of the European Public Prosecutor and the structure of the office: monocratic and vertical or horizontal and collegial?

b) EPPO is a European body which must be able to collaborate with national authorities operating under legal systems that regulate differently the competences, functions and supervision over the activities of their respective public prosecutors. So how can one expect that greater harmonization will successfully be promoted?

¹**N.B.** Given the expository nature of this paper, specific citations were not considered appropriate

c) In connection with the creation of this Office, should definitions be given to **substantive EU law** or unified substantive crime typologies? This would also help to reduce procedural differences in trials conducted in different Member States.

d) The issue of the **protection of fundamental rights is a crucial question**. In democratic systems, a criminal offence is a personal offence and so it is the person who must be protected, from the very beginning of the investigation. A common criminal justice area involves not only coordination among institutions, but also **close relations between the person and the Union**. The legitimacy of the European Union as regards extending rights will be put to the test also in terms of the solutions found for the EPPO.

As regards this question, there are two related themes: **judicial review** and **procedural guarantees**. We must consider the connection between the Articles that establish the legal basis of EPPO (especially Articles 86 and 325 TFEU) and Articles 2, 3 (para. 2), 6 TEU, Article 82 TFEU on mutual recognition, Articles 47-50 of the Charter of Fundamental Rights of the European Union, and the rights protected by the European Convention on Human Rights (ECHR) - in particular Article 46, which requires States Parties to comply with a final judgment of the ECtHR (many different aspects will have to be considered, especially after the negative opinion of the Court of Justice of the EU (2/13) on EU accession to the ECHR).

e) If EPPO follows the path of enhanced cooperation, what are the problems that may arise from the need to maintain judicial cooperation procedures with other countries?

To provide a more specific representation of the "state of play", taking for granted the most well known and now agreed aspects, it would appear necessary to consider first of all the first question, which has two possible basic alternatives.

1.3 Role of the European Public Prosecutor and the structure of the Office

The debate on the role of the European Public Prosecutor and the structure of the Office is still ongoing. It is, therefore, important to look at the two main alternatives under discussion.

Two recent points of reference may be taken as representative of the complex ongoing debate: the draft regulation issued by the Commission in 2013 (A) and the conclusions of the Greek and the Italian presidencies (B).

A) The model of the European Public Prosecutor in the Commission proposal is essentially a centralised model. It is a model where cooperation is vertical and expressed through a combination of elements that are decentralised but framed within a hierarchical structure. EPPO would include the European Public Prosecutor and deputy prosecutors operating in all Member States, but the structure would remain vertical and monocratic. Everything would be done under the direct supervision of EPPO. EPPO would have extended powers of initiative, which, together with its delegates, would have the same power as that of national prosecutors. Connected to this interpretation of EPPO is the principle of "territoriality", underlined in the proposed Regulation. It means that the territory of the states that make up the Union must be regarded **as a single legal area**, understood as a single unit, in which the European Public Prosecutor's Office can exercise its investigative and accusatory functions. This proposal implicitly gives the AFSJ **an entirely "Community" status**. With the territoriality of the European legal area understood in this way, the competence of the Prosecutor and delegates would be uniform and vertical everywhere.

B) The draft prepared by the Greek Presidency challenged this structure, adding to the already lively debate. A **more markedly intergovernmental model** was adopted. The structure of EPPO is

presented as collegial, more horizontal than vertical, and within it Member States have a very different voice. The novelty is that in the Greek model, the 'apical' structure is collegial. It consists of a central office that includes the prosecutor, the members of the College, and the staff. The consequence of a structure like this is very indicative: it emerges as a *multilevel* structure with a strong intergovernmental presence in terms of composition, investigative methods and decision-making. It moves away from an exclusive EPPO competence towards competences divided between EPPO and Member States: cooperation and constant consultation between EPPO and the corresponding state authorities.

The Italian Presidency has basically followed the Greek model, explicitly abandoning the principle of "territoriality", which, as mentioned earlier, is an important part of the Commission's proposed Regulation. While Article 25 (1) of the Regulation speaks of the territory of the Union as a single legal area, the amendment made to that article by the Italian Presidency says that the investigative work of the Prosecutor takes place within a single office, a formulation which, by replacing the words "single area", envisages a more restricted approach to territoriality.

On this decisive aspect of the **final configuration to give EPPO, one which influences everything else, debate is still ongoing.**

2. JUDICIAL REVIEW

The question of judicial review is crucial because it is based on two fundamental premises:

A) The centrality of the principle of legality and the rule of law for the legitimacy of the European Union and, therefore, the need for judicial review to test the constitutionality of the acts.

B) The impact of investigations adopted by the European Public Prosecutor's Office on fundamental rights. Which fundamental rights may come into conflict with acts adopted by the European Public Prosecutor? Primarily those in the Charter of Fundamental Rights of the European Union:

1. The right to an effective remedy and to a fair trial (Article 47)
2. Presumption of innocence and right of defence (Article 48)
3. Principles of legality and proportionality of criminal offences and penalties (Article 49)
4. Right not to be tried or punished twice for the same offence (Article 50)
5. Rights related to inquiries and investigations that may affect the fairness of the proceedings and violate the dignity of the person, such as identification tools, the ways people are summoned, personal data collection, interrogation of the accused or witnesses, the rights of children.

The primary issue is to decide how the decisions of the European Public Prosecutor to initiate investigations, to continue them and close them, should be subject to judicial review. The positions on this thorny question are quite distant. Special importance should be given to the debate on the function of the Court of Justice of the European Union as regards the "judicial review" of EPPO activity in the absence of any mention of this aspect in Article 86 TFEU. We should, therefore, ask: Will the Court of Justice play a role and what will it be? Will EPPO apply "European law", which is the only way that the Court of Justice can be competent to judge its activities?

On the latter point, the complexity of the issue is reflected in the difference of views between the Commission (proposed Regulation COM (2013) 534) and the Legal Service of the Council. Thus, a number of alternatives emerge.

Let us start with the wording of Article 36 of the proposed Regulation on the issue of review.

c. 1: "When adopting procedural acts in the exercise of its functions, the European Public Prosecutor's Office is considered a national authority for the purposes of judicial review.

c. 2: "The provisions of national law applicable under this Regulation shall not be considered as provisions of EU law for the purposes of Article 267 TFEU, which is the Article that defines the competences of the Court of Justice". Moreover, Articles 263, 265, 267, 268 TFEU do not apply.

The consequence of this interpretation of the European Commission is that the Court of Justice cannot review the acts carried out by EPPO since judicial review would lie within the competence of the primary and secondary national courts in each case. However, a contradiction has been highlighted between the way in which the Commission describes EPPO as a truly "European body" and the exclusion of the Court of Justice from judicial review.

From another point of view, a complex series of objections and opinions have been drawn up by the Council Legal Service, based, in particular, on the interpretation of Article 86 TFEU, which can be summarised thus:

1. As regards Article 36(1) of the proposed Regulation, the Legal Service concludes that it should be redrafted so as to avoid the complete exclusion of the Court from the judicial review of measures taken by the Prosecutor. **Exclusion of judicial review** competence should be limited to only two cases:

a) Procedural measures adopted by the European Public Prosecutor **after** an appeal to the competent national court;

b) Procedural measures adopted by the European Public Prosecutor **before** an appeal to a national court, but only to the extent that such measures are based on national law or - if different - when they do not affect either the right to effective protection or the autonomy of Union law.

2. Paragraph 2 of Article 36 of the proposed Regulation should be deleted, the reason being that it could be read as excluding the possibility of a **preliminary ruling** on the interpretation of national law as an instrument implementing EU law (pursuant to Article 267 TFEU).

Overall, the opinion of the Council Legal Service tends to give significant leeway to the competence of the Court of Justice in the acts adopted by the European Public Prosecutor, especially as regards **preliminary rulings**, stressing, at the same time, the competences of national courts. According to the arguments of the Legal Service, the rule of law can only be fully respected by a blend of the two dimensions, which together cover the constitutional fabric of the European Union. It is not reasonable to imagine that judicial review should lie beyond the bounds of the constitutional parameters of the Treaties. This issue is fundamental and **seems to be of crucial importance in the ongoing discussions**.

It may be noted that the diversity of views between the Commission and the Council Legal Service highlights the ongoing difficulties regarding the legal physiognomy of the European Public Prosecutor's Office and the nature of the acts it undertakes.

The final part of paragraph 1 of Article 263 TFEU states: The Court of Justice "shall review the legality of acts of bodies, offices or agencies intended to produce legal effects vis-à-vis third parties." Moreover, Article 267 TFEU: "The Court of Justice of the European Union has jurisdiction to give preliminary rulings concerning: (...) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union."

Therefore, the competence of the Court could only be excluded if it is decided that the European Public Prosecutor does is not an organ or agency of the Union. According to the argument used by the Commission, this nature is not considered and the office is seen as a "national authority" when adopting procedural measures in the exercise of its function.

We may notice, therefore, that there are opposing systematic views of the questions. In addition, another possibility has been advanced - still interpreting the Court of Justice as a court of last resort and wanting to preserve European competence – that of instituting a **specialised court** on the legal basis of Article 257 TFEU.

2.1 RULE OF LAW and FUNDAMENTAL RIGHTS

A crucial aspect is the compliance of the activities of the European Public Prosecutor with fundamental rights. The main issues may be outlined as follows:

a) The exclusion of the Court of Justice of the European Union (or a European court) raises the issue of respect for the **rule of law** in the European Union in relation to the protection of fundamental rights, in particular under **Articles 47-50 of the Charter of Fundamental Rights**. Since the acts and decisions adopted by EPPO, whether at centralised or decentralised level, are acts that take place in Union territory, it is argued that they should be subject to judicial review according to the constitutional principles of the European treaties.

b) One debate hinges on compliance with the principles of **subsidiarity and proportionality** (Article 5 TEU). In any event, the principle retains its full value in the distinction between the work of the European Public Prosecutor and the decentralised prosecutors. From this point of view, subsidiarity and proportionality become crucial issues vis-à-vis the control of the different phases of EPPO action.

c) Some maintain the need to use all the possibilities included in Articles 263 and 267 TFEU, which together provide complete and effective legal protection, with the full involvement of the Court of Justice of the European Union in a constant dialogue with national courts, within their respective competences.

d) The centrality of the protection of fundamental rights and of the courts that protect them come up against the problem of "**counter-limits**" (codified in Article 4(2) TEU) and the use of this principle in aspects of a crime. It is worthwhile clarifying the nature of the problem. It is a question of the relation between **supranational legality** and **constitutional legality** and the possibility of a gap forming between the two. Article 4(2) states: "The Union shall respect the equality of Member States before the Treaties and their national identities, inherent in their fundamental structures, political and constitutional." Thus, the question remains whether it could be necessary for the principle of counter-limits to be used in the event of a discrepancy between the supranational configuration of protected rights (Article 6 TEU) and the fundamental rights which form the constitutional identity of a Member State. In fact, Article 6 TEU provides that **fundamental rights, as guaranteed by the ECHR** and as they result from the constitutional traditions common to the Member States, are part of Union law as its general principles.

However, it is doubtful whether this wording is sufficient to exclude the possibility of using the criterion of "counter-limits" in cases where a discrepancy arises in the protection of fundamental rights between a national constitution and supranational legitimacy, notwithstanding the provisions of Article 6 TEU.

3. PROCEDURAL SAFEGUARDS

A) In establishing EPPO, another critical issue is procedural safeguards in relation to:

a) The identification of a pre-trial phase in which the legitimacy of EPPO actions may be submitted to judicial review to verify compliance with the principle of legality.

b) The protection of fundamental rights as regards EPPO's direct dealings with suspects and accused persons.

It should be noted that the issue is closely linked to that of judicial review. **All procedural issues hinge on the question of judicial review.**

How would the establishment of EPPO affect the ongoing negotiations regarding the Europeanisation of procedural safeguards in criminal trials?

The debate focuses on the tendency towards **harmonisation** of procedural law, which is still today very different in different Member States. It has been pointed out that an ungovernable contradiction could be created between the institutional unification that EPPO represents and the maintenance of major regulatory differences. Some of the questions that need to be addressed include: **Can institutional unification be contemplated if there continues to be deep disharmony, especially with regard to procedural law?** At what level would it be possible to harmonise procedural regulations? Can the confines between prosecutorial powers and judicial powers be set unitarily in the pre-trial phase? There are Member States, such as Germany, that do not envisage judicial review for prosecutorial functions, such as those of the European Public Prosecutor.

These problems have always been of difficult solution and are part of the ongoing legal-institutional discussions at European level. In some cases there have been retreats on previous positions. An example is the transition from the *Corpus Juris* to the *Green Paper* (after one year: 2000-2001) on this very set of issues, as regards both the possibility of substantive EU criminal law and the harmonisation of procedural rules.

On the positive side, encouraging consensus has been reached with:

- Directive 2010/64 EU on the right to interpretation and translation,
- Directive 2012/13 EU on the right to information,
- Directive 2013/48/EU on the right to use a lawyer in criminal proceedings

Other questions remain open, including the **presumption of innocence, legal aid, protection of vulnerable persons**: all issues that are subject of intense debate in which positions are not yet convergent.

The criterion for harmonisation exists and lies within the principle of **mutual recognition** present since the late nineties within the Tampere *Conclusions* (point 33) and codified in Lisbon in Article 82 TFEU. Essential elements that should accompany this principle, according to the recommendation of the European Parliament (P6_TA-PROV 2009, 0836), include the principle of the presumption of innocence, the right to a "Letter of Rights", the right to produce evidence, the right to be informed in a comprehensible language, the right of access to documents.

The question of harmonisation can be seen in some borderline cases. For example, some Member States have included the decision to initiate inquiries (searches in homes, freezing of assets, etc.) within the exclusive jurisdiction of the courts. Thus, the European Public Prosecutor, faced with a case that is subject to national legislation, cannot even initiate investigations in the most urgent cases since there arises the issue of constitutional counter-limits. However, such evident disharmony would no longer seem to be sustainable after the establishment of a European Public Prosecutor's Office.

B) The issue of the protection of fundamental rights is also prominent.

The protection of fundamental rights is provided for in primary legislation (Articles 2, 3 and, especially, 6 TEU) and the EU Charter, Articles 47-50 concerning Justice. For the specific case of criminal investigations, a problem that arises is the relationship with Article 6 ECHR, relating to the rights of the accused, which, if violated, may be invoked in a complaint before the Strasbourg Court.

A possibility to be considered is an appeal to the European Court of Human Rights for violations occurring in criminal proceedings involving the European Public Prosecutor. The precision of Article 6 ECHR on the phases prior to the trial and the right to a fair trial, as compared to the less specific wording of the EU Charter, could mean its provisions have to be taken into account, especially in cross-border cases, for example when evidence is acquired in states other than those in which the criminal proceedings are taking place and where the full protection of the accused is problematic.

In relation to Article 6 ECHR, some questions need to be addressed, and this has become even more urgent after the failure of the EU accession to the ECHR despite the obligation imposed in Article 6(2) TEU. The ECHR provisions are the result of an international agreement, which places them at a lower level than EU law. Therefore, "Community" rules prevail over the "pactional" regulations of the Convention. If, as a matter of principle, a complaint can be lodged with the Strasbourg Court if a fundamental right of a citizen is violated at a National court level, the same cannot be done when dealing with a regulation derived from the legal system of the European Union. The issue may be important for the relation between EPPO and choice of jurisdictions for the protection of rights. However, what if EPPO were excluded from judicial review by the Court of Justice?

4. EUROJUST and OLAF

4.1 Relations between EPPO and EUROJUST

Difficulties remain to this day in defining the relations between "competing" organisations. There are still some unanswered questions including:

- EPPO and EUROJUST: same judicial logic but different levels of legal integration. What role will EUROJUST play after EPPO?

- How do we interpret the words "from Eurojust" in Article 86 TFEU, which is the legal basis for EPPO? Surely, it indicates the intent to establish a functional relation between the two bodies.

Even after EPPO is created, EUROJUST will continue to have a role in protecting the EU's financial interests (PIF), but the matter is still to be worked out, rather urgently. EPPO has to strengthen the system of collaboration between institutions and bodies dedicated to fighting crime. However, after EPPO, the system needs to achieve maximum organisational transparency **and the mix of competences must be free of obstacles**. EUROJUST is supposed to intervene when criminal cooperation is needed between the judicial authorities of different Member States. A mainstay in future negotiations involving the two bodies is that EPPO is "responsible" for investigating, bringing to justice and getting a judgment, while Eurojust has no responsibility in this regard, since its job is to provide support and coordination.

Two incomparable levels that must communicate with each other, an issue also rooted in the "from" in Article 86 TFEU.

4.2 OLAF

What role will be played by OLAF (European Anti-Fraud Office)? The administrative nature of its work on combating fraud should not be an unsurmountable obstacle to its relationship with EPPO and should also allow it to continue its work, which overall has been judged to be effective. But it will have to be reworked from the standpoint of support to EPPO.

The competences of OLAF and EPPO do not coincide (OLAF has much greater powers of administrative investigation, for example with regard to the counterfeiting of goods, which is not necessarily detrimental to the financial interests of the EU). However, when investigations involve both administrative and financial crimes, a substantial and procedural balance must be established.

An analysis has to be made between the new 2013 OLAF Regulation and the proposal for a Council regulation of EPPO (2013) to determine the relations between the two and avoid the risk of

damaging interference. The most delicate area involves the confines between administrative irregularities and criminal offences, which will involve cooperation between OLAF and EPPO.

4.2.1 OPEN QUESTIONS

Difficulties to be addressed:

1. The relationship between administrative investigation and criminal judicial investigation vis-à-vis a possible delay effect when the two types of investigation cross over, and the protection of fundamental rights.
- 2 Will the new OLAF Regulation manage to bridge the regulatory gaps which have until now limited its investigations?
3. At present, OLAF has direct relations with the courts of Member States. Thus, with the establishment of EPPO, its activities and the relation between the two bodies need further regulation.
4. Because of its wide-ranging competences, OLAF can investigate a case that includes crimes affecting the financial interests of the Union as well as those that do not. In similar cases, EPPO cannot be its interlocutor. Thus, there will be a need for having clear procedures to avoid confusion, delays or actions of dubious legal basis, which are susceptible to appeals.

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