Chapter 2
The European Public Prosecutor's Office (EPPO): Introductory Remarks

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Abstract These introductory remarks deal with the reasons why the EPPO is perceived by some as a controversial body. These reasons are mirrored with the problem identification and the causes thereof. The size of EU fraud and related corruption and money laundering, both at the income and expenditure side, is quite significant. There is also a strong enforcement deficit in the Member States, especially in the case of complex transnational VAT and customs fraud cases. Three fields of action are potentially of interest for the EPPO: VAT, customs and smuggling, and fraud and corruption within the EU institutions. This leads to the analysis of what the potential added value of the EPPO could be, both from a technical fraud perspective as from a political legitimacy perspective. Finally, the introduction deals with the ongoing negotiations on the EPPO proposal, taking into account the mandate and rationale of Article 86 TFEU in the framework of the Area of Freedom, Security and Justice.

Keywords Corpus Juris · Sovereignty · Area of Freedom, Security and Justice (AFSJ) · Financial Interests EU · Fraud · VAT Fraud · Customs Fraud · OLAF · European Public Prosecutor's Office

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W. Geelhoed et al. (eds.), *Shifting Perspectives on the European Public Prosecutor's Office*, https://doi.org/10.1007/978-94-6265-216-3_2

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2.1 The European Public Prosecutor's Office: A Controversial Body

Both the T.M.C. Asser Instituut and Leiden University deserve sincere congratulations for the organization of the event, as the choice of the topic and the timing could not have been better planned. At the end of the Dutch Presidency there is a first general draft of the Council, although quite some specific topics remain under debate and will be addressed by the incoming Slovak Presidency.

When one evaluates the scholarly work[1] on the topic—avoiding the very rich UK tabloid press—it is quite astonishing to see what words are used: the European Public Prosecutor's Office (EPPO) is a conundrum, it is an enigma, it is mysterious, it is a Trojan horse, it is a white elephant,[2] it is a two headed dragon,[3] and it can go on like that. This sounds appealing, but there is also something alarming, something threatening. At the tenth anniversary of the ECLAN network[4] in Brussels in April 2016, the Belgian Minister of Justice, Mr. Geens, labelled the EPPO draft design of the Council as follows: 'The baby is not a beauty, let's hope it has some brains'.[5]

So why is this topic so controversial? In fact, there are many reasons for that. The first reason is that it is a new supranational institution in the field of criminal law enforcement. Unlike Europol and Eurojust it would also be entrusted with autonomous operational investigative and prosecutorial powers. This means that Member States fear that their sovereign powers will be transferred to the supranational EU level.

The second reason is that this transfer of sovereignty is in fact a matter of 'shared sovereignty', or of what the Germans call '*Vergemeinschaftlichung*'. This means that at the national level, in this case the pre-trial investigation and prosecution, the European dimension is increasing. National authorities are increasingly bestowed with European functions. Transfer of sovereignty and shared sovereignty seems to

[1] Csúri 2016; Erkelens et al. 2015.

[2] Csúri 2016.

[3] Erkelens et al. 2015.

[4] ECLAN: European Criminal Law Academic Network.

[5] Conference programme available at: http://www.iee-ulb.eu/files/attachments/.1292/ECLAN_final_programme.pdf (accessed January 2017).

be contradictory, but that is only the case at first sight. In many areas of European regulation, and increasingly also with regard to European enforcement, European agencies, bodies and institutions have been created. However, they execute their powers in strong interaction with the national level, be it because they apply also national law or be it that they are acting in close cooperation with the national institutions. Verticalisation does not automatically mean that these powers are not embedded in the national legal orders. Mostly they are. This is for instance the case in the area of competence of the EU competition authority, the EU Central Bank (ECB) and the European financial regulatory and enforcement agencies, as for instance the European Securities and Markets Authority (ESMA). This would mean in our field that national prosecutors would investigate and prosecute offences under the direction and guidance of the EPPO. Both, transfer of powers and Europeanisation of domestic criminal justice at the operational level is for most Member States an uneasy scenario in the area of criminal justice. Member States are afraid that the EPPO will open the door for transferring powers to the EU level, but that this will also come back as a boomerang, harmonizing national procedures.

A third reason why the EPPO—just like the other European bodies—is so controversial is that it operates in a common space or area, comparable to the internal market and the monetary union: the policy Area of Freedom, Security and Justice (AFSJ). This entrusts it with the objective to protect common interests that go beyond the territories of every single state or jurisdiction. Member States do not like this combination of vertical institutions with transnational powers. By large, they do prefer horizontal and intergovernmental modes of cooperation. It comes to no surprise that some national parliaments stated that there is no need for the EPPO as the intergovernmental judicial cooperation could be further improved. Going beyond this would violate EU subsidiarity. During the negotiations in the EU Council, Member States have removed concepts as the 'single legal space'. They also have decentralized the functioning of the EPPO within their national jurisdictions, even to the extent that the EPPO would need mutual recognition instruments for transnational cooperation.

The fourth reason why a future EPPO is controversial, in my opinion, is related to the substantive competence (*ratione materiae*) of the EPPO. PIF-offences[6] look pretty much as a specialized and small area, but that is not really the case. They are related to corruption, organized crime, money laundering, tax offences, custom offences, etc. That could be a reason why the Member States are opposed to include VAT offences in the competence of the EPPO, although VAT carousel fraud is substantial and very transnational in nature. In addition to that, many Member States are concerned that the category of PIF-offences will very soon be broadened to other offences. These could be offences that are related to the EU interests, such as counterfeiting of the Euro, or tendering-fraud. Additionally, euro-offences could be added, as defined in under Article 83(1), including terrorism, trafficking in human beings, etc., and annex-offences harmonized under Article 83(2), such as

[6] PIF: French acronym: Protection des Intérêts Financiers (de l'Union européenne).

market abuse, serious violations of the environment, or VAT crimes *tout court*. Member States are afraid not to be able to lock the door, once it is opened.

The fifth reason, although not such a strong one, certainly is relevant as it is related to the institutional design of the EPPO as such. The EPPO that has been proposed is not identical to the public prosecutor's offices in the Member States. In many countries prosecutors do not investigate, they only prosecute, and the real investigation is in the hands of the police, or administrative bodies, with full or great autonomy. However, the EPPO that has been proposed will do both, investigate possible crimes and prosecute suspects, which for many Member States is a new model. Linked to that specific set of competences, the Commission proposed to have an independent prosecutor: independent from the executive branch of government both at the domestic and the Union level. To my opinion this is a very reasonable choice in view of the area EPPO has to work in. Its caseload will involve cases of corruption, not just in the private sector, but in the public sector as well. Therefore, the independence of the Office is a key factor in order for it to be successful. However, there are many Member States that do not have independent prosecutors, not just in Eastern Europe, but also in Western Europe.

Are these fears of the Member States new? I would not say so. If we take a look at the powers of European Anti-Fraud Office (OLAF),[7] a non-judicial body, we see that can investigate in the territory of Member States together with the law enforcement agencies or in very exceptional circumstances alone. Its administrative investigative powers have been laid down in EU regulations, but in practice Member States have tried to block it as much as possible. Member States do not like to transfer operational powers to law enforcement agencies. The same can be said about the reform of Eurojust. Member States were not willing to upgrade substantially the powers of the national members of Eurojust under the Amsterdam Treaty. Even in the actual reform—although the Lisbon Treaty provides for a legal basis to increase the powers of Eurojust—Member States prefer the *status quo*.

2.2 Problem Identification: Size of EU Fraud and Lack of Enforcement

The second question to be put forward relates to the problems at hand and the causes thereof. What is exactly the problem? The issue of criminal law protection of the EU budget and related corruption and money laundering offences is discussed now for over 30 years. Despite the magnitude of the cases and the large amount of money involved, few cases are prosecuted and very little money is collected (in case of income-fraud, like VAT) or recovered (in case of EU subsidy-fraud).[8] The

[7] OLAF: French acronym: Office européen de la Lutte Antifraude.

[8] See for example OLAF 2016: "In 2015, OLAF opened 219 new investigations. It concluded 304 investigations, which represents a new record for the Office." (p. 3).

judicial follow-up to OLAF reports is not impressive either. Nevertheless, still many national governments are trying to minimize the problems and do state that we can deal with it as it stands, namely through traditional horizontal cooperation between states.

In my opinion, despite 30 years of discussion there is still no clear picture of the phenomenon. Empirical research and empirical data are lacking in this area. One cannot just blame the Commission for that; also the Member States are to be held responsible. They are not willing to invest in independent academic investigation in this field of research.

Three fields of action are potentially of interest for the EPPO: VAT, customs and smuggling, and fraud and corruption within the EU institutions. Concerning VAT, fortunately one can rely on neutral sources. The European Court of Auditors (ECA) published in 2015 a special report on 'Tackling intra-community VAT fraud —more action needed'.[9] Despite the technicalities, this report is very readable and deserves to be consulted. Rather astonishingly, the report demonstrates that even for the European Court of Auditors it appears to be difficult to paint a clear picture of EU fraud. What is however clear to the Court is that the major players, who are the Member States, have no clue of the size and nature of the problem. Even if they have data, the data are not shared, not even at the national level, between judicial authorities and tax authorities. For certain, data on VAT fraud is not shared horizontally between Member States. Reasons for not doing so are both of a legal and practical nature.

Reading the report one really comes across the point that there is still only a very approximate idea of the features of the phenomenon. It is very difficult to come up with an evidence driven argumentation when the figures are not available. This does however not mean that the empirical problem is small, quite the contrary. The dark number is so big because of the lack of data and information flow between the enforcement authorities and the lack of judicial cooperation. Still, Member States are stating that they can deal with it at the national level. But let us not forget that VAT is an intra-community system. Even if most of the VAT income goes to the national budget, the system as such is very much transnational, as it is linked to the single area. Companies of all kind can run around with goods and services in the EU, deliberately avoiding VAT payments, and Member States do discover it in very few cases and prosecute only a handful of these offences.

In the field of customs we do have a completely unified EU customs code. However, the customs enforcement is fully national. At the national level, there is a very different set of authorities from one Member State to another. The division of labour between administrative and judicial authorities is also very different from one Member State to another. The cooperation within the states and the transnational horizontal cooperation remains fragmented too. The result is a harmonized EU customs code that is applied by a patchwork of national authorities with different powers. Moreover, the EU customs code did not harmonise the enforcement

[9] European Court of Auditors 2015, no. 24.

dimension, not even the administrative enforcement and administrative sanctioning. As an example of this, the EU internal market has historically shown to have a significant problem with counterfeited tobacco products and tobacco products that are smuggled to be sold on black markets in the EU. The result is of course that—apart from the health dimension—Member States and the EU lose significant amounts of tax revenue (VAT, excises, custom duties) due to illicit tobacco trade. In the last decade, there has been a strong increase in so-called 'white cheapies' that are illegally traded in the EU. They are legally produced in Belarus or Ukraine and then imported illegally in the EU through criminal networks operating for the black markets. Member States' enforcement is weak, certainly when they are only a transit-country. In some Member States, if illegal trade is discovered and the tobacco is seized, it is legally sold on the market by the customs authorities themselves.

The third field is related to fraud and corruption within the EU institutions, bodies and agencies. Thanks to OLAF internal investigations, to whistle blowers and also to national judicial investigations—mostly in Belgium—one can be sure that there were and are still are serious cases of fraud and corruption within the EU, which not only deserve disciplinary action, but also a criminal follow-up in the Member States. Since the coming into force of the new OLAF regulation in 2013, there is surely a better setting for cooperation between national judicial authorities and EU/OLAF. Belgian investigating magistrates can obtain from the OLAF director a waiver of immunity and receive access to the premises, without for instance a political decision of the College of the Commission. However, OLAF investigations are disciplinary and administrative only, and OLAF cannot impose any sanctions.

It can be deduced from these three fields of action that the magnitude of the phenomenon and the resulting problem should not be minimized. It is also a phenomenon that undermines both the budget and the legitimacy of the EU and the Member States together.

2.3 EPPO's Added Value

Notwithstanding the preceding critical comments, much can be asserted also on the possible added value of the EPPO. The discussion on the added value is partially a technical one and partially a political one. This means that the need and legitimacy of this choice cannot be based only on empirical evidence, but also on the objectives of EU integration, as laid down in Article 3 TEU and on the main objectives of the AFSJ.[10] What are the main arguments that have been mentioned in favour of the

[10] Article 3, para 2 TEU: The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.

setting up of the EPPO? They can be found in the *Corpus Juris* study of 1997,[11] the *Corpus Juris* study of 2000,[12] the green paper of the Commission of 2001,[13] the follow up on the green paper, and in the impact assessment done by the Commission prior to the EPPO proposal.[14] The main arguments can be summarised as follows. First, although over time the horizontal cooperation between Member States has been strengthened both in law and practice, there is still a serious problem of fragmentation in the European criminal law enforcement area that could be overcome with the EPPO.[15] Second, the horizontal cooperation model, even when it is based on mutual recognition, has its limits, as it depends on the action of the national authorities, which not always have the necessary oversight. Moreover, their criminal policy is generally not based on common EU interests, but on national priorities. Third, the judicial follow-up of the OLAF findings and reports by criminal proceedings in the Member States remains problematic. The EPPO could bring substantial change in this regard. Finally, EPPO could certainly contribute to more efficient and effective investigation and prosecution of fraud and corruption within the EU institutions, bodies and agencies.[16]

Even if an added value can be identified, the question remains for whom this actually is an added value. Obviously, the EPPO has added value for the Union itself, as it aims at the protection of essential interests of the EU and its functioning. Even if the substantive competence is limited to PIF offences, it is linked to common policies in the single legal area. One must not forget that for decades, national enforcement agencies, prosecutors and judges urge legislators to come up with more European solutions in order to deal with the problems they face. When this call is answered, it can also contribute to a greater legitimacy of the EU integration process. In addition to that, it is clear that the EPPO can offer added value to EU citizens. These citizens claim more transparency and an effective tackling of fraud and corruption. Taxpayers of course require value for money and demand effective investigations and prosecutions against illegal constructions in the area of customs fraud, VAT fraud and subsidy fraud. Finally, establishing an EPPO is also in the interest of suspects, as they would only have to face one authority and one set of rules, including procedural safeguards, instead of facing a multiplicity of potential investigations under different jurisdictions.

[11] Delmas-Marty 1997.

[12] Delmas-Marty and Vervaele 2001.

[13] Commission of the European Communities 2001.

[14] Commission staff working document impact assessment 2013.

[15] Ligeti and Simonato 2013.

[16] Weyembergh and Brière 2016.

2.4 Final Comments

Finally, it is necessary to make some comments on the ongoing negotiation process and on the legal basis in Article 86 TFEU, which is an astonishing article. In view of the ongoing crisis of the EU integration process, this article constitutes an important expression of shared sovereignty in the field of criminal justice. The fact that Member States (governments and parliaments) signed and ratified the Lisbon Treaty, including Article 86 TFEU, is of course not meaningless. Some think of a treaty as a box of toys—you can play with it depending on what you personally need. I cannot share this view at all. Article 86 TFEU is not only a legal basis for potential use. It is also related to duties under the treaties, related to the objectives of the AFSJ. The realization of the AFSJ is not an option, it is a duty under the Treaties. The legislative procedure according to which the EPPO regulation has to be adopted is based on the old-fashioned unanimity procedure (in which procedure each Member State has a veto right). At the same time, the Lisbon Treaty has also build in possibilities for enhanced cooperation, which allows the EU to introduce the EPPO within a subset of Member States. In any case, the European Parliament (EP) has to consent. Surely, the EPPO will not be establish using the qualified majority procedure including a trilogue. However, for the EP is it not a case of taking or leaving. The EP has followed the outcome of the Council negotiations closely and wants to influence certain points that (the majority of) its members define as critical. It is obvious that the negotiated EPPO must be able to solve most of the problems that have been mentioned. The outcome must also fit within article 86 TFEU. Article 86 TFEU is certainly not identical to Article 85 or Article 82, which means that the article must also have an added value compared to the classical horizontal cooperation and to the work of Eurojust. Without a sufficient added value compared to Articles 85 and 82, the negotiated EPPO cannot fit within the shoes of Article 86 TFEU. In that case it would be better to strengthen Eurojust under Article 86 TFEU.[17]

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[17] See Weyembergh and Brière 2018.

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